

## CHAPTER ONE

### NATURE OF *ḌAMĀN* AND ITS RELATED ISSUES

In this chapter, we will study the essence of *Ḍamān* and issues pertaining to it. These include the definition of *Ḍamān*, its elements, its conditions, property and its types, usufruct (*manāfi'*) and the causes for *Ḍamān*. We have divided this chapter into four sections.

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*.

## SECTION ONE

### DEFINITION OF *ḌAMĀN* AND ITS LEGALITY

The chapter will first and foremost attempt to give the definition of *Ḍamān* according to the lexicographers and jurists. We will then give our own definition in the light of their definitions. We will also discuss the legal basis of *Ḍamān* in the Holy Qur'ān, Sunnah, *ijmā'*, *qiyās*, *fiqhī* and *uṣūlī* maxims. This section is divided into three parts:

The First Part Of Inquiry: Literal And Technical Definitions Of *Ḍamān*.

The Second Part Of Inquiry: The Legality Of *Ḍamān*.

The Third Part Of Inquiry: Views Of Jurists on *Ḍamān Al-Mithl* (Reparation In Kind) And In Reparation In Value.

#### 1.1.1 Definition of *Ḍamān*

Hence, we will explain the meaning of *Ḍamān* according to the lexicographers and jurists and the relationship between the literal and technical meanings of *Ḍamān*. We will also explain the words which have a common meaning with *Ḍamān* such as *kafālah*, *ta'wīd*, *gharāmah*, and *mas'ūliyat al-madanīyah* respectively.

##### 1.1.1.1 *Ḍamān* According To The Lexicographers

The meaning of *Ḍamān* revolves around several terms; some of which are



*iltizām*, *mas'ūliyyah* and *kafālah*. The expression of *ḍamintu al-māl ḍamānan fu ana ḍāminun wa ḍamintuhu alzamtuhu* is used in *Mukhtār al-Ṣiḥāḥ* to mean 'I have given warranty in respect of the property and so I am the guarantor and committed myself for it'. The phrase *ḍamantuhu al-māl* means that a person made himself responsible in respect of the property. The phrase *ḍamana al-shay'* means that a person has given warranty that the thing is in good condition and free from defects. The person who undertakes the responsibility is known as *ḍāmin*, *kafīl*, *multazim*, *ghārim*.<sup>9</sup>

The word *ḍamān* is used in the Prophetic *ḥadīth* "*al-kharāj bil-ḍamān*".<sup>10</sup> [The benefit of a thing is in return for the liability or loss due to that thing]. The meaning of *ḍamān* in this Prophetic *ḥadīth* refers to the obligation of the purchaser in respect of the thing purchased if it is perished in his hands after he has taken possession of it. The purchaser is entitled to return it to the seller if it was found to be defective and there is no liability upon him, but if it is perished in his hands, he is liable to repair it.<sup>11</sup>

The expression *ḍamana al-shay' wa bihi ḍamanan wa ḍamānan* signifies that a person guaranteed the thing and he is the guarantor of it. The phrase *ḍamanahu iyyāhu* means that a person becomes surety for the thing. The expression *fulān ḍāminun wa ḍamīnun* means that someone is surety (*kāfil* and *kafīl*). The phrase

<sup>9</sup> Muḥammad Abū Bakr al-Rāzī, *Mukhtār al-Ṣiḥaḥ* (Bayrūt: Dār al-Qalam), p. 384.

<sup>10</sup> Abū Bakr bin Abī Shībah, *al-Muṣannaf fi al-Aḥādīth wa al-Athār*, 4, p. 373.; 'Abd al-Razzāq al-Ṣan'ānī. See *Al-Muṣannaf*, 8, p. 176.; Al-Bayhaqī, *Sunan al-Bayhaqī*, 5, p. 321.; Al-Daraqutnī, *Sunan Dār al-Quṭnī* (Al-Qāhifāh: Dār Al-Mahāsin), 3, p. 53.; Al-Tirmidhī, *Sunan al-Tirmidhī*, 3, p. 581.; Ibn Mājah, *Sunan Ibn Mājah*, 2, p. 754.

<sup>11</sup> See Aḥmad al-Zarqā, *Sharḥ al-Qawā'id al-Fiqhiyyah*, 1st ed. (Bayrūt: Dār al-Gharb al-Islāmī, 1983/1403), pp. 361 and 362.

*ḍamintu al-shay' aḍmanahu ḍamānan fa ana ḍāminun wa huwa maḍmunun* means that 'I became surety in respect of the thing and so I am guarantor and the thing is guaranteed'. The word *ḍāmin* is used in the Prophetic *ḥadīth*<sup>12</sup> "Who so dies in the path of Allāh, He will be responsible to enter him in the paradise."<sup>13</sup>

It is also said that *ḍamantuhu al-shay' taḍminan faḍamanahu 'annī* means that he made himself liable to me in respect of the thing, that is, he made himself liable and he is bound by it.<sup>14</sup>

#### 1.1.1.2 *Ḍamān* in the Usage of the Jurists

*Ḍamān* is regarded as one of the means of security, which is recognized by the Sharī'ah. Security consists of *ḍamān*, *kafālah* (suretyship), *kitabah* (documentary evidence), *shahādah* (testimony), *rahn* (mortgage) and *hawālah* (transfer of debt).

The jurists have given several definitions which we will discuss in the subsequent sections:

##### 1.1.1.2.1 The Definition of *Ḍamān* according to the Ḥanāfī

The first definition is "to add the obligation of one person to the obligation of

<sup>12</sup> Aḥmad Ibn Ḥanbal, *Musnad al-Imām Aḥmad Ibn Ḥanbal*, 2, p. 522.

<sup>13</sup> Ibn Manẓūr, *Lisān al-'Arab* (Al-Qāhirah: Dār al-Ma'rifah), 11, pp. 589-590.

<sup>14</sup> Al-Fayrūz Abādī, *Al-Qāmūs Al-Muḥīṭ* (Al-Qāhirah: Muassasat Fan Al-Tibā'ah), 4, p. 245.

another person in relation to a person, debt or a property ('*ayn*')<sup>15</sup>. Hence, there are three types of *kafālah* (suretyship):

*kafālat bi al-nafs* (surety for the person);

*kafālat bi al-dayn* (surety for the debt)

*kafālat bi al-'ayn* (surety for the giving of something).

The second definition is "adding the obligation of the guarantor (*kafil*) to the obligation of the person whose guarantee is given in respect of a debt." But the first definition is more correct because it is broad and can encompass all the three types of *kafālah*.

#### 1.1.1.2.2 Definition Of *Ḍamān* According To The Mālikīs

*Ḍamān* and *kafālah* are synonymous and it is when the claimant joins the obligation of the guarantor (*dāmin*) with the obligation of the person to whom the guarantee is given (*maḍmūn*). This applies whether the use of obligation depends on a thing or not.

*Ḍamān* is to engage oneself with another's obligation in respect of a right.<sup>16</sup>

<sup>15</sup> Al-Sarakhsī, *al-Mabṣūṭ* (Miṣr: Maṭba'ah Al-Sa'ādah, 1324H), 19, pp. 160-16.; Al-Marghanānī, 'Alī Ibn Abī Bakr. *Al-Hidāyah Sharḥ Bidāyah al-Mubtadī* (Al-Qāhirah: Al-Maṭba'ah Al-Amīriyyah Al-Kubrā, 1325H), 7, p. 163.

<sup>16</sup> Ibn 'Arafah, *Hāshiyat al-Dusūqī 'alā al-Sharḥ Al-Kabīr* (Al-Qāhirah: Maṭba'ah Muṣṭafā Al-Bābī Al-Ḥalabī), 3, pp. 329-330. See *Al-Khattāb, Mawāhib al-Jalīl*, 5, p. 96. See *Balāghat al-Sālik 'Alā al-Sharḥ al-Saghīr*, 2, p. 664.

#### 1.1.1.2.3 Definition Of *Ḍamān* According To The Shāfi'is

*Ḍamān* in Sharī'ah is a contract which requires performance of one's obligation in respect of an established right due on someone else or to produce the thing itself or the person who is required to be produced<sup>17</sup> or it is to add one's liability to another's.<sup>18</sup>

#### 1.1.1.2.4 Definition Of *Ḍamān* According To Ḥanbalī

*Ḍamān* is the liability, which is rendered obligatory or will become obligatory upon a person whom the guarantee is given; liability to produce the debtor to the creditor. This is of four types:

1. Liability in respect of the established debts.
2. Liability, which has yet to be obligatory or which cannot practically become obligatory.
3. Liability in respect of the future debts.
4. To be surety for producing of the debtor at the time of necessity and this is called *kafālah bil nafs*.<sup>19</sup>

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<sup>17</sup> Al-Khatīb Al-Sharbīnī, *Al-Mughnī al-Muḥtāj* (Miṣr: Maṭba'at Muṣṭafā al-Bābī al-Ḥalabī, 1958), 2, p. 198.

<sup>18</sup> Al-Shirāzī, *Al-Muḥadḥab fī Fīqh Madhab Al-Imām Al-Shāfi'* (Miṣr: Dār Al-Kutub Al-'Arabīyah al-Kubrā), 1, p. 399.

<sup>19</sup> *Al-Mughnī* on the margin of *Sharḥ al-Kabīr* by Imāmayn Muwaffiq al-Dīn ibn Qudāmah and Shams al-Dīn Ibn Qudāmah al-Maqdisī, 5, p. 71.

### 1.1.1.2.5 Definition Of *Ḍamān* According To The Contemporary Jurists

*Al-Ḍamān* is known as an undertaking on monetary compensation in respect of harm to others;<sup>20</sup> or it is undertaking to indemnify a person in respect of his right arising from the destruction (*itlāf*) of a property or loss of profits; or harm, be it partial or total, which has occurred to one's life.<sup>21</sup>

In short, *Ḍamān* in Islamic jurisprudence regulates one of the meanings: First, the obligation of a person to perform what is incumbent upon him, whether it relates to a right, material, a person, work or a property. Thus, the obligation of the person includes those relating to one's right, property, performance of work and production of a person. A person is not released from this obligation except when he discharges it in due manner and time. Second, to become surety for another person, by way of adding the obligation of the surety (*kafīl*) to the obligation of the principal debtor (*aṣīl*) in respect of the demand of a person, debt or work. The word *kafālah* here is synonymous with *Ḍamān*, that is, a contract involving security, and liability legalized to cater for the need of people, and this is to enable the *makfūl lahu* (claimant, creditor) to receive his right.

*Ḍamān* according to this criterion is wider than *kafālah* as *Ḍamān* has a general meaning which encompasses *kafālah*. Whereas, *kafālah* has specific meaning which aims to strengthen the obligation upon the principal debtor. The proprietor of the right has the choice of asking either the debtor or the guarantor to discharge the

<sup>20</sup> Muṣṭafā Zarqā', *Al-Madkhal al-Fiqhī al-Ām*, 2/1032.

<sup>21</sup> Wahbah al-Zuhaylī, *Naẓariyyāt al-Ḍamān*, p. 16.

debt, to fulfil the right, to perform the thing guaranteed, to deliver the property or to perform the work and the like.<sup>22</sup>

In the course of the investigations on the subject of *ḍamān*, it was discovered that, according to the lexicographers and jurists, there appear to be a number of words used in Islamic law, whose meaning is similar to that of *ḍamān* such as *kafālah* (suretyship), *ta'wīḍ* (compensation), *iltizām* (obligation), *mas'ūliyat al-madaniyyah* (civil responsibility) and *ḍamān al-mutlafāt* (compensation for destruction of property). Therefore, it is appropriate to explain the meaning of these words and their relationship to *ḍamān*.

## 1.1.2 Related Terms And Their Relationship To *Ḍamān*

### 1.1.2.1 Al-Kafālah

Literally, it means *al-ḍam* (addition). It is used in the Qur'ān {*wa kaffalahā Zakariyyā*}<sup>23</sup>, that is, he (Zakariyya) took care (as surety) of her (Mary), meaning that he (Zakariyya) added her to himself and his family in maintenance. The Prophet (s.a.w) said: "I and the supporter of orphan will be together in the paradise."<sup>24</sup>

<sup>22</sup> Muḥammad al-Shuhūt al-Jundī, *Ḍamān al-'Aqd wa al-Mas'ūliyat al-'Aqdīyah fī al-Sharī'ah al-Islāmīyah* (Dār al-Nahdat al-'Arabiyyah), pp. 21-22.

<sup>23</sup> *Al-Qur'ān, Maryam* (19): 5.

<sup>24</sup> Al-Bukhārī, *Al-Jāmi' Al-Ṣaḥīḥ*, (Jeddah: Al-Maktab Al-Islāmī) 7, p. 68.

The jurists have divided *al-kafālah* into two, *kafālah bi al-māl* and *kafālah bi al-nafs*.<sup>25</sup>

*Kafālah bi al-nafs* according to the usage of the jurists is an obligation in respect of producing the *makfūl* (guaranteed person) to the *makfūl lah* (the person to whom the guarantee is given) at a definite time. However, *kafālah bi al-māl* as understood by the jurists is the addition of the obligation of the *kafīl* (surety) to the obligation of the *aṣīl* (principal debtor) in respect of the demand of a debt. Hence, *kafālah* is an obligation in respect of discharging a debt.<sup>26</sup>

By looking at the meaning of the word *ḍamān* in the usage of the jurists, it is evident that the Ḥanāfīs and Mālikīs used the word *ḍamān* to mean *kafālah*, i.e., they are synonymous. But the Shāfi'īs and Ḥanbalīs employed the word *kafālah* in guarantees involving a person while the word *ḍamān* is used in guarantees involving property and profits.

#### 1.1.2.2 *Ta'wīḍ* In The Sharī'ah

*Ta'wīḍ* is derived from the word *'iwaḍ*, and this is, *badal* (substitute) and *khalaf* (in place of). The phrase *'iwaḍahu ta'wīḍahā* is used to mean to pay compensation for a loss. The noun *wa'tāḍ* signifies taking compensation (*'iwaḍ*). *'Iwaḍ* is the infinitive noun for *'āḍah*, *'iwaḍan*, *'iyāḍan* and *mu'awwiḍah*, that is,

<sup>25</sup> Al-Sarakhsī, *al-Mabṣūṭ*, 19, p. 161.

<sup>26</sup> Al-Marghanānī, 'Alī Ibn Abī Bakr. *Al-Hidāyah Sharḥ Bidāyah al-Mubtadī*, 7, p. 163. Ibn 'Arafah, *Ḥāshiyat al-Dusūqī 'alā al-Sharḥ Al-Kabīr*, 3, p. 229.

substitute. The expression *'uḍtu fulān wa a'aḍtu wa 'iwaḍtuḥu* is used to mean that one has given compensation for or substituted the loss. The expression *ta'ūḍu minhu wa i'tāḍ akhadha al-'iwaḍ wa i'tāḍahu minhu ista'āḍahu wa ta'ūḍahu* is used to ask for compensation. The plural of *'iwaḍ* is *a'wāḍ*.<sup>27</sup>

Technically, *ta'wīḍ* means the payment of monetary compensation rendered obligatory in respect of harm inflicted on others. It is also defined as compensation for the purchase price in the contract of sale or wage in the contract of *ijārah*.<sup>28</sup> *'Iwaḍ* is also known as compensation in its absolute sense (*muṭlaq al-badal*), that is whatever is paid in exchange for something else. The reward of the hereafter is one of its kinds.<sup>29</sup>

*Ta'wīḍ* is derived from the word *'iwaḍ*. It is used by the jurists to mean the payment of compensation for loss.<sup>30</sup>

Sheikh Muḥammad Abū Zahrah is of the view that the property demanded by the relative of the deceased in the court of law is not in compensation for the soul of the person but for the loss of the usufructs (*manāfi'*) as a result of a killing.<sup>31</sup>

*Ta'wīḍ* aims at repairing harm, whether it be physical or psychological. In the Sharī'ah, provisions that establish a comprehensive theory of *ta'wīḍ* are abundant.

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<sup>27</sup> *Al-Mawsū'ah Al-Fiqhīyah* (Kuwayt: Wizārat al-Awqāf wa-al-Shu'ūn al-Islāmīyah), p. 45.

<sup>28</sup> Husayn Mar'ī, *Al-Qāmūs al-Fiqhī*, 1962, p. 32.

<sup>29</sup> *Al-Mawsū'ah Al-Fiqhīyah* – 'Umūm, *Ghilat*, p. 58.

<sup>30</sup> Muḥammad Rawās Qal' Jī, *Mu'jam Lughat al-Fuqahā'* (Bayrūt: Dār Al-Nafāis), p. 139.

<sup>31</sup> Muḥammad Abū Zuhrah, *Al-Jharimah wa al-Uqūbah fī al-Fiqh Al-Islāmī* (Al-Qāhirah: Dār Al-Fikr Al-'Arabī), p. 575.



### 1.1.2.3 *Al-Gharāmat Al-Māliyah* (Pecuniary Fine)

*Al-gharāmat al-māliyah* literally means the fine or whatever pecuniary liability imposed on a person in respect of a harm with regards to any fault or deception on his part.<sup>32</sup>

The pecuniary fine is one of the monetary penalties in the Sharī'ah. *Gharāmah* is the obligation of the person responsible for the offence to pay a sum of money fixed by the *qāḍī* to the public treasury. The situations in which the Sharī'ah fixes a pecuniary penalty relate to *jarā'im al-ta'zīriyyah ghayr jismiyyah* (crimes punishable by a discretionary penalty but not involving physical punishment) such as stealing something lost, or fruit, or sitting in a place which serves wine; or breaching the traffic rules.<sup>33</sup>

This *gharāmah* (fine) partakes in the judgment given against a person (*maḥkūm 'alayh*) requires him to pay such fine incumbent upon him. Thus, he is under the obligation to pay to the state the amount of money for which a judgment is given.<sup>34</sup>

### 1.1.2.4 Civil Responsibility (*Mas'ūliyyāt al-Madaniyyah*)

The term "civil responsibility" is regarded as a legal term which corresponds to the term *ḍamān* in Islamic Sharī'ah. The term civil responsibility in its legal sense is used as a title referring to whatever is rendered due upon a person in respect of the

<sup>32</sup> *Al-Mu'jam al-Wajīz*, (Miṣr: Wazārat Al-Tarbiyyah wa Al-Ta'līm), p. 449.

<sup>33</sup> Sharīf Fawzī Muḥammad Fawzī, *Mabādī' al-Tashrī' al-Jinā'ī al-Islāmī*, pp. 195-196.

<sup>34</sup> Sharīf Fawzī Muḥammad Fawzī, *Mabādī' al-Tashrī' al-Jinā'ī al-Islāmī*, pp. 195-196.

right of others in order to mend the harm caused by him as result of a breach of the terms of contract or the commission of an illegal act. Hence, *iltizāmāt* is more general than civil responsibility which is confined to indemnifying what is due in respect of a harm as result of the breach of contract or commission of an illegal act. However, *iltizāmāt* encompasses whatever obligation arises as a result of an individual will, contract, commission of an illegal act, acquisition of a prohibited thing or spending from another person's property. Civil responsibility may be contractual responsibility ensuing from the breach of the terms of the contract by one of the contracting parties, without an incidental excuse which absolves the breach, and when it is not possible to compel this contracting party to execute the terms of the contract, and when the breach of the contractual term results in harm to the other contracting party. Strictly speaking, one is absolved from responsibility in respect of the non-performance of the contract in the following situations:

1. If the non-performance of the contract is the result of an inevitable act of a stranger.
2. If the non-performance is due to an incidental excuse which allows the termination of the contract.
3. If it is possible to ward off the harm by compelling the contracting party to execute the contract but it would be a defective one.
4. If the non-performance of the contract does not result in the harm of the other contracting party.<sup>35</sup>

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<sup>35</sup> Al-Sanhūri. *Al-Wasā'it fi Sharḥ Al-Qānūn Al-Madanī* (Bayrūt: Dār Iḥyā' Al-Turāth al-'Arabī, 1970), I, p. 653.

The meaning of this word in the above provisions is responsibility, accountability and punishment for what a person does. The synonyms for the technical meaning of this word are *taḳlīf* and *ahliyyah* in the terminology of the jurists.<sup>36</sup>

The jurists, however, have not focussed their attention on the division of *mas'ūliyyah* or *taḳlīf* as the conventional law. They focussed instead on the considerations of the result of this *mas'ūliyyah* (responsibility) or *taḳlīf* (burden) and what becomes obligatory as a consequence by distinguishing between the remedies (*jawābir*) and the penalties (*zawājir*). The penalties or punishment are the consequence of *taḳlīf*, while the remedies are the responsibility or burden ensuing from the ruling on *ḍamān*.<sup>37</sup>

These monetary remedies or compensation when they are established as being due, are intended to remove the harm ensuing from the breach of the general rules of the Sharī'ah prescribed in respect of one's right in order to keep one's soul, body, property, and other financial rights. Likewise, these remedies are purported to remove the harm arising from the breach of the terms of the contract or the refusal to execute it without an excuse to absolve it.<sup>38</sup>

### 1.1.3 The Legality Of *ḍamān*

The subject of *ḍamān* is not only regarded in the Sharī'ah but also which

<sup>36</sup> Wahbah al-Zuhaylī, *Usūl al-Fiqh al-Islāmī* (Bayrūt, Lubnān: Dār al-Fikr, 1996/1417), 1, p. 97.

<sup>37</sup> 'Abdul Qādir 'Audaḥ, *Al-Tashrī' Al-Jinā'ī Al-Islāmī*, (Beirut: Dār Al-Kutub Al-'Arabī), 1, p. 267.

<sup>38</sup> Ibid, 1, p. 269.

given great attention and protected. It comes as no surprise that we find that protection of property, rights and profits are regarded as being among the five necessities protected by the Shari'ah protects.

### 1.1.3.1 Qur'anic Proof Of The Legality Of *Ḍamān*

Allāh (s.w.t.) says: "For whom who produce it is (the reward of) a camel load; will be bound by it (*wa ana bihi za 'īm*)"<sup>39</sup>

The word *za 'īm* is from the types of *ḍamān* and *kafālah*, meaning to say, that 'I am responsible to him', because this word conveys the same literal and technical meaning as *kafīl* (surety). Allāh (s.w.t.) also says: *wa kafalahā Zakariyyā*,<sup>40</sup> which means that Zakariyyā took care (as surety) of her (Mary). There is another recitation of this *āyah* by *Kuḍī 'īn*, by adding a *shāddah* (doubling sign) over the letter of *Fā'*. Then this *āyah* means that Zakariyyā became a breadwinner for her.<sup>41</sup>

Allāh (s.w.t.) also says: "And break not your oath after you have confirmed them; indeed you have made Allāh your surety (*kafīl*)",<sup>42</sup> that is to say, that you made Allāh (s.w.t.) your watcher and observer all the covenants that you have made and the contract that you have concluded.<sup>43</sup>

<sup>39</sup> *Al-Qur'ān, Yūsuf* (12): 72.

<sup>40</sup> *Al-Qur'ān, Āli 'Imrān* (3): 37.

<sup>41</sup> Ibn Kathir, *Tafsīr al-Qur'an al-'Azīm*, (Egypt: Dār Iḥyā' Al-Turāth Al-'Arabī), 2, p. 325.

<sup>42</sup> *Al-Qur'ān, Al-Naḥl* (16): 91.

<sup>43</sup> Ibn Kathir, *Tafsīr al-Qur'an al-'Azīm*, (Egypt: Dār Iḥyā' Al-Turāth Al-'Arabī), 2, p. 325.

Allāh (s.w.t.) says, "If then anyone transgresses the prohibition against you, transgress you likewise against him and if you be patient it is good for the patient person."<sup>44</sup>

Al-Ṭabarī relates from one group who said: "Indeed, this verse is revealed in relation to one who takes revenge on his oppressor at the time of his ability. He should take revenge in the like manner on the oppressor and it should not be extended to others."<sup>45</sup>

The jurists have differed in the case of a man who is victimized by a person in respect of property and subsequently the oppressor deposits some property with the victim. The question arises as to whether it is allowed for the victim to commit a similar injustice. One group such as Ibn Sīrīn, Ibrāhīm al-Nakha'ī, Sufyān and Mujāhid are of the view that it is allowed for him to do so. They relied on the above verse. Al-Imām Mālik and his supporters said: "It is not permissible for him."<sup>46</sup> They support their view with a prophetic *ḥadīth*: "Return the trust to whom it is due and do not breach the trust even with the person who breached the trust with you."<sup>47</sup>

### 1.1.3.2 Argument on the Basis of Sunnah for the Legality of *ḍamān*

In the Sunnah, there are many *ḥadīth* which indicate the legality of the *ḍamān*

<sup>44</sup> *Al-Qur'ān, Al-Naḥl* (16): 126.

<sup>45</sup> Al-Qurṭubī. *al-Jāmi' li Ahkām al-Qur'ān* (Al-Qāhirah: Dār Al-Kutub Al-Miṣriyah, 1997), 9, p. 234.

<sup>46</sup> Al-Qurṭubī. *al-Jāmi' li Ahkām al-Qur'ān*, 9, p. 234.

<sup>47</sup> Al-Daraqutnī, *Sunan Dār al-Qunī*, p. 10.

as follows:

1. A person bought a slave and he stayed with him for some times, and later he found a defect in the slave. Thereupon, he litigated to the Prophet (s.a.w) and sent back the slave. The defendant said, "O Prophet he used my slave." The Prophet said: "the benefit of a thing is return for the liability for loss due to that thing."<sup>48</sup>
2. (Anyone who treats a patient but has no medical skill and such a treatment affects his body or a part of it, he is responsible for it.)<sup>49</sup>  
This *ḥadīth* is reported on the authority of 'Amrū Ibn Shu'ayb from his father and from his grandfather from the Prophet (s.a.w). This *ḥadīth* is an authority on the liability of quack doctors (*muṭabbib*) for the loss of the body or part of it whether it be as a direct, or indirect result, intentional or mistaken. There is an *ijmā'* on this point. It is mentioned in the *Nihāyat al-Mujtahid* that if the quack makes a mistake he is to be subjected to a beating, imprisonment, *diyah* from his property and, some said, upon his '*āqilah*. The quack (*muṭabbib*) is a person who has no medical skill and has not undertaken training under a well-known medical officer, whereas a skilful medical officer

<sup>48</sup> Abū Bakr bin Abī Shībah, *al-Muṣannaf fī al-Aḥādīth wa al-Athār*, 4, p. 373.; 'Abd al-Razzāq al-Ṣan'ānī. See *Al-Muṣannaf*, 8, p. 176.; Al-Bayhaqī, *Sunan al-Bayhaqī*, 5, p. 321.; Al-Daraqutnī, *Sunan Dār al-Qutnī*, 3, p. 53.; Al-Tirmidhī, *Sunan al-Tirmidhī*, 3, p. 581.; Ibn Mājah, *Sunan Ibn Mājah*, 2, p. 754.

<sup>49</sup> See al-Imām Mālik, *Al-Muwatta'*, "Kitāb al-'Aqḍiyah" and Aḥmad Ibn Ḥanbal, *Musnad al-Imām Aḥmad Ibn Ḥanbal*, 5, p. 436.

is one whose master confirms his skill and expertise.<sup>50</sup>

Ibn Qayyim said in the *Hady al-Nabawī* that a skilful doctor considers twenty alternatives in his treatment of the patient. The ignorant doctor practices medical science of which he has no previous experience and causes as a result of his ignorance, the destruction of the life of a person. As such, he breaches his trust with the patient so he is under the obligation to pay compensation. There is an *ijmā'* of the jurists on this point.<sup>51</sup>

Al-Khaṭṭābī said:

*"I do not know any difference of opinion in the case where the medical officer transgresses in his treatment which results in the death of the patient for whom he is responsible and the practitioner who does not know by his knowledge and act that he is transgressor but if the destruction is caused as a result of his treatment he is liable to pay diyah but he is not subject to qisās penalty because he has committed the act not on his own but with the permission of the patient and the crime perpetuated by the doctor according to the generality of the scholars is to be borne by the 'āqilah."*<sup>52</sup>

Al-Imām al-Shāfi'ī distinguished between the act whose penalty is fixed by the Sharī'ah, like *ḥadd*, and the one whose punishment is not fixed, like *ta'zīr*. A person is not responsible in respect of the former but is responsible in the latter because he resorts to *ijtihād* and has transgressed in exercising it. If the affliction of hardship was direct he would be responsible provided it was intentional but if it was mistaken it would be

<sup>50</sup> Al-Ṣan'ānī, *Subul al-Salām, Sharḥ Bulūgh al-Marām*, 3, p. 250.

<sup>51</sup> Ibn Al-Qayyim, *Al-Hady Al-Nabawī*, (Beirut: Dār Al-Qalam), p. 97.

<sup>52</sup> Al-Ṣan'ānī, *Subul al-Salām, Sharḥ Bulūgh al-Marām*, 3, p. 252.

borne by the 'āqilah.<sup>53</sup>

There is an authority that the medical practitioner is liable for the offence caused as a result of his treatment. However, if he is known to be a doctor, he will not be liable, and he (doctor) is the one who knows the cause of the sickness and his skill is confirmed by his masters who have given licenses to him to practice his medical profession. In our time, a doctor is recognized by acquiring a degree from an accredited university together with a license given by the government for the practice of the profession and treatment of patients.<sup>54</sup>

4. "It is in your hand what you have taken until you return it".<sup>55</sup> This is an authority that it is incumbent upon a person to return to their owners whatever he has taken from them by way of borrowing or *ijārah* (hiring) or other than these two. And on the basis of this, some argue that the borrower and the safe keeper (*wadī'*) are responsible. And this is a valid argument for the compensation, because the things taken are in the hand of the one who has taken them until he returns them, meaning to say he is responsible for it.<sup>56</sup>

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

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<sup>53</sup> Al-Šan'ānī, *Subul al-Salām, Sharḥ Bulūgh al-Marām*, 3, p. 250.

<sup>54</sup> Al-Bayḥaqī, *Sunan Al-Bayḥaqī*, 8, p. 141.

<sup>55</sup> It is reported by Aṣḥāb Sunan al-Arba'ah and Hākim. See also Al-Shawkānī, *Nayl al-Awṭār*, 6, p. 40. See Al-Šan'ānī, *Subul al-Salām, Sharḥ Bulūgh al-Marām*, 3, p. 67.

<sup>56</sup> Al-Shawkānī, *Nayl al-Awṭār*, 5, pp. 334 and 336.



Sunnah of the Prophet: "The blood, property and honour of a Muslim is prohibited to his fellow Muslim."<sup>57</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>58</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>59</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, "O Muḥammad you usurped it."<sup>60</sup> The Prophet (s.a.w.) said. "But it is borrowed returnable and guaranteed."<sup>61</sup> The *ḍamān* in respect of property leads to creating

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<sup>57</sup> Aḥmad Ibn Ḥanbal, *Musnad al-Imām Aḥmad Ibn Ḥanbal*, 2, p. 277.

<sup>58</sup> Al-Baihaqī, *Al-Sunan Al-Kubrā*, (Beirut: Dār Iḥyā' Al-Turāth Al-'Arabī), 6, p. 97.

<sup>59</sup> *Al-Qur'an*, *Al-Mumtaḥanah* (69): 8.

<sup>60</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 *mutaqawwim* property belonging to others without leave. Abū Muhammad Al-Baghdādī, *Majma' al-Damānāt*, p. 117.

<sup>61</sup> Al-Baihaqī, *Al-Sunan Al-Kubrā*, 6, p. 88.

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.) says: "Do not transgress, indeed, Allāh does not like the transgressor."<sup>62</sup> Also in a Prophetic *ḥadīth*: "It is in the hand that you have taken until you return it."<sup>63</sup>

The capitalists leave the states which does not respect individual properties<sup>64</sup>

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<sup>62</sup> *Al-Qur'an, Al-Baqarah* (2): 190.

<sup>63</sup> It is reported by Aṣḥāb Sunan al-Arba'ah and al-Hakīm. See also Al-Shawkānī, *Nayl al-Awṭār*, 6, p. 40. See Al-Ṣan'ānī, *Subul al-Salām, Sharḥ Bulūgh al-Marām*, 3, p. 67.

<sup>64</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.

in their policy and take refuge in other states which protects individual properties and accepts the practice of *ḍamān* in all situations.

#### 1.1.4 Arguments on the Legality Of *Ḍamān Al-Mithl* (Restitution In Kind)

This section is devoted to explain the legality of *ḍamān al-mithl* by focusing on the argument of its proponents.

##### 1.1.4.1 Arguments of the Proponents Of *Radd al-Mithl*

###### 1.1.4.1.1 Argument on the Basis Of The Qur'ān

The proofs on which the proponents of restitution in kind rely in *mithliyyāt* (the things that can be matched in the market) are many: For instance, Allāh (s.w.t.) says: “And then anyone transgresses the prohibition against you, transgress you likewise against him.”<sup>65</sup> Al-Qurṭubī mentioned the argument of the jurists, on the basis of this verse, for the obligation of *mithl* (i.e. kind of a thing) and or the value of the thing if the restitution in kind becomes difficult.<sup>66</sup> They also argue on the basis of the general meaning of the Qur'ānic verse: “And if you punish, let your punishment be proportional to the wrong that has been done to you.”<sup>67</sup> Allāh (s.w.t.) also says:

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<sup>65</sup> *Al-Qur'an, Al-Baqarah* (2): 194.

<sup>66</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa a-Sharḥ al-Kabīr* (Miṣr: Maṭba'ah al-Imām), 5, p. 207.

<sup>67</sup> *Al-Qur'an, Al-Naḥl* (16): 126.

“The recompense for an injury is an injury equal thereto (in degree).”<sup>68</sup> A closer indication of the obligation of restitution in kind is the Qur’ānic verse: “If anyone of you doth (killing) so intentionally, the compensation is an offering.”<sup>69</sup> This *āyah* conveys by implication the obligation for the replacement of the same kind of animal when has been killed by him. Yet, what is regarded as authoritative in the Ḥanafī school is that an animal is not regarded as *mithliyyāt*.<sup>70</sup>

#### 1.1.4.1.2 Argument On The Basis Of The Sunnah

It is reported by Anas who said: “Some of the wives of the Prophet (s.a.w.) presented some food to him and ‘Ā’ishah knocked over some of it. Then the Prophet (s.a.w.) said: “Food for food and dish for dish.” It is reported by ‘Ā’ishah who said: “I have not seen anyone make food like Ṣafīyyah. I presented a dish of food to the Prophet which was not mine and I broke the dish. I asked the Prophet what its expiation (*kaffārah*) was. The Prophet (s.a.w.) said: “Dish for dish and food for food.”<sup>71</sup> This is an authority for the *ḍamān al-mithl* for the thing perished.

#### 1.1.4.1.3 Argument On The Basis Of Intellect/Sense<sup>72</sup>

*Al-mithl* is of two types: perfect and deficient; the perfect one is of the same

<sup>68</sup> *Al-Qur'an, Al-Shūrā* (42): 40.

<sup>69</sup> *Al-Qur'an, Al-Mā'idah* (5): 95.

<sup>70</sup> Al-Marghanānī, 'Alī Ibn Abī Bakr. *Al-Hidāyah Sharḥ Bidāyah al-Mubtadī*, 3, p. 72.

<sup>71</sup> Al-Shawkānī, *Nayl al-Awṭār*, 6, p. 70.

<sup>72</sup> This school is explained by the statement of Sarakhsī.

kind in shape and meaning and the deficient one is of the same kind in meaning only, that is, the property's attributes. Thus, what becomes obligatory is the perfect one except if a person is unable to do so, then the deficient one is due in lieu of the perfect one. The reason is reparation, and this is more completely compensated in kind because by doing so the attributes of the property and its kind are taken into account whereas in price just the value of the property is taken into account. If this is the case, it is to be compensated in deficient manner, that is, by paying the price on the grounds of necessity.<sup>73</sup> This theoretical expression shows nothing more than the interests of the advocates of the restitution in kind as they intend to effect the realization of complete justice between harm and its compensation. This cannot be brought about by way of acceptance of its price. If we try to express in scientific terms which is closer between the loss of the loser and what he receives in compensation, it is necessary to take into account the expenses that the purchaser incurred in the transaction such as those incurred in transportation, travelling to the market, brokerage and so on. Thus, in accepting restitution in kind, these expenses are to be borne by the transgressor, since it is fairer that they should be borne by him as opposed to imposing the price of the perished thing on the transgressor at the time it perishes, in addition to determining the price of the expenses that the purchaser incurred such as brokerage, transportation, travelling, time and so on which are necessary for the determination of the price of the perished thing. All of us know how much the purchaser had incurred for the purchase of the commodity and a like kind of compensation is binding on the transgressor by considering those expenses borne by the purchaser. It is necessary to explain that the price which is obligatory in *ghayr mithliyyāt* (things which cannot be matched in

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<sup>73</sup> Al-Sarakhsī, *al-Mabṣūṭ*, 11, p. 50.

market) includes all expenses incurred.<sup>74</sup>

#### 1.1.4.2 Analysis of the Argument of the Proponents Of *Radd al-Mithl* (Return of the Similar)

The opponents do not agree that the above Qur'ānic verses and the Prophetic Traditions imply any obligation of restitution in kind. But it is pertinent to understand that the *mithliyyah* which the Sharī'ah prescribes is more general because it includes restitution in kind or its price. It is clear to anyone that the advocates of restitution of *mithl* (kind) in *mithliyyāt* regard the price as its *mithl* in meaning in accordance with the division made by al-Sarakhsī, though this is refuted by others. From another perspective, the implication of *mithl* in the above Qur'ānic verses and the Prophetic Traditions on the price confirms that it relates to the acceptance of the thing that has no *mithl* (kind) such as hunted animals as discussed earlier. Likewise, numerous narrations of the *ḥadīth* by Anas imply that the food which was dropped was cooked, hence it was not regarded as *mithliyyāt*. Therefore, some jurists understood that the Prophet (s.a.w.) ordered the return of food for the food which was dropped and a dish for the broken dish as a way of help and redress without laying down any definite ruling for the compensation to be in kind, because there is no fixed kind for it. Al-Hāfiẓ said: "In a way the *ḥadīth* indicates that the two foods were different.)"<sup>75</sup>

The payment of the price is preferable at the time that the return of the thing

<sup>74</sup> Muḥamad Aḥmad Sirāj, *Ḍamān al-'Udwān fī al-Fiqh al-Islāmī* (Al-Qāhirah: Dār al Thaqāfah li-al-Nashr wa al-Tawzī', 1990/1410), pp. 55, 56, 58.

<sup>75</sup> Al-Shawkānī, *Nayl al-Awṭār*, 6, p. 72.

becomes difficult, as the price also includes the expenses of the purchase, except if justice requires restitution in kind and this is where justice cannot be achieved by payment of the price. It is for this reason that the usurpation of shares in a company and transfer of its ownership to a third party affects the rights of other shareholders in the selection of the management board of the company and its manner of conduct which has far-reaching effects on the financial position of the company. This harm cannot be cured for a long period just by paying the price of the shares and hence the transgressor is compelled to return the shares and to remove the harm if justice to be brought about.

However, in other situations in which it is easy to compensate the harm by payment of the price there is no objection to it because the objective is the removal of the harm and to achieve this, anything can be resorted to. From a scientific perspective, the rule for the obligation of the restitution in kind according to the proponents of this view applies only to the *makīlāt* (measured by a measuring vessel), *mawzūnāt* (weighable things) and *madhrū'āt* (measured by their length) so long as its general attributes remain. However, other products such as clothes, vehicles and electronic equipment come under the *mithliyyāt* except if some of their original attributes are changed as a result of excessive use and alteration and then they become *qīmiyyāt*.<sup>76</sup>

Thus, the jurists allow the owner of the property to take the price as a substitute in kind if the usurper has consented to so and then both of them are bound by the judgment of the *Qāḍī* (the judge) in respect of the price, especially in situations when they differ on the attributes of the thing lost as a result of usurpation or destruction.

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<sup>76</sup> Al-Khirashī, *Sharḥ Al-Khirashī* (Al-Qāhirah: Al-Maṭābi' Al-Amīriyyah, 1317H), 6, 133.

If a *Qāḍī* passes a judgment ordering substitution (*mithl*), and its payment and its rate are lower than at the time of usurpation or destruction he is not liable for the differences of the price. The preferred stand in the Mālikī school is to resort to the price to prevent harm to the owner.<sup>77</sup>

#### 1.1.4.3 Statements Of Jurists On Ruling With Regards To Cessation Of The *Mithlī*

According to the Ḥanafī, Shāfi'ī, Ḥanbalī and Imāmiyyah schools of law, the payment of the price is obligatory if the return of the thing becomes difficult as a result of its unavailability.<sup>78</sup>

However, the Mālikīs stipulate that in the case of cessation of the *mithlī* the affected person (*maghṣūb minh*) should wait until the usurped thing comes into existence if it has a specific time and season, and if not then he should take its price which was current at the time of cessation.<sup>79</sup>

Despite the unanimous opinion of the majority of jurists that the price at the time of cessation is obligatory, they have differed to a large extent on the calculation of the price. According to al-Imām Abū Ḥanīfah, the assessment should be on the basis of the prevailing price at the time of the litigation, while Abū Yūsuf held the view that its estimation should be on the basis of the price at the time of usurpation;

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<sup>77</sup> Ibid, 6, p. 135.

<sup>78</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 9, p. 85.

<sup>79</sup> Ibn 'Arafah, *Hāshiyat al-Dusūqī 'alā al-Sharḥ Al-Kabīr*, 13, p. 444.



whereas for Muḥammad Ibn al-Ḥasan al-Shaybānī it should be the price at the time of cessation. The reasoning underlying the latter's statement is that usurpation renders *mithl* obligatory upon the usurper and recourse to the price is as a result of impossibility, and this impossibility is caused as a result of the cessation of the property. Thus, regard is paid to the price at the time of the cessation as if he destroyed it at that time. The rationale underlying Abū Ḥanīfah's statement is that the like kind of thing usurped is obligatory and cessation of the property by others does not invalidate that obligation. As we have seen, according to the Mālikīs he is to wait until the time of its finding. If the *mithl* remains, it is obligatory after its cessation and then its right shifts from restitution in kind to the price in litigation, and regard is to be paid to the price at the time of litigation.<sup>80</sup>

The Mālikīs agree with Muḥammad Ibn al-Ḥasan al-Shaybānī on the calculation of the price of *mithlī* which had ceased, as discussed earlier. However, the Shāfi'īs assess the price of the usurped and perished thing by taking into account the maximum price from the time of usurpation to the time of cessation, as the usurper has been under the obligation to return the usurped thing or its kind at all times up to the time that it became difficult and had ceased, as "the continuation is like the beginning", according to the Islamic legal maxim.<sup>81</sup> This view is subscribed to by some Mālikīs such as Ibn Wahb, Ashhab and 'Abd al-Malik.<sup>82</sup>

<sup>80</sup> Al-Kāsānī, *Badāi' Al-Ṣanāi' fī Tarfīb al-Sharāi'* (Al-Qāhirah: Maṭba'at Al-Imām), 7, p. 151.

<sup>81</sup> Ibn Shihāb, *Nihāyat Al-Muḥtāj ilā Sharh Al-Minhāj* (Al-Qāhirah: Maṭba'ah Muṣṭafā al-Bābī al-Ḥalabī), 5, p. 161.

<sup>82</sup> Al-Shāṭibī, *Al-Muwāfaqāt fī Uṣūl al-Sharī'ah al-Islāmīyah* (Al-Qāhirah: Al-Maṭba'ah Al-Tijāriyah Al-Kubrā), 3, p. 160.

## SECTION TWO

### ASBĀB (CAUSES) OF ḌAMĀN

We will discuss in this chapter the causes which render *Ḍamān* obligatory for perished items and the position of the jurists by mentioning numerous reasons for *Ḍamān* in Islamic law. The discussion will be made as follows:

#### 1.2.1 Definition Of *Sabab* According To The Jurists

*Sabab* is a rope. Moreover, it is used for all things which are linked to others and its plural is *asbāb* (causes). It is also a thing which is linked to goal, that is, it is a thing which is linked to other things without having any effect in its linkage.<sup>83</sup>

In other words, it is an attribute with whose existence the *ḥukm* is present and not by it, that is, it has no effect in producing the *ḥukm* but it is a means to it. For example, the rope is used for pulling out water from the well, but it has no effect in pulling out the water without the irrigator.

#### 1.2.1.2 *Sabab* In The Usage Of The Jurists

*Sabab* is regarded as one type of declaratory law (*ḥukm al-waḍ'ī*). The majority of the jurists recognize it as an attribute which is evident (*ẓāhir*) and constant (*munḍabīṭ*) and there is an indication for it through which a *ḥukm shar'ī*

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<sup>83</sup> Muḥamamd Rawās Qal' Jī, *Mu'jam Luḡhat al-Fuqahā'*, p. 314.

(law of Sharī'ah) can be known, like the decline of the sun being known as *sabab* for the obligation of prayer. According to al-Ghazālī it is not a cause by its nature but the Law-giver made it a cause.<sup>84</sup>

Some said: "It is a cause by itself and indeed *sabab* is fixed for a *ḥukm* because it demonstrates to a *ḥukm* like a sign especially after the time of the cessation of the revelation."<sup>85</sup>

The Ḥanafīs recognized it as a way (*ṭarīq*) of deducing a *ḥukm* which itself has no effect, that is, no requisite (*wujūb*) and existence (*wujūd*) are attributed to it, and the causes are not discernible to human intellect, yet there is a gap between it and the 'illah of a *ḥukm* which cannot be attributed to the *sabab*.<sup>86</sup>

The qualification by the word *wujūd* shows that it differs from 'illah and *sharṭ* because *ḥukm* is present by the existence of the 'illah while a *ḥukm* is present with the existence of *sharṭ* (condition).

The qualification by the phrase that "causes are not discernible to the human intellect" implies that there are some *asbāb* which resemble 'illah which has a direct effect to the *ḥukm* but the real *sabab* (*sabab al-ḥaqīqī*) has no direct or indirect effect to the *ḥukm*.

<sup>84</sup> Al-Ghazālī, *Al-Mustasfā*, 1, p. 59.

<sup>85</sup> Al-Zarkashī, Badr al-Dīn Muḥammad Ibn 'Abd Allah al-Shi'ī, *Al-Baḥr al-Muḥīt fī usūl al-Fiqh* (Miṣr: Dār Al-Kitāb Al-'Arabi), 3, p. 356.

<sup>86</sup> Al-Zanjānī, *Takhrīj al-Furū'* 'Alā al-Usūl (Dimashq: Maṭba'ah Jāmi'ah, 1962), p. 348.

The Shāfi'is recognized that *sabab* is an attribute which is manifest (*zāhir*) and constant (*munḍabiḥah*) and the transmitted evidence indicates that through its presence a *ḥukm shar'ī* can be known.<sup>87</sup>

The qualification by the word *zāhūr* (manifest) distinguishes it from the hidden attribute like putting sperm in the womb of a women upon which *'iddah* is not dependent because it is hidden but it depends on an evident attribute such as divorce.

The qualification by the *ḍabṭ* (constancy) is to distinguish it from the *sabab* which varies and does not apply at all times like hardship in travelling which cannot be *sabab* and therefore, the *sabab* for shortening the prayer is travelling and not hardship.

An example of *sabab* is the decline of the sun as a sign for knowing the obligation of prayer in the Qur'ānic verse, which reads: "Perform prayer from the decline of the sun."<sup>88</sup>

### 1.2.1.3 *Sabab* According To The Majority Of The Jurists:

It is a thing that a *ḥukm* is found with its presence but not by it whether it has a proper (*munāsabah*) relationship with the *ḥukm* or not.

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<sup>87</sup> *Al-Mausū'ah Al-Fiqhiyyah*, (Kuwait), 24, p. 146.

<sup>88</sup> *Al-Qur'an, Al-Isrā'* (17): 78.

Examples of *munāsabah* are the intoxicating effect which is a *sabab* (cause) for the prohibition of wine because it leads to the destruction of the intellect and travelling which is a *sabab* to break fast in *Ramaḍān* because it leads to easiness and removal of hardship.

An example of *ghayr al-munāsib* is, according to our perceptibility, the decline of the sun as the *sabab* for the obligation of *Zuhr* prayer in the Qur'ānic verse, which reads: "Perform your prayer from the decline of the sun".<sup>89</sup> Our intellect (*'aql*) is unable to perceive any obvious relationship between the *sabab* and the *ḥukm*.<sup>90</sup>

It is also known as any thing the existence of which the Law-giver declares to be a sign for the existence of the *ḥukm* and its non-existence to be as sign for the non-existence of the *ḥukm* like *zinā* as cause for the *ḥadd* penalty, insanity as cause for interdiction (*ḥajr*), and usurpation as a cause for the return of the usurped property, provided it remains intact and its compensation is due if it had perished. The non-existence of *zinā*, insanity and usurpation necessitate the non-existence of the *ḥadd* penalty, interdiction, and the return or the compensation of the property.<sup>91</sup>

It is any attribute whose existence is declared by the Law-giver to be a sign for the existence of *ḥukm* and its non-existence as a sign for the non-existence of

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<sup>89</sup> *Al-Qur'an, Al-Isrā'* (17): 78.

<sup>90</sup> Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuhū* (Bayrūt: Dār Al-Fikr), pp. 53-54.

<sup>91</sup> 'Abd al-Karīm Zaydān, *Al-Madkhal li Dirāsāt Al-Sharī'ah Al-Islāmīyah* (Bayrūt: Muassasat Al-Risālah), p. 55.

*ḥukm* like the times of the five daily prayers.<sup>92</sup>

#### 1.2.1.4 *Sabab* In The Usage Of The Jurists

*Sabab* is used in the terminology of the jurists as corresponding to *al-mubāshirah*. The Majallat al-Aḥkām in article 887 defines *mubhirat itlāf* as “personally to destroy a thing without intervening circumstances.” *Tasabbibin itlāf* is defined in article 888 to become the cause of destruction of a thing, that is to say, as regards one thing, to perform an act, which leads to the destruction of another thing happening in the ordinary course of events. The person who commits the act is called “*mutasabbib*”.<sup>93</sup>

Imām Zanjānī said that *sabab* is “a thing which leads to the *ḥukm* by a single or by many means like the statement that when you enter the house you are divorced is the *sabab* for suspending the *ḥukm* until entering the house. Likewise, if a person shoots a man who then dies, the shooter is liable, since the death has occurred as a result of injury and the injury was caused by the shooter.”<sup>94</sup>

The Mālikīs recognize *tasabbub* as “what destroys a thing through another cause if the cause was such an event through which another act was happening in its ordinary course like digging a well as a result of enmity to cause animal or other

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<sup>92</sup> Ḥafīd Thanāullah al-Zuhdī, *Talkhiṣ Usūl al-Fiqh* (Bayrūt: Dār Al-Ma‘rifah), p. 9.

<sup>93</sup> *Majallat Al-Aḥkām Al-‘Adliyyah*, Article 887.

<sup>94</sup> Al-Zanjānī, *Takhrīj al-Furū‘ ‘Alā al-Usūl*, p. 352.

things to fall into it and if someone else causes others to fall into it he will be liable to as *mubāshir* and not the digger as *mutasabbib* (causer).<sup>95</sup>

The Ḥanbalīs say: "That *tasabbab* of an act normally leads directly to the destruction and its doer is called *mutasabbib*".<sup>96</sup>

By looking at the definition of *sabab* according to the Fuqahā' and Uṣūlīyīn we find that the definition of the jurists is wider than that of the jurists although all the definitions share some meaning of the *sabab* and all have agreed that *sabab* corresponds to *mubāshir fī ta'addī*, if the *mubāshirah* and *tasabbab* both lead to the same result, i.e., the criminal intention and the intention to destroy.

Whether this undertaking is unilateral or bilateral, it involves the rights of Allāh or the rights of man, whether it be a contract of exchange (*mu'āwadah*) or a charitable gift (*tabarru'*) or a combination of both, from which accrues the origination of right or its annihilation or someone gets unlimited or limited authority in disposition and so on.

Hence, any disposition which does not bring about the lawful interest, like the various crimes such as murder and theft cannot fall within the ambit of '*aqd*' in this meaning but falls within the ambit of *al-taṣarruḥ* as it will be explained later.

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<sup>95</sup> Al-Shāḥibī, *Al-Muwāfaqāt fī Uṣūl al-Sharī'ah al-Islāmīyah*, 1, p. 211.

<sup>96</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 9, p. 488.

It is the connection between the offer by one party and the acceptance by the other party which brings about its effect in the subject matter of the contract.<sup>97</sup>

This definition can be analyzed as follows:

1. The existence of two contracting parties, or their representatives.
2. Connection between offer and acceptance.
3. The offer and acceptance bring about effects and consequences in the object or subject matter of the contract.

Some the traditionists (*muḥaddithīn*) recognized that '*aqd*' is the connection between the offer by one contracting party and the acceptance by another party so as to establish an effect on the subject matter of the contract.<sup>98</sup>

### 1.2.1.5 The Connection Between The Literal Meaning Of The '*Aqd*' (Contract) And Its Legal Usage

'*Aqd*' literally means conjunction and tie. Hence, if a person enters into a contract he decides first and foremost whether to originate anything or execute it. The tie occurs between his will and the decision to originate or execute what he intends to achieve whether it needs the consent of other party or not or whether it involves property or not. In this sense there is a connection between the literal and

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<sup>97</sup> Ḥasan 'Alī al-Shādhilī, *Naẓariyat al-Sharḥ fī al-Fiqh al-Islāmī* (Al-Qāhirah: Maṭba'at al-Sa'ādah), p. 87.

<sup>98</sup> 'Abdul Ḥamīd Al-Ba'li, *Ḍawābiṭ Al-Uqūd*, (Egypt: Maktabat Wahbah), p. 40.



technical meanings of the '*aqd*' and in addition the literal meaning includes the connection between things which are tangible such as rope as we discussed earlier. Hence, the literal meaning is more general than its technical meaning.<sup>99</sup>

## 1.2.2 Contract ('*Aqd*) and Disposition (*Taşarruf*) In Islamic Law

### 1.2.2.1 Definition Of *Taşarruf*

*Taşarruf* in their usage is any act, which originates an obligation and creates lawful effect. The lawful disposition is of two types, by word and by deed. The former includes all contracts and other dispositions of the like such as *waqf* (religious endowment), *nadhr* (vow), and the act of an uncommissioned agent ('*amal al-fuḍūlī*') and so on. The latter are all acts which are causes for *ḍamān* like the destruction of property belonging to another or its usurpation.<sup>100</sup>

Technically, *taşarruf* means what comes out from a person be it a statement or an act for which the Law-giver has laid down an effect whether it involves a will of originating any right or not, whether the consequence is for his or advantage or whether it involves harm or otherwise.<sup>101</sup>

Examples of those *taşarrufāt* which involve originating rights are sales,

<sup>99</sup> Hasan'Alī al-Shādhilī, *Naẓariyat al-Sharḥ fī al-Fiqh al-Islāmī*, p. 115.

<sup>100</sup> Hasan'Alī al-Shādhilī, *Naẓariyat al-Sharḥ fī al-Fiqh al-Islāmī*, p. 98.

<sup>101</sup> Hasan'Alī al-Shādhilī, *Naẓariyat al-Sharḥ fī al-Fiqh al-Islāmī*, p. 99.

charitable gifts and charitable endowments. An example of *taṣarruḥāt* which do not involve originating rights is the admission of a right because it is a statement for the establishment of a right but not its origination. Examples of those *taṣarruḥāt* which are advantageous for the person who is making a disposition are sales, *ijārah* (lease, hire) and examples of those which are advantageous to others are *waqf*, bequests and release from debt; and examples of those which involve harm are theft and murder, for the Law-giver has laid a deterrent consequence for the perpetrator.<sup>102</sup>

Therefore, *taṣarruḥ* is whatever comes out from a person be it a statement or an act for which the Sharī‘ah prescribes a consequence whether it is advantageous for this person or not. The statements include sales, charitable gifts (*hibah*), charitable endowments (*waqf*) and admissions of a right. The acts are such as the acquisition of the permissible things, or consumption (*istihlāk*) and usufruct whether the statements or acts are advantageous for the person like sales and hunting or advantageous for others like *waqf*, and bequests.

It is clear from the above that there are two types of *taṣarruḥ* (disposition), i.e., verbal and practical. The practical disposition is the physical type which originated by a man like usurpation, destruction and receiving the consideration and delivery of the thing sold.

The verbal disposition is of two types: contractual and non-contractual. The contractual type is the meeting of two wills like a partnership and a sale. The non-

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<sup>102</sup> ‘Isā Aḥmad ‘Isawī, *Kitāb al-Madkhal li-fiqh al-Islāmī* (Miṣr: Maktabah Wahbah), p. 391.

contractual type may be just the mere assertion of a right like litigation and admission or it may be the origination or annihilation of a right like a charitable endowment (*waqf*), divorce and release from a debt. Thus, the person making the disposition is either acquiring or discharging.<sup>103</sup> It is settled that *taṣarruḥāt* is either the confirmation of certain things such as sales, *ijārah*, and charitable gifts; or the release of certain things such as divorce, the release of a slave and a pardon from *qīṣās* and so on.<sup>104</sup>

Finally, it is affirmed that legal *taṣarruḥāt* is mainly of two types: origination (*inhā'*) and admission (*iqrār*). Some admission is regarded as legal *taṣarruḥāt* while others as testimony (*shahādah*) because admission is a kind of testimony.<sup>105</sup>

The *taṣarruḥ* is the originating disposition and the admission (*iqrār*) is not regarded as an individual *taṣarruḥāt*

It is possible to define *taṣarruḥ shar'ī* as "a statement or an act which brings about a legal ruling".<sup>106</sup>

Therefore, *taṣarruḥ* is more general than *'aqd* (contract) and *iltizām* (obligation) for it includes statements and acts and regulates *iltizām* and things other than *iltizām*.

<sup>103</sup> Al-Kamāl Ibn al-Humām, *Fatḥ al-Qadīr* (Miṣr: Al-Maktabah Al-Tijārīyah), 5, p. 311.

<sup>104</sup> *Natā'ij al-Afḳār* (Miṣr: Maṭba'ah Muṣṭafā Al-Bābī Al-Jalī), 6, p. 279.

<sup>105</sup> Al-Kāsānī, *Badā'ī 'Al-Ṣanā'ī fī Tarṭīb al-Sharā'ī*, 7, pp. 182 and 190.

<sup>106</sup> See Al-Kāsānī, *Badā'ī 'Al-Ṣanā'ī fī Tarṭīb al-Sharā'ī*, 7, pp. 170 -171. Ibn 'Ābidīn, *Hāshiyat Radd al-Mukhtār 'Alā al-Durr al-Mukhtār* (Maṭba'ah 'Isā Al-Bābī Al-Ḥalabī), 5, p. 92.

In short, *taṣarruf* is more general than '*aqd* and *iltizām*. '*Aqd* in its general sense is synonymous with *iltizām* but *iltizām* is more general than '*aqd* in its specific meaning and '*aqd* in its specific sense is a kind of *iltizām* and more specific than the word *taṣarruf*. Therefore, all '*aqd* is *taṣarruf* but not all *taṣarruf* is '*aqd*.<sup>107</sup>

### 1.2.2.2 A Unilateral *Iltizām* (Undertaking)

It is a kind of promise (*ta'āhud*) made by a promisor to a person for a thing which does not exist at the time of the promise, like the promise of rewards, or prizes for high scorers in an exam or to a person who manufactures medicine to cure a specific sickness.

The examples of unilateral *iltizām* (undertaking) in Islamic law are many some of which are as follows: *al-ju'ālah*<sup>108</sup>, *al-waḡf*<sup>109</sup>, *al-ibrā'*<sup>110</sup>, *al-waṣiyyah*<sup>111</sup>, *al-yamīn*<sup>112</sup>, *al-kafālah*.<sup>113</sup>

<sup>107</sup> Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuhū*, 4, pp. 83-84.

<sup>108</sup> It is an undertaking to pay a specific wage for a person who does a specific work without specifying the duration.

<sup>109</sup> It is the confinement of a property from disposition and designating it for charitable purposes like endowment for knowledge purposes.

<sup>110</sup> Release of a person by another person in respect of his right, like the release of creditor his debtor in respect of the debt.

<sup>111</sup> Transfer of ownership after death by way of charity, whether it be property or usufruct (*manfa'ah*) like a person making bequest in respect of some property.

<sup>112</sup> It is a firm oath, which a person takes for doing or not doing some thing like I take oath in the name of Allah that I will not use force against my neighbor.

<sup>113</sup> Discussed earlier, p. 9

### 1.2.2.3 Comparison Of *Taşarruf* With '*Aqd* In Its General Sense

It is clear from the definition that *taşarruf* has the following meanings:

(A) *Taşarruf* includes all disposition which come under the '*aqd*' according to its application, as it also includes cases which involve harmful effects and the Law-giver has prescribed a deterrent penalty such as the case of theft or murder, or in other words *taşarruf* includes certain issues which come within the sphere of public law as well as private law. Hence, the scope of '*aqd*', according to its general application, falls within the sphere of private law and not public law. However, *taşarruf* has a wider scope as it includes all issues which are within the boundaries of public law apart from private law.

(B) *Taşarruf* includes two principal things or elements as follows:

1. Statement made by a person for whom the Lawgiver has prescribed an effect, be it beneficial or harmful.
2. An act performed by a person for whom the Lawgiver has prescribed an effect, be it beneficial or harmful.

(C) The comparison of the definition of '*aqd*' according to its general application with *taşarruf* shows that they overlap with each other in some respects while they differ in others. They overlap in *taşarruf*, which

involves beneficial effects. Thus, all *taṣarruf* in this sense is '*aqd*' and all '*aqd*' according to this meaning is *taṣarruf*. *Taṣarruf* differs from '*aqd*' in matters which involve harmful effects like murder and theft. They fall within the ambit of *taṣarruf* and they do not come within the boundary of '*aqd*'. Hence, '*aqd*' is more specific and *taṣarruf* is more general.

Let us now compare '*aqd*' in its general sense with *iltizām* or personal right in man made law (*fiqh al-waḍ'ī*). After we have discussed the definition of *iltizām* in man made law and compared it with the definition that Islamic law has given to '*aqd*' in its general application, it is clear that '*aqd*' here is more general than *iltizām* because '*aqd*' includes all the things to which the word *iltizām* applies in man made law and it also includes the following:

- i. The rules which regulate man's relations with his family (personal matters such as marriage, divorce, *raj'ah* (revocation of divorce) and *khul'* (divorce at the insistence of the wife who must pay compensation) are a part of private law as discussed earlier.
- ii. Some *taṣarrufāt* come within the sphere of administrative law, like the appointment of a *qādī* and his removal, the orders issued by them or jurists or other leaders.
- iii. Some *taṣarrufāt*, enter the sphere of administrative law like the appointment of executive officers (*umarā'*).

- iv. Some judicial matters like interdiction on a slave with limited legal rights and arbitration between two persons.<sup>114</sup>

It becomes crystal clear from the above discussion that '*aqd*' in its general sense is not *iltizām* in man made law because the subject matter and object of *iltizām* in man made law is of property type. However, '*aqd*' in its general sense in Islamic law includes besides personal matters, matters which come within the sphere of administrative and constitutional law and judicial matters. Although they are apparently separate, nevertheless, the definition that we have given to '*aqd*' in its general sense combines all of these.<sup>115</sup>

#### 1.2.2.4 The Results of these Comparisons

It is possible to summarize the results of these comparisons as follows:

1. There is a firm relationship between the literal and technical meanings of the '*aqd*' except that '*aqd*' in its literal sense is more general than in the technical sense because, as discussed earlier, '*aqd*' literally means a tie between two things and in this sense it applies to abstract thing (*ma'ānī*) as well as to material things.
2. '*Aqd*' in its general sense is not by itself *taṣarruf* in its technical sense but it

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<sup>114</sup> Ḥasan' Alī al-Shādhilī, *Nazarīyat al-Sharḥ fi al-Fiqh al-Islāmī*, p. 115.

<sup>115</sup> Al-Sanhūrī. *Al-Wasā'it fi Sharḥ Al-Qānūn Al-Madanī*, p. 99.

is more specific. Therefore, every '*aqd*' is *taṣarruḥ* not every *taṣarruḥ* is '*aqd*'.

3. The basis of the '*aqd*' is will (*irādah*), be it unilateral or bilateral, whether the will emanates from the ruler or the ruled.

The common basis for all these *taṣarruḥāt* which fall within the ambit of the contract in its general sense is *iltizām* of a person by his will for an act which brings about a legitimate interest. Thus, every person is bound by his will even in a contract in which the consent of the other party is necessary. The proposer is bound by his will and the acceptor is bound by his will – thus it is *iltizām* on the basis of will.

4. *Al-'aqd* in its general sense is more general than *iltizām* in man made law. Therefore, all *iltizām* is '*aqd*' but not all '*aqd*' is *iltizām* in view of the fact that '*aqd*' here includes, on the one hand, the personal matters while some of them come within the sphere of administrative and constitutional and judicial matters.<sup>116</sup>

5. It is clear from the discussion that the methodology of investigation in Islamic law differs completely from that of man made law. This demonstrates conclusive evidence for the authenticity of Islamic law. The fact that it is independent in its investigation and terminology and that it has not borrowed from other sources shows the authenticity of Islamic Law.

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<sup>116</sup> 'Alī Qarā'ah, *Aḥkām Al-'Uqūd fī Al-Sharī'ah Al-Islāmiyyah*, (Egypt: Maktabat Wahbah), pp. 7-8.



The Islamic Legal understanding of the *'aqd* is the growth of the thematic aspect (*tur'a*) which the Islamic law leads and not as innate aspect. Hence, *'aqd* is the tie between offer and acceptance not from the angle that it originates personal obligation on the part of the contracting parties as this is the evident meaning in its innate aspect, but from the perspective that it establishes legal effect in the subject matter of the *'aqd*, that is, its ownership is changed and it is here that the thematic aspect comes into view.<sup>117</sup>

Therefore, *ḍamān* becomes obligatory as a consequence of the infringement of law in order to remove the harm, whether this infringement of law relates to any of the following:

1. Refusal to perform the contract as it negates the Islamic legal principle requiring the obligation to perform the contract and undertaking as in the Qur'ānic verse which says: "O you who believe! Fulfil your contracts" and also in another *āyah*: "You will be responsible for what you undertake".<sup>118</sup>
2. Infringement of the general Islamic legal injunctions as a result of non-performance of what the Law-giver made an obligation or prohibition in respect of the performance of *'aqd*.

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<sup>117</sup> 'Abdul Ḥamīd Al-Ba'ī, *Ḍawābiṭ Al-'Uqūd fī Al-Fiqh Al-Islāmī*, (Egypt: Maktabat Wahbah), p. 54.

<sup>118</sup> *Al-Qur'an, Al-Isrā'* (17): 34.

'*Aqd*, according to the definition discussed earlier, is the link between offer and acceptance. Thus, it is the two wills joined to each other and in agreement with each other. The generality of the jurists do not apply the word '*aqd* on the two wills without drawing the distinction between them, regardless of whether they come into being by an offer alone. When they discuss the validity or invalidity of the '*aqd*, or the validity or invalidity of its conditions, they include all *taṣarruḥāt* without making a distinction between contract and unilateral will. Hence, they mention divorce and charitable endowment in the same way as they mention sale, *ijārah*, marriage and *khul'*.<sup>119</sup>

### 1.2.3 *Ḍamān* In The Contract ('*Aqd*)

The contracts aim to bring about interests which are necessary for people. They cater for their needs and facilitate their social dealings, and this is the reason for making permissible the various contracts including sale, *rahn*, *ijārah*, *wakālah*, *kafālah*, *shirkah* (partnership), *muḍārabah*, *hawālah* (transfer of debt), *qarḍ* (loan), *wadī'ah* (safe keeping), *i'jārah* (renting or hiring), *ju'ālah*, *muzāra'ah* (sharecropping contract) and *musāqāt* (partnership to cultivate trees) and so on. All these various types of contract have specific legal consequences; some of them, such as sale, *hibah* (gift), bequest, inheritance and pre-emption and acquiring the permissible things (*mubāḥ*) have the effect of transfer of ownership from the owner to another person.

<sup>119</sup> Al-Sanhūrī, *Maṣādir Al-Ḥaq*, (Cairo: Ma'had Al-Buḥūth Wa Al-Dirāsāt Al-'Arabiyyah), 1, p. 75.

The contracts which have the effect of ownership of usufruct (*manfa'ah*) are *ijārah*, *'āriyah*, and marriage. Contracts which involve work are those such as *wakālah*, the hiring of persons and labour companies and contracts involve the growth of property and its utilization are like partnership, *muḍarabah*, *muzāra'ah*, *musāqāt*, and *iḥyā' al-mawāt* (improvement of a barren land), and contracts which involve the safeguard of property and its return to its owner are *wadī'ah*, *qarḍ* and *'āriyah*. Thus, these contracts may involve other legal consequences according to the intention of the contracting parties and the Law-giver and *ḍamān* is subsequently attached to the original *ḥukm* (ruling) and has a binding effect on it.<sup>120</sup>

One of the reasons which obliges a person to *ḍamān* is the contract that he concludes with another party or which comes into being by a single will and he is bound by it as it is stated in the Holy Qur'ān. For instance, Allāh (s.w.t.) says: "Fulfil your undertaking, and you will be responsible for it."<sup>121</sup> The Prophet (s.a.w.) said: "Muslims are bound by their conditions." This is because it is a condition suitable for a contract and it is beneficial for the creditor as security for obtaining his debt, and stabilizing the contract. From this the obligation to fulfil the condition follows and it is up to the creditor to compel the debtor to discharge the undertaking, to execute the condition. It is up to him, to dissolve the contractual relationship, and what is binding upon him from the undertaking of an obligation if the debtor acted contrary to the valid end and objective of the contract by refusing to fulfil his responsibility relating to the execution of the agreed upon condition in the contract. It is a condition, which

<sup>120</sup> Muḥammad Abū Zuhrah, *Al-Milkiyyah wa Naẓariyāt al-'Aqd fī al-Sharī'ah al-Islāmiyyah* (Al-Qāhirah: Dār Al-Fikr Al-'Arabī), pp. 76-77.

<sup>121</sup> *Al-Qur'an*, *Al-Mā'idah* (5): 1.

is not without force for it is laid down by the consent of the contracting parties and has become an inseparable part of the contract and applies upon it the principle of contract laid down by the contracting parties.<sup>122</sup>

### 1.2.3.1 Nature Of *Ḍamān* In Islamic Law

*Ḍamān* in Islamic law relates to the execution of the requirements of a contract or the compensation of the harm arising from it. The result of the erroneous course of action by one of the contracting parties differs from commutative contracts (*'uqūd al-mu'āwāḍāh*) to contracts involving trusts (*amānah*) just as the unlawful act as the cause of liability and it becomes clearly visible that liability results in the destruction of property as it is an established principle of the Sharī'ah that the mistaken destruction of property is a cause for liability.<sup>123</sup>

*Ḍamān* in the contract depends on the will of the contracting parties. It is in the nature of a contractual obligation as the object of the contract cannot be completed without the agreement and consent of the contracting parties because people are bound by their word so long as they are competent. Hence, it is a right of that party for whom it is established and it is classified as the fulfillment of the contractual obligation, which is enacted by the Qur'ānic verse: "O you who believe fulfil your contract". So the will of the contracting parties determines the liability

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<sup>122</sup> 'Alī al-Khafīf, *Al-Ḍamān fī Al-Fīqh Al-Islāmī* (Al-Qāhirah: Ma'had Al-Buhūth wa Al-Dirāsāt Al-'Arabiyyah, 1971), pp. 66-70.

<sup>123</sup> Al-'Iz Ibn 'Abd al-Salām, *Qawā'id al-Ahkām fī Maṣāliḥ al-Anām* (Bayrūt-Lubnān: Dār al-Kutub al-'Alamiyyah), 2, p. 101.

relating to the contract, and it is a source which distinguishes it from other types of liabilities like *ḍamān al-yad*. Al-Suyūṭī says that the difference between liability (*ḍamān*) in a contract and liability in respect of possession (*yad*) is that in the former, the thing or its substitute is agreed upon by the parties whereas in the latter the return is in kind or in value.<sup>124</sup>

### 1.2.3.2 Mode Of *Ḍamān* In Islamic Law

*Ḍamān* in a contract, according to the Sharī'ah injunctions, is discharged by carrying out the very same thing ('*aynī*) or performing its equivalent (if its execution becomes different) in the contract which has already been agreed upon by the contracting parties at the time of the conclusion of the contract. This is achieved either by payment of price, wage or its value that commensurate with the compensation for the object of the contract and at the time the right of other party is affected. *Ḍamān* is therefore, a means of compensating the affected party, which can be either in kind or in value.<sup>125</sup>

*Ḍamān* in a contract means that the liability arises from the contract through either agreement of the contracting parties or a provision in the contract. Examples of those liabilities which are agreed upon by the contracting parties are the specific dower, substitute for *khul'*, and compromise on blood money and examples of those liabilities provided by the contract are the

<sup>124</sup> Al-Suyūṭī, *Al-Ashbāh wa-al-Nazā'ir fī Qawā'id wa Furu' Fiḥ al-Shāfi'īyah* (Miṣr: Dār Ihyā' Al-Kutub Al-'Arabīyah Isā al-Bābī al-Ḥalabī), p. 39.

<sup>125</sup> Muḥammad Abū Zuhrah, *Al-Milkīyah wa Naẓariyāt al-'Aqd fī al-Sharī'ah al-Islāmiyyah*, p. 105.

contract of sale, *salām* (to buy by payment in advance), *ijārah* and *ṣulḥ* (compromise). So the origin of *ḍamān* in the contract is the will of the contracting parties as such whatever the parties agree in the contract and are bound by it is contractual *ḍamān* regardless of whether it is completed by the agreement or the provision.

Contractual *ḍamān* is applicable in commutative contracts, which are contracts that fix a mutual obligation upon the contracting parties especially in the contract of sale and contract of service. The liability in these types of contract is discharged by the contracting parties through fulfilment of their obligation either by their free choice or by compulsion. The fact is that it is founded for the execution of the object of the contract, and the realization of the objective of the contracting parties which cannot be achieved except by the execution of the obligation itself, rather than its substitute.

*Ḍamān* attaches to the rights of man as there is no right for Imām in pardoning the transgressor while the Sharī'ah has accorded this right to him in respect of the *ta'zīriyyah* crimes. Likewise, the right to bring action for *ḍamān* is vested in the affected party, in contrast to action in criminal matters that are regarded as *ḥisbah* litigation in the Sharī'ah which entitles every Muslim to bring action and start proceedings except in the case of slander as only the slandered person or his heir is entitled to bring action.

The ordinary liability (*jawābir*) is legalised to procure the interests which

have been lost while the punitive (*zawājir*) one is for the removal of evils. In the *jawābir* the sin of the person upon whom liability is placed is not a condition, while the punitive liability is imposed because of the sin, and on this account the *jawābir* is awarded in mistake, ignorance and on the insane and infants. Likewise, the *jawābir* falls in property, *ibādāt* (devotional matters), selves (*nufūs*), body organs, injuries, and usufructs (*manāfiʿ*), while punitive liabilities occur in crimes and the infringement of the law. In this regard, al-ʿIzz bin ʿAbd al-Salam and Qarāfī mention that whatever the Lawgiver has prescribed on selves (*nufūs*), body organs, injuries from blood money (*diyāt*), expiatory gifts (*kaffārāt*) are *jawābir* and whatever penalties the Lawgiver has prescribed such as *qisās*, beating or imprisonment or disciplinary punishment are *jawābir*.<sup>126</sup>

#### 1.2.4 *Ḍamān Al-Yad* (Liability On Account Of Possession)

*Yad* literally has several meanings, one of them is the specific limb, which is the source of strength, and force, or part of the limb. This meaning is clear in the Qurʾānic *āyah*: “As to the theft, male or female, cut off his or her hands: as retribution for their deed and exemplary punishment from Allāh”.<sup>127</sup>

It is also used as power, authority and appropriation and there is no distinction as to whether that appropriation is as a result of external force over concrete moveable things like books and so on or immoveable things abstract

<sup>126</sup> Muḥamad Aḥmad Sirāj, *Ḍamān al-ʿUdwān fī al-Fiqh al-Islāmī*, pp. 55, 56, 58.

<sup>127</sup> *Al-Qurʾān, al-Māʾidah* (5): 38.

(*ma'nawī*) affairs, as it is said: "This house is in possession of Zayd and the affair is in Allāh's hand".<sup>128</sup>

*Yad* is used technically in legal terminology to mean absolute domination over a thing be it within or without the *shar'ī* or customary usage. The domination is of two types, either innate (*takwīnī*) or subjective (*i'tibī*) depending on the attributes of the dominator or controller.

*Yad* over property means the authority of a person over it because *yad* (hand) is a limb which is not capable of being addressed with the declaratory laws and so it is inevitable to use subjective expression.

#### 1.2.4.1 Three Types Of *Yad* According To Ḥanāfīs

1. *Yad milk*: This means that the possessor of the property is the owner due to one of three factors, that is, contract, inheritance and the keeping the permissible (*mubāḥ*) things.
2. *Yad amānah*: This means taking possession of property with the leave of its owner, the possessor of which is called *amīn* (trustee). *Yad amānah* has two effects: one of them is that there is no liability upon the possessor if the thing perishes in his hand without hostile action or fault on his part and the second is that the trustee cannot deal with the

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<sup>128</sup> Ibn Manẓūr, *Lisān al-'Arab*, Letter of Wāw and Yā'.



entrusted property without the leave of its owner as we have seen in *al-waḍī'ah*, property belonging to a partnership and *muḍārabah* property in the hand of *muḍārib*.

3. *Yad ḍamān*: This means the taking of property belonging to someone else without his permission for one's own use. Thus, it is the opposite of *yad amānah*. The appropriator is called *ḍāmin*. There are two effects; one of them is that the appropriator cannot deal with the appropriated property in anyway, and the second is that liability is placed upon him in all situations.<sup>129</sup>

#### 1.2.4.2 Types Of Yad According To The Shāfi'īs

Jalāl al-Dīn al-Sayūṭī, a Shāfi'ī scholar has divided *yad* with respect to whether there is liability or not into two:

1. Possession on trust *ab initio*, unless it is encroached upon and is changed to *yad ḍamān*. Examples are the position of the *mudī'*, partner, agent and debtor.
2. Possession other than on trust, that is *yad daman ab initio* like the position of the appropriator and the borrower and the purchaser of a voidable contract.<sup>130</sup>

<sup>129</sup> Al-Kamāl Ibn al-Humām, *Faṭḥ al-Qadīr*, 7, p. 360. Munīr al-Qāḍī, *Sharḥ Al-Majallah* (Baghdad: Maṭba'ah Al-'Ānī), 1, p. 41.

<sup>130</sup> Al-Suyūṭī, *Al-Ashbāh wa-al-Nazā'ir fī Qawā'id wa Furu' Fiqh al-Shāfi'īyah*, p. 390.

#### 1.2.4.3 Four Causes of Liability on Account of Possession

There are four courses of liability on account of possession. These are discussed as follows:

1. Taking possession of other's property may be on the basis of *shar'ī* authority, it is like the position of *al-waḍī'ah*, or the result of permission given by the Law-giver in the case of finding of a lost thing with the aim of returning it to its owner after taking the necessary steps to discover the identity of the owner. It is not regarded as transgression and no liability is placed upon the person who discovered such thing if perished in his hand. However, if the other's property is encroached upon like the appropriation by the appropriator or the position of a person taking possession of another's property other than by usurpation, the owner is entitled to be compensated if the thing in his hand is destroyed for any reason. This includes all types of appropriation the effects of which continue even if the property changes hands if, for example, a purchaser purchases the property from the appropriator or a tenant rents from him or a borrower borrows from him or a pledgee takes the property on pledge from him or a *muḍārib* takes it on *muḍārabah*. So the effect of transgression continues in the hands of all the subsequent possessors of the property like the purchaser and tenant and so on if the thing perished. However, if the possession is on a *shar'ī* authority, the owner is not entitled to be compensated for the destruction of the property seized by him and this is like the position of the ruler who has taken back the

usurped property from the usurper in order to return it to its owner.<sup>131</sup>

2. There should be compensation to the owner of the property, though taking possession of the property is with his permission. It is like the position of the borrower according to the Ḥanbalīs and Shāfi'īs, but this is opposed, to the Ḥānāfīs.<sup>132</sup>
3. *Al-ḍamān* is a means and way of taking possession like the position of a receiver of property by way of "*sawm shirā'*" i.e., price received by the buyer for the purpose of making a purchase and the position of a receiver of property by way of "*sawm naẓār*" i.e. property is received to show or to look at, according to others than the Ḥānāfīs.<sup>133</sup>
4. Taking possession of others' property is with the permission of its owner especially for the interest of its owner but if it involves a commonality of interest, regard is paid to superior interest. If the interest of the owner is superior then taking possession of the property is on trust, otherwise it is *yad al-ḍamān*. This is the position of the Ḥanbalīs and they have derived from this principle the liability on the part of the borrower and no liability in respect of the thing deposited for safe keeping.<sup>134</sup>

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<sup>131</sup> 'Alī al-Khafīf, *Al-Ḍamān fī Al-Fiqh Al-Islāmī*, p. 105.

<sup>132</sup> 'Alī al-Khafīf, *Al-Ḍamān fī Al-Fiqh Al-Islāmī*, p. 105, pp. 106-107.

<sup>133</sup> Al-Qarāfī, *Al-Furūq*, (Bayrūt: Dār Al-Ma'rifah Li-al-Ṭibā'ah wa al-Nashr), 2, p. 207.

<sup>134</sup> Maṣṣūr al-Bahūti, *Kashaf al-Qinā'* (Riyadh: Maktabah al-Nashr Al-Hadīthah), 2, p. 326.

#### 1.2.4.4 Consequences Of *Yad Al-Amānah* And *Yad Al-Ḍamān*

There is no liability on the part of the trustee if the property is destroyed in his hands except if he was neglectful in keeping it or he has done wrong upon it. This is evident from the statements of the jurists on contracts involving liability.

However, in *yad al-ḍamān* the rule is that the owner is to be compensated for the destruction of his property whether the destruction is the result of wrong done to it by the person in whose possession the property is or by a stranger, or due to other acts of God such as death and blazing fire and so on.<sup>135</sup>

Excepting the situation where the destruction of the property is caused by a stranger, the possessor is liable for its loss; but if the destruction is caused by the owner himself, he is liable for it and naturally not the possessor of the property.<sup>136</sup>

#### 1.2.5 *Ḍamān al-Atlāf* (Liability For Destruction)

*Atlāf* is the infinitive noun for the verb *atlaḥa*, which is a transitive. *Talaḥa* which means extinction and ruination. In the *Lisān al-'Arab*, the word *talaḥa* is employed for the annihilation and ruination of a thing. Hence, the phrase *atlāf al-māl* means the destruction and ruination of property.<sup>137</sup>

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<sup>135</sup> Munīr al-Qāḍī, *Sharḥ Al-Majallah*, 1, p. 41.

<sup>136</sup> Munīr al-Qāḍī, *Sharḥ Al-Majallah*, pp. 43-44.

<sup>137</sup> Ibn Manẓūr, *Lisān al-'Arab*, the word *talaḥa*, 9, p. 18.

### 1.2.5.1 Difference Between *Ḍamān Al-Atlāf* And Other Liabilities

The disposition that originates obligation (*iltizām*) is of two types: the first type is the declaratory disposition and this is a permissible disposition, provided its conditions are fulfilled such as all types of contracts. The second type is the actual disposition which includes all the prohibited acts and wrongs done on another's right.

The wrong acts on another right varies as the rights vary. This occurs sometimes on the soul or the body, while at other times on the honour, dignity and freedom of a man or on one's property and so on.<sup>138</sup>

Hence, liability for destruction arises from offences and crimes committed by the destroyer of property while the liability in a contract ensues from the failure to discharge one's obligation under the contract.

The difference between the *ḍamān al-ittlāf* and *ḍamān al-yad* is that in the former the liability arises as a result of the destruction and the destroyer is under an obligation to compensate the value of the thing destroyed, whether the destroyed property was in his possession or not. In *ḍamān al-yad* the liability arises for the destruction of the property on the grounds of possession by someone and as such there is no justifying legal factor for its owner to safeguard it. The value of the destroyed property is taken into account if such property or similar thing to it cannot be found on the market at the same price (*qīmī*) of its original. If similar thing can be

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<sup>138</sup> Subḥī al-Maḥmaṣānī, *Al-Nazarīyāt al-‘Āmmah lil-Mājibāt wa al-Huqūq* (Bayrūt: Dār Al-‘Ilm li Al-Malāyīn, 1972), 1, p. 165.

found on the market at the same price (*mithlī*), it must be given as compensation.<sup>139</sup>

Al-Suyūṭī has mentioned the difference between *ḍamān al-yad* and *daman al-atlāf* by saying that in *ḍamān al-itlāf* the effect is direct without any cause, whereas in *ḍamān al-yad* the effect is both direct and consequential.<sup>140</sup>

### 1.2.5.2 Conditions For *Ḍamān Al-Itlāf* (Compensation For Destruction)

For the compensation for destruction the jurists have laid down the following four conditions:

1. The act has to be harmful.
2. The harm occurred as a result of transgression or encroachment.
3. The harm is to be the direct or consequential effect of the transgression.
4. The offence is committed intentionally in a period of time and especially when it is consequential or the harm is caused by an animal or solid things.<sup>141</sup>

### 1.2.5.3 Definition Of The Harmful Act And Its Types

#### 1.2.5.3.1 False Testimony:

Sometimes harm is caused as a result of giving false testimony, and so if two

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<sup>139</sup> ‘Alī al-Khafīf, *Al-Ḍamān fī Al-Fiqh Al-Islāmī*, p. 20.

<sup>140</sup> Ibn Nujaym, *Al-Ashbāh wa al-Nazā’ir* (Al-Qāhirah: Muassasah Al-Jayl), p. 390.

<sup>141</sup> ‘Alī al-Khafīf, *Al-Ḍamān fī Al-Fiqh Al-Islāmī*, pp. 20-22.

witnesses retract their testimony after the judgment is rendered in a civil litigation and confess that they had given false testimony, the judgment is not annulled according to the prevailing opinion, but the witnesses are to compensate the harm suffered by the defendant, to the value liable for the property on which judgment is given.

Al-'Izz bin 'Abd al-Salām said: "When two persons have given false testimony in respect of a disposition and then retract, if this disposition is as such whose attainment was not possible like real estate and landed property the liability is placed upon them according to a more correct opinion."<sup>142</sup>

#### 1.2.5.3.2 Compulsion

Compulsion is also a harmful act. Compulsion might has a connection with the harmful act which leads to liability. So what is the essence of compulsion and how does it lead to liability? Al-Zayla'ī defined it as "an act found in the compeller and so the effect of his act occurs in the object, whereby, payment is due upon the compeller for the act that he tried to obtain".<sup>143</sup> The condition of the compulsion is that the compeller is able to execute his threatened act and he is of the view that the thing is most likely happen by his act even though he did not commit the act.

<sup>142</sup> Al-'Izz bin 'Abd al-Salām, *Qawā'id al-Ahkām fī Maṣāliḥ al-Anām*, 2, p. 124. Al-Shirāzī, *Al-Muḥadḍab fī Fiqh Madhab Al-Imām Al-Shāfi'ī*, 2, p. 177.

<sup>143</sup> Al-Zayla'ī, *Tabyīn al-Haqā'iq Sharḥ Kanz al-Daqa'iq* (Al-Qāhirah: Maṭba'ah Jāmi'ah Fuād Al-Awwal, 1950), 5, p. 181.

### 1.2.5.3.3 *Taghrīr* (Deception)

*Taghrīr* is one of the means of causing harm to others, and there is a connection between it and the subject of our discussion. *Taghrīr* literally means deception. As provided by article 164 of the *Majallat al-Ahkām* in the chapter on sale, *taghrīr* means to cheat. Thus, the deceiver lures the party by making a false statement. Hence, the jurists regard it as defective consent which enters the mind of the deceived person as a result of ignorance and wrong information. The means of deception may be either a statement like a misleading description of a thing given by a liar which is intended to make another person do something, or it may be an act like to tying the udders of a she-sheep with the aim of explaining that it has plenty of milk, or covering a thing in order to conceal its condition and giving misleading information such that it is well manufactured to induce the purchaser to buy it.

Deception may occur in the contract and so a person, by accepting it, originates the contract on the assumption that it is beneficial to him or free from fraud and then it becomes clear that he has been deceived. The effect of the deception in this situation appears to be that the contract is not binding, as the jurists have mentioned them in detail when they discuss them. Sometimes deception occurs in acts like making a traveller take route that it is safe but the thief steals all his belongings or he took a route on the assumption that it was not prohibited or there was no danger of destruction of his property and then the opposite happens, such person has to pay for the loss of the property.<sup>144</sup>

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<sup>144</sup> 'Alī al-Khafīf, *Al-Ḍamān fī Al-Fiqh Al-Islāmī*, p. 201. Subḥī al-Maḥmaṣānī, *Al-Nazarīyāt al-'Āmmah lil-Mūjibāt wa al-Huqūq*, 2, p. 429.



#### 1.2.5.4 An Act Committed With The Permission Of The Proprietor Or The Ruler

There is no compensation for harm caused without transgression, as we mentioned earlier. Likewise, there is no compensation upon a person who uses the right belonging to another person with his permission even though the owner receives harm as a result of it, such as if a person orders another one to cut off his hand or destroy his property and the person commits the act, then there is no liability upon him. Moreover, there is no liability in a surgical operation provided it is done with the permission of the patient, or in a sports competition and so on. The ruler or his representative with general authority is to administer the public affairs including roads and so on. It is on this basis that Sarakhsī said that if a person digs a well in a common market or builds a shop with the permission of the ruler, he is not liable for the loss of anything because he is not the consequential or direct transgressor.<sup>145</sup>

#### 1.2.5.5 Mode Of Compensation For Destruction:

The principles relating to compensation for the usurpation of property also apply for compensation for destruction of property. Since, it generally means giving of its kind if the thing can be matched in the market (*mithliyyāt*) or its value if it cannot be matched in the market (*qīmiyyāt*).

If the value and price of the thing vary with the changes of time and place, it

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<sup>145</sup> Al-Sarakhsī, *al-Mabṣūṭ*, 27, p. 6.

is necessary to specify the time and place to be taken into account in determining the due compensation upon the usurper. If the usurped property cannot be matched in the market, it is binding upon the usurper to pay the price at the time and place of usurpation according to the Mālikīs, and the price at the time of its destruction according to the Ḥanbalīs.<sup>146</sup>

However, according to Shāfi'īs, as we stated earlier, the usurper is liable for the maximum price between the time of usurpation and the time of destruction.<sup>147</sup> The Ḥanāfi's agree with the views of the Mālikīs as far as usurpation<sup>148</sup> is concerned. However, in regard to destruction they took into account the price of the perished thing at the time that it perished.<sup>149</sup>

The compensation for destruction may take another form and this is by removing the harm itself or compelling the destroyer to make it good so far this is possible. An example of this is the rebuilding of a destroyed wall in its original stake, making good a damaged vehicle or the commodity so far as is customarily possible.

In Majma' al-Ḍamānāt it is provided: "And in short: if a destroyer destroys the material belonging to a person, he has to restore it to its original condition so far as possible as in the case of a person who takes a tool of a person and fractures his tooth."<sup>150</sup>

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<sup>146</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 5, p. 193.

<sup>147</sup> Al-Khatīb al-Sharbīnī, *Al-Mughnī al-Muḥtāj*, 2, p. 280.

<sup>148</sup> Al-Zayla'ī, *Al-Kītr* (Beirut: Dār al-Ma'rifah), 5, p. 223.

<sup>149</sup> Ibn Nujaym, *Al-Ashbāh wa al-Nazā'ir*, p. 146.

<sup>150</sup> Abū Muhammad Al-Baghdādī, *Majma' al-Damānāt*, p. 147.

#### 1.2.5.6 Inevitable Accident:

It is a legal maxim that whatever is inevitable there is no liability for it. So if a sailor is blown by a violent wind and his ship is sunk and the persons and goods on board are drowned and lost, he is not liable because he was not the cause for it. Likewise, if a doctor takes the necessary precautions and consideration but the patient dies he is not liable because there is no casual relationship between the act and the harm. The liability arises when there is a casual relationship. However, in direct killing or bodily injury, the responsibility of the perpetrator is absolute although the acts are inevitable. Thus, if a hunter misses his target and hits a person, he is liable for it. The British judicial rules do not make such a distinction and hold that there is no responsibility for inevitable accident. In the case of *Powell V. Stanley* (1899) a number of persons gathered for shooting training. The bullet fired by the defendant was directed at the trunk of the tree but it passed through the tree and hit the plaintiff. The court passed a judgment that the defendant had taken all the necessary precautions and consideration and he was not negligent.<sup>151</sup>

#### 1.2.5.7 Participatory Negligence

Participatory negligence is recognised as the neglect of the plaintiff in protecting his own self as he participates in the harm affecting himself. Hence, in 1972 a judgment was given in the case of *O'Connell V. Jackson* by reducing the damages by 15% to the plaintiff who suffered injuries in an accident at the time of

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<sup>151</sup> Abū Muhammad Al-Baghdādī, *Majma' al-Damānāt*, p. 105.

riding his motorcycle because he did not wear his helmet, which contributed to the increase of the gravity of the injury. In another case, the Court of Appeal rendered a judgment by reducing the damages in a car accident for not fastening the safety belt. Reference is made earlier in the historical development to the slowness of English law to recognize the idea of participatory carelessness until the end of this century. The judgment rendered by 'Alī bin Abī Ṭālib in the case of Qārisa, Qāmisa and Waqisa by distributing one third of the *diyyah* to the '*āqilah* of each of the three young girls who were playing together and removing the share of Mawqūsa because the act of a person on himself is of no legal consequence. Likewise is the case of three persons who were shooting at each other with catapults one of whom was killed by a stone. The two thirds *diyyah* is due to be paid to the person who is killed because the death is caused by three of them jointly. One third *diyyah* is of no effect because the act of a man in regard to himself is of no legal consequence and the remaining two thirds *diyyah* is to be borne by the other two. This is the stand taken by the Shāf'īs and the dominant view among the Ḥanbalīs. This differs from an accident by two persons because a perfect *diyyah* is due upon the '*āqilah* of each of them because he dies as a result of another's act.<sup>152</sup>

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<sup>152</sup> Muḥamad Aḥmad Sirāj, *Ḍamān al-'Udwān fī al-Fiqh al-Islāmī*, p. 434.

## SECTION THREE

### CONDITIONS WHICH RENDER *ḌAMĀN* OBLIGATORY

After completing our discussion on the pillars of *ḍamān* and its causes, we will discuss in this section the conditions, which according to the jurists, are necessary to render the *ḍamān* obligatory whether the fulfilment of those conditions relates to *dāmin* (guarantor), *maḍmūn* (thing guaranteed) or *maḍmūn lah* (the person for whom the guarantee is given). We will divide this chapter into two main parts.

#### 1.3.1 Conditions (*Shurūṭ*) In The Lexicography And The Usage Of The Jurists

##### 1.3.1.1 Condition According To Lexicographers:

*Sharṭ* (pl. *shurūṭ*) is an infinitive noun which means to bind or be bound by something. *Sharaṭ* (pl. *ashrāt*) means portent as it is used in the Qur'ānic *āyah*: “The portent of the Day of Judgment has come”, i.e. the sign of the Day of judgment. According to the jurists of *uṣūl* a condition is “an evident and constant attribute upon which rest the existence of the *rūlīng* but which has no impact in bringing about the *rūlīng*”. In other words, it is an attribute whose absence necessitates the absence of the *ḥukm* or the *sabab* (cause). As the condition has no impact in the *ḥukm*, the presence of the condition does not automatically bring about the presence or absence of the object (*mashrūṭ*). Hence, it is defined as an attribute whose absence necessitates the absence of the *ḥukm* but whose presence does not necessitate the

presence or absence of the *ḥukm*.<sup>153</sup>

### 1.3.1.2 Condition In The Usage Of The Jurists

Condition according to the usage of the jurists applies to a thing being external to another thing which depends on it, but it is not being affected by its presence. For instance, *wuḍū'* (ablution) is a necessary condition for *ṣalāh*. *Wuḍū'* is external to *ṣalāh*. The presence of *wuḍū'* does not necessitate the presence of *ṣalāh* but *ṣalāh* is dependent on *wuḍū'*, so the absence of *wuḍū'* necessitates the absence of *ṣalāh*.

There are two types of conditions: *shara'ī* conditions and *ja'īlī* conditions or suspension conditions.

1. *Shara'ī* conditions: These are attribute upon which rests the existence of a thing in reality or by the command of the Law-giver so that a *ḥukm* is not valid without it as seen in our previous examples. Another example is the testimony of witnesses in the contract of marriage. The Prophet (s.a.w.) said: "There is no marriage except by legal guardian and two just witnesses." If there were no witnesses, the contract of marriage is not valid. The testimony is a condition for the contract of marriage that the Law-giver has prescribed in the interests of society.

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<sup>153</sup> Hasan'Alī al-Shādhilī, *Nazarīyat al-Sharḥ fī al-Fiqh al-Islāmī*, pp. 48-49.

This applies to all the things that the Law-giver has laid down as a condition for the validity of *ṣalāh*, the execution of *ḥadd* penalties, or for the validity of *taṣarruḥāt* (dispositions) like sales, or marriage.

2. Suspension Conditions: It is a condition that is laid down by the *mukallaḥ* upon which a disposition dependent on. The suspension is known by the conditional words such as “if”, “when”, “whenever” and so on or by the implication of these words.

For instance, a person may say, “When I travel abroad you will be my agent to sell my house.” In this example, the person makes the selling of his house by his agent depends on his intention and confirmation of being travelled abroad. Thus, the condition (travel abroad) laid down by him is originating then contract must be met. If he travelled, the contract of agency relating to the sale of his house would be complete.<sup>154</sup>

Other examples of conditions are, the passage of one year for the obligation of *zakāt*, the ability of delivery of the thing sold for the validity of the sale and fulfilment of all the requirements (*iḥsān*) for stoning a person to death for *zinā*, and maturity of mind for giving the orphan’s property to him. All these matters are attributes that are evident and constant. So *ṣalāh* is dependent on *wuḍū’* and without *wuḍū’* *ṣalāh* is not valid. The obligation of *zakāt* is dependent on the passage of one

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<sup>154</sup> Ḥasan’Alī al-Shādhilī, *Nazarīyat al-Sharḥ fī al-Fiqh al-Islāmī*, pp. 48-49.

year. The absence of both *wuḍū'* and the passage of one year necessitates the absence of *ṣalāh* and *zakāt*. However, the presence of *wuḍū'*, for instance, does not automatically necessitate *ṣalāh*. If a person takes ablution before the time for prayer, the condition is present but it does not necessitate the existence or non existence of its object (*mashrūt*) i.e. *ṣalāh*.

Some added one more qualification at the end of the definition of condition. They define it as an attribute whose absence necessitates the absence of a thing but whose presence does not necessitate automatically presence or absence of the thing. This is so in the obligation of *zakāt* which is dependent on the passage of one year. But the passage of one year does not render *zakāt* obligatory and there has to be a cause for it, that is, the minimum amount of property liable for payment of *zakāt*.

### 1.3.1.3 The Difference Between Pillar and Condition

Pillar and condition are the attributes or elements upon which depends the existence of a thing. But, the pillar (*rukṇ*) partakes of the essence of something such as bowing (*rukū'*) or recitation (*qirā'ah*) in *ṣalāh*. Offer and acceptance are pillars of the contract because they are the essential parts of it. However, condition is an attribute upon which depends the existence of a thing but it does not partake of the essence of the thing. So ablution is a necessary condition for *ṣalāh* but it is exterior to it. Likewise, the presence of two witnesses in the marriage contract and the specification of the consideration in the contract of sale are among the conditions to



be met for the context to hold.

Hence, all contracts and dispositions have pillars and conditions, and so if the pillar becomes defective it makes the contract invalid, and if the condition becomes defective the contract is voidable according to the Hanfis for the defect relates to an external attribute. However, the majority of the jurists regard defect in an attribute in the same way as in *aşl* (essential part).<sup>155</sup>

### 1.3.2 Pillars Of *Ḍamān*

The essential elements of *Ḍamān* for property are four: the guarantor (*ḍāmin*), the creditor (*maḍmūn lah*), the principal debtor (*maḍmūn 'anh*) and the thing guaranteed (*maḍmūn bih*). The *ḍāmin* (guarantor or surety) is a person who undertakes voluntarily the fulfilment of a right for its owner in case of the inability of the debtor. The *maḍmūn 'anh* who is also known as *aşıl*, *gharīm*, and *madīn*, is the principal debtor. The *maḍmūn lah* is the creditor and is also known as the *muṭālib* (claimant). The *maḍmūn bih* is the thing guaranteed.

### 1.3.3 Conditions Of *Ḍamān*:

The jurists have laid down certain conditions which are to be fulfilled in order that the contract of guarantee can be concluded, becomes valid and its effect can

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<sup>155</sup> Wahbah al-Zuhaylī, *Usūl al-Fiqh al-Islāmī*, 1, pp.98-100.

materialise. These conditions are as follows:

#### 1.3.3.1 First: Conditions Of Guarantor (Surety):

1. The guarantor should have perfect legal capacity, that is, he should have reached the age of majority and age of maturity. The guarantee of a person with imperfect legal capacity such as an infant or a insane person, is not valid because the guarantee imposes liability to discharge the obligation upon the guaranteed person.
2. He should be legally competent to make benevolent acts whether he is a man or a woman, because a guarantee is a charitable contract and not a commutative contract. This is the view of the majority of the jurists.
3. The guarantee must be with the consent of the guarantor and if he is compelled to it, it is not a valid one.<sup>156</sup>

#### 1.3.3.2 Second: Conditions Of *Maḍmūn 'Anh* (*Makfūl 'Anh*)

1. The principal debtor should be known to the guarantor, otherwise the guarantee is not valid as it will lead to disputes. There are some jurists who do not regard the knowing, permission or consent of the

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<sup>156</sup> Muḥammad 'Abd al-Mun'im Abū Zayd, *Al-Ḍamān fī al-Fiqh al-Islāmī wa Taṭbīqātuhū fī al-Masārif al-Islāmīyah* (al-Ma'had al-'Ālamī lil-Fikr al-Islāmī, 1981/1401), pp. 25-27.

guaranteed person as conditions for the validity of *ḍamān*.

There are two types of *ḍamān*: *ḍamān* is a pure benevolent act, by which a guarantor makes himself liable to fulfil a right from the beginning and then returned to the guaranteed person for payment. This is a pure and known benevolent act. *Ḍamān* is also a benevolent act in view of the fact that the guarantor does a benevolent act by undertaking to fulfil a right in case of the inability of the debtor but he then does not turn to the debtor for the payment.<sup>157</sup>

2. The guaranteed person is to be alive: so if a person dies and he is indebted but he has not left behind anything and if a person guarantees that man, such a guarantee is not valid according to Abū Ḥanīfah as he held the view that the guarantee for a bankrupt deceased is not valid. However, according to Muḥammad and Abū Yūsuf it is a valid one.<sup>158</sup>
3. In contrast, the majority of the jurists held the view that the guarantee for a person who is already indebted or a person who will incur debt is valid regardless of whether the debtor is dead, alive, rich, bankrupt, present or absent or whether he is legally competent to make a benevolent act or not. An exception to this is the situation where a guarantor guarantees a person who is not legally competent to make benevolent acts such as a

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<sup>157</sup> Muḥammad 'Abd al-Mun'im Abū Zayd, *Al-Ḍamān fī al-Fiqh al-Islāmī wa Taḥqīqātuhū fī al-Masārif al-Islāmīyah*.

<sup>158</sup> Al-Kamāl Ibn al-Humām, *Fath al-Qadīr*, 5, p. 311.

infant and insane person and so he is not entitled for compensation from them for what he did. It appears that the difference of opinion between the majority of the jurists and the two disciples of Abū Ḥanīfah on one hand, and between Abū Ḥanīfah on the others is a difference in form. This is so because they are unanimous on the permissibility of discharging a debt on a benevolent basis and the release of a bankrupt deceased from debt without it being called benevolence according to the majority of the jurists. At the same time it is not correct to apply the term *ḍamān* to it according to the Ḥanāfīs.<sup>159</sup>

### 1.3.3.3 Third: Conditions Of *Maḍmūn Lah* (*Makfūl Lah*, *Al-Dā'in*)

1. The *maḍmūn lah* (creditor) should have legal capacity but it need not be perfect. So, a guarantee for a person who has reached the age of majority or maturity is valid as a guarantee for a person who is allowed to do trade.
2. The creditor has to be known and if he is unknown, the guarantee does not achieve its objective, that is, security for it necessarily leads to dispute. It is also necessary that the guarantor should know what he undertakes is and not simply that he is guaranteeing something.
3. Abū Ḥanīfah and Muḥammad express the view that the consent of the

<sup>159</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 9, p. 488.

creditor is necessary for the validity of *ḍamān* because it involves the establishment of a right upon a person and that cannot be established except by his consent or the consent of his representative as in sale and purchase. However, there are some other jurists who do not see the creditor's consent as a condition for the validity of *ḍamān*.

4. The creditor has to be present at the signing of the contract of *ḍamān* because his presence is necessary in order to express his acceptance so that the contract of guarantee may be concluded.<sup>160</sup>

#### 1.3.3.4 Fourth: Conditions Of *Maḍmūn Bih* (The Guaranteed Debt)

1. The guaranteed debt has to be a valid debt and be capable of being paid. It is a sort of debt that cannot be settled except by payment or release like the price or loan for instance.
2. The thing guaranteed is to be an established debt upon a debtor. An example of this, is the debt relating to *salam*. i.e. to buy by payment in advance.
3. The thing guaranteed must be capable of delivery by the guarantor. So the guarantee in *hudūd* and *qīṣās* is not valid according to Abū Ḥanīfah

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<sup>160</sup> Muḥammad 'Abd al-Mun'im Abū Zayd, *Al-Ḍamān fī al-Fiqh al-Islāmī wa Taṭbīqātuhū fī al-Masārif al-Islāmīyah*, pp. 25-27.

but according to his two disciples it is allowed in *ḥadd* of *qadhaf* and *qīṣās*. The ability to deliver is a condition so that the performance of the obligation can be demanded.

4. The guarantee is valid if the debt is known. Ibn Qudāmah mentions, “that the Shāfi‘īs do not allow an unknown guarantee, and the Mālīkīs tried to restrict the application of unknown *ḍamān* to what is customarily known.”<sup>161</sup>

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<sup>161</sup> Muḥammad ‘Abd al-Mun‘im Abū Zayd, *Al-Ḍamān fī al-Fiqh al-Islāmī wa Taṭbīqātuhū fī al-Masārif al-Islāmīyah*, pp. 25-27.

## SECTION FOUR

### OBJECT OF *ḌAMĀN*

The object of *Ḍamān* is the main axis around which revolve the concept and justification of *Ḍamān*. By looking at the statements of the jurists we find that the object of *Ḍamān* is either property, usufruct (*manfa'ah*), or right. So, we will divide this chapter into the following parts.

*Ḍamān* of property.

*Ḍamān* of rights.

*Ḍamān* of usufructs.

#### 1.4.1 *Ḍamān* Of Property

##### 1.4.1.1 Definition Of Property According To The Lexicographers:

Property is known as anything<sup>162</sup> which a person can acquire and or store, be it the thing itself (*'ayn*) like gold, silver, animals, plants, or its usufruct is derived from things such as vehicles, clothes and premises. However, anything that it is not possessed literally is not called property like a bird in the air, fish in the sea, trees in the jungle and minerals in the earth.

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<sup>162</sup> Ibn Manẓūr, *Lisān al-'Arab*, 11, p. 639, *māddah mīm, wāw, lām*.

#### 1.4.1.2 Definition Of Property According To The Jurists:

The jurists have given various definitions of property and we shall look at how each Islamic jurist defines it:

##### 1.4.1.2.1 First: Definition of Property According to the Ḥanāfīs

Property is “a thing which is naturally desired by man, and can be stored for times of necessity”. It is also defined as “a name applied for things other than man, created for the interest of man and it is possible to store and deal with it as one likes.”<sup>163</sup>

Muḥammad bin Hassan defines it by saying that property is “all the things that a man can own such as *darāhīm*, *danānīr*, wheat, barely, clothes and so on”.<sup>164</sup>

##### 1.4.1.2.2 Second: Definition Of Property According To The Mālikīs

Property “is a thing upon which ownership is exclusively established by an owner who acquired it in the right manner.”<sup>165</sup> Thus, it is evident that anything that can be owned is regarded property.

The ownership which means exclusiveness relates only to a thing that has a

<sup>163</sup> Ibn ‘Ābidīn, *Hāshiyat Radd al-Mukhtār ‘Alā al-Durr al-Mukhtār*, 4, p. 501.

<sup>164</sup> Al-Kamāl Ibn al-Humām, *Fatḥ al-Qadīr*, 3, p. 519.

<sup>165</sup> Al-Shāṭibī, *Al-Muwāfaqāt fī Uṣūl al-Sharī‘ah al-Islāmīyah*, 2, p. 17.



price among people. Otherwise, what can be owned by a man to the exclusion of others loses its significance. So the criterion for the determination of property is the taking of a benefit in a lawful manner.<sup>166</sup>

#### 1.4.1.2.3 Third: Definition Of Property According To The Shāfi'īs

Imām al-Shāfi'ī said that the word property does not apply except to a thing that has value by virtue of which the thing can be sold or the loss of which can be compensated for even if its value is very small like a “fels” and so on which people do not throw away.<sup>167</sup> So the Shāfi'īs stress that the attribute of property cannot be materialised except by two things, that is, value and reparation or compensation for its loss.

Therefore, a thing cannot be regarded as property if it has no value and no use. It cannot be used on two grounds, as al-Nawāwī says, one is the triviality of the thing like one or two seeds of wheat or raisins and so on, and the second is the lowliness of the thing such as insects.<sup>168</sup>

Al-Zarkashī defined it as “the thing that one can get benefit from, that is, it is intended for use.. It may be either physical property or usufructs.”<sup>169</sup>

<sup>166</sup> Muḥammad Abū Zuhrah, *Al-Milkiyyah wa Naẓariyāt al-'Aqd fī al-Sharī'ah al-Islāmiyyah*, p. 64.

<sup>167</sup> Al-Suyūṭī, *Al-Ashbāh wa-al-Nazā'ir fī Qawā'id wa Furu' Fiqh al-Shāfi'īyah*, p. 354.

<sup>168</sup> Al-Nawawī, *Rawdat al-Tālibīn wa 'Umdat al-Muntabīn* (al-Maktab al-Islāmī, 1985), 3, p. 350.aq

<sup>169</sup> Al-Zarkashī, *Al-Manshūr fī al-Qawā'id* (Kuwait: Muassasat Al-Khalīj), 3, p. 222.

#### 1.4.1.2.4 Fourth: Definition Of Property According To The Ḥanbalīs

Al-Khirqī, - one of the prominent members of Hanbalis School - defines property as: “any benefit of which is normally permissible excluding the circumstance of need or necessity”.

So things which have no benefit such as insects are excluded from the definition of property. The same applies to things which have prohibited benefit like wine, things whose benefit is allowed when there is a need like keeping a dog, or things whose benefit is permissible on the grounds of necessity such as eating the flesh of a carcass.

Property is also known by them as “anything whose benefit is permissible under any circumstances or its acquisition is permissible without the circumstance of necessity.”<sup>170</sup>

Thus, from the view point of the majority of the jurists, the criteria for the determination of property consists of the following:

- a. The term property generally applies to all that has a value and benefit among the people.
- b. The value is as a result of getting benefit from it in a lawful manner.
- c. The benefit is not restricted to a particular situation or one of necessity but it should be a thing whose benefit is allowed under normal circumstances.

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<sup>170</sup> Ibn Aḥmad Al-Maqdisī, *Kashshāf Al-Qinā'*, (Riyadh: Maktabat Al-Naṣr Al-Ḥadīthah), 3, p. 152.

Al-Sheikh al-Khafif relates from some jurists that “the quality of being property is nothing but the one on the basis of which the people have accepted it as property and made it the object of their dealings”. And this cannot be for any other reason than people need it and that it is naturally desired by them and it should be possible to take possession of it, to monopolize it and to prevent people from getting it. Therefore, it should not be a thing that is meant to be saved for times of necessity but it is sufficient if it be a thing whose acquisition is easy when the need arises. This is true as far as benefit and right are concerned and so if this criterion is realised it is regarded as property on the basis of people’s usage and dealing.<sup>171</sup>

#### 1.4.2 Types Of Property In Islamic Law

##### 1.4.2.1 First: Commercial (*Taqawwim*) Or Non-Commercial Of Property

The jurists have classified property from various perspectives one of which is whether the property has a commercial value or not. The Hānāfis classified property into two categories: *mutaqawwim* and *ghāyr mutaqawwim*. *Mutaqawwim* is a property created for man’s interest and its acquisition and disposition are possible according to the Sharī’ah principles as one chooses. In other words, “It is a thing whose storage is possible when a need arises and its acquisition is permissible from the Sharī’ah point of view without compelling situations.”<sup>172</sup> Examples of

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<sup>171</sup> ‘Alī al-Khafif, *Al-Milkīyah fī al-Sharī’ah al-Islāmīyah* (Al-Qāhirah: Ma’had al-Buhūth wa Al-Dirāsāt Al-‘Arabīyah, 1968), p. 9.

<sup>172</sup> Muḥammad Zayd al-Abyānī and Muḥammad Salāmah al-Sanjalfī, *Sharḥ Murshid al-Hayrān* (Baghdād: Maṭba’ah Al-Ma’ārif, Ed. 2, 1955), 1, p. 2.

*mutaqawwim* property are premises, vehicles, money, clothes and so on.

Therefore, anything which is not in man's possession is regarded as not being property like a bird in the air and fish in the sea. Likewise, things that are in man's possession but whose benefit is not permissible, like wine and pigs as far as a Muslim is concerned are not regarded as *mutaqawwim* property. However, it is property which has commercial value as far as a non-Muslim is concerned.

By the term "normal conditions", it is meant that there is no necessity or compelling situation. So it is allowed to gain benefit from wine in times of necessity, for instance, when a person is dying of thirst it is permissible for him to drink wine. Likewise, it is permissible to take the flesh of a carcass in compelling situations though wine and the flesh of a carcass have no commercial value and their benefit is not allowed by the Sharī'ah in normal situations.

The idea of commerciality or non-commerciality among the Ḥanāfīs rests on two bases: possession and permissibility of its benefit by the Sharī'ah. This is the idea which forms the basis for showing special regard to the property, its preservation and protection according to the Ḥanāfīs.<sup>173</sup>

However, according to the majority of the jurists the permissibility of the benefit is an element of being property and so if a thing whose benefit is not permissible the Sharī'ah, it is not property. Hence, they have not divided property, as

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<sup>173</sup> Ibn 'Ābidīn, *Hāshiyat Radd al-Mukhtār 'Alā al-Durr al-Mukhtār*, 4, p. 501.

the Ḥānāfīs did, into *mutaqawwim* and *ghayr mutaqawwim*. According to them *mutaqawwim* is property which has value and *ghayr mutaqawwim* is property which has no value.

So wine and pigs are not *mutaqawwim* property according to the Ḥānāfīs as far as Muslims are concerned, while they are *mutaqawwim* for *dhimmī*.<sup>174</sup>

In the sametime, Mālikīs says they are not property with respect to the rights of Muslims but are property with respect to the rights of *dhimmī*.<sup>175</sup>

#### 1.4.2.1.1 Legal Consequences Of The Division Of Property Into *Mutaqawwim* And *Ghayr Mutaqawwim*

The legal consequences of the division of property into *mutaqawwim* and *ghayr mutaqawwim* are as follows:

- a. Anyone who destroys a *mutaqawwim* property has to compensate for it, either in kind if it is *mithliyyāt* or by its *qimī*, because the Law-giver has commended its protection and sanctity. The *ghayr mutaqawwim* does not deserve protection and has no sanctity and consequently there is no compensation for its destruction. If a person destroys a fish in the sea or an animal in a field belonging to no one there is no compensation for it.

<sup>174</sup> Al-Sarakhsī, *al-Mabṣūṭ*, 13, p. 25.

<sup>175</sup> Al-Dardīr, *al-Sharḥ al-Kabīr* (Dār Ihya' Al-Kutub Al-'Arabīyah), 3, p. 447.

Likewise, there is no compensation if a Muslim destroys a bottle of wine belonging to another Muslim because wine has no commercial value as far as the right of Muslims is concerned. But if the wine belongs to *dhimmī* the destroyer is bound to pay compensation according to the *Ḥanāfīs* and *Mālikīs* as stated earlier but no compensation is due according to *Ḥanbalīs*, *Shāfi'īs* and *Zāhirīs* because it has no commercial value in respect of the rights of both Muslims and *dhimmī*.

- b. In *mutaqawwim* property, disposition such as sale, gift, leasing or hire and so on is valid, while it is not the case in *gahyr mutaqawwim* property. So if a Muslim sells wine the sale is invalid and if a *dhimmī* sells it is valid because wine has a commercial value in respect of latter's rights.<sup>176</sup>

#### 1.4.2.2 *Al-Mithliyyāt And Al-Qīmiyyāt* (Fungible And Non-Fungible Property)

Some property resembles others in its kind and value while some others are different from each other in their value as well as in their kind. The first type is known as *mithliyyāt* while the latter as *qīmiyyāt*. The *mithlī* property as defined in the Majallah as “a thing found in the Bazaars and weekly markets, that is, a thing to be matched without any difference causing any increase of price” (article 145). *Al-Ghazzālī* said *al-mithlī* “resembles each other in benefit and value”. Examples are the published books found in the market, vehicles manufactured in the same model and type exhibited for sale as all of them resemble each other and there is no significant

<sup>176</sup> *Al-Jaṣāṣ, Ahkām al-Qur'ān* (Al-Qāhirah: Dār Al-Ṣuḥuf), 2, p. 436.

difference in price. As such, they are *mithliyyāt*.<sup>177</sup>

Generally, all things that can be counted, measured and weighed come within this category, that is, these things are similar and close to each other in value. In particular, the Majallah enacts that “*‘Adadiyyāt mutaqāribah* are things counted, there being no difference in price between individual things and units. These are all of the nature of *mithliyyāt*. (Article 147). Examples of this are walnuts or eggs because they are of the same kind and each of them is sold individually by counting and the difference between each individual one is insignificant.”<sup>178</sup>

However, the *qīmī* property as defined by the Majallah is “a thing which cannot be matched in the market or Bazaars or if it is found, but there is a difference in the price” (article 146). A type of *qīmī* property which cannot be found in the market is the precious antiquities. An example of the property that can be found in the market but which has a difference in price are the things which can be measured and weighed but differ in their price. This is considered as *qīmī*. (Article 148) like horses and cows as they can be found in the market but each individual specimen has its own price.”<sup>179</sup>

The legal consequences of this division are as follows:

- a. The *mithlī* property establishes debt in the contract when its attributes are

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<sup>177</sup> Muḥammad Qudrī Bāshā, *Murshid Al-Ḥayrān ila Ma'rifat Aḥwāl Al-Insān* (Bayrūt: Dār al-Ma'rifah), Article 21.

<sup>178</sup> *Majallah Al-Aḥkām Al-'Adliyyah*, Articles No. 28 & 29.

<sup>179</sup> Muḥammad Qudrī Bāshā, *Murshid Al-Ḥayrān ila Ma'rifat Aḥwāl Al-Insān*, Article 7.

not specified as opposed to *qīmī* which does not establish a debt.

- b. Compensation in *mithlī* property is by payment in kind, or price when *mithlī* is altered or disappears from the market. Like a numerical thing whose place of origin had ceased in the market due to certain reasons, the compensation is the payment of its price because compensation of a similar thing which, being the perfect performance became difficult due to certain reasons, and thus it is substituted to imperfect performance, which is possible and involves less burden.<sup>180</sup>
- c. If the object of obligation involves a *qīmī* thing, the debtor cannot pay such thing as compensation except with the consent of the creditor, as it opposed to *mithlī* where the debtor can pay in kind even without the consent of the creditor.<sup>181</sup>
- d. If the object of the contract involves a *mithlī* thing and it perishes before delivery the contract is not annulled because the replacement of the thing by the owner is possible in this situation. In contrast, with *qīmī* the contract is annulled and the obligation of the debtor no longer exists due to the impossibility of the execution of the contract.<sup>182</sup>

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<sup>180</sup> Muḥammad Abū Zuhrah, *Al-Milkiyyah wa Naẓariyāt al-'Aqd fī al-Sharī'ah al-Islāmiyyah*, p. 57.

<sup>181</sup> 'Abd al-Karīm Zaydān, *Al-Madkhal li Dirāsāt Al-Sharī'ah Al-Islāmiyyah*, p. 223.

<sup>182</sup> Muḥammad Yūsuf Mūsā, *Al-Amwāl wa Naẓariyyah Al-Aqd* (Al-Qāhirah: Dār al-Fikr al-'Arabī), p. 165.



- e. The *qīmi* accepts division, whereas *mithlī* does not accept it.<sup>183</sup>

#### 1.4.2.3 'Ayn And Manfa'at (Actual Property And Usufruct)

Essentially, property consists of concrete things that are perceptible through the senses such as sight and touch but the usufruct, is said to be *mutaqawwim* property which cannot be perceived by the senses. It cannot be perceived by the senses but by reflection and meaning. It generally includes all the rights which customarily have an economic value like the right of easement (*irtifāq*) for immovable property and so.<sup>184</sup>

*A'yān* is the plural of '*ayn*'. '*Ayn* is a thing which is fixed and present. In the words of the Majallah "*al-'ayn* is a thing which is fixed and individually perceptible. For example, a house, a horse, a chair, a heap of wheat, and a sum of money all are *a'yān*". The word '*ayn* in the above sense stands opposite to *dayn*, which is defined by the Majallah as a thing on the debit side of an account. For example, a debt of so many piasters and so many piasters not being present and seen and a fixed quantity, before division, of a heap or wheat, or sum of money being ready and seen standing to the debit of a person, are all in the category of *dayn* (Art. 158).

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<sup>183</sup> Muḥammad Yūsuf Mūsā, *Al-Amwāl wa Naẓariyyah Al-Aqd*.

<sup>184</sup> *Majallah Al-Aḥkām Al-'Adliyyah*, Articles No. 30 & 31.

#### 1.4.2.4 Moveable And Immovable Property (*Al-'Aqār And Al-Manqūl*)

The immovable property is "anything which is firmly rooted and which cannot be moved and delivered". In contrast to immovable property is moveable property which can be moved and delivered. It is defined in Article 3 of Murshid al-Ḥirān as "all that can be moved and delivered and it includes merchandise, animals, measurable and weighable things, gold and silver. It also includes premises and plants standing on the earth owned by someone or specified for charitable purposes."

However, there are some kinds of properties which are regarded as immovable properties as they are inseparable accompaniment like premises and plants. These are included in the immovable property in some contracts and *shara'ī* disposition because they are attached to the immovable property. Hence, there is no need for a provision to include them in the subject matter of the contract.<sup>185</sup>

Al-Dardīr said: "*al-aqār* includes premise, plants and land which does not have these" It is equally applied to land attached with premises and trees.<sup>186</sup>

#### 1.4.3 *Ḍamān* Of Usufructs (*Manāfi'*)

Usufruct includes the use of any thing, be it a residential house and riding animal; or the fruit of the tree and rental of the house, which the jurists call *al-*

<sup>185</sup> Muḥammad Abū Zuhrah, *Al-Milkiyyah wa Naẓariyāt al-'Aqd fī al-Sharī'ah al-Islāmiyyah*, p. 60.

<sup>186</sup> Al-Dusūqī, *Al-Sharḥ al-Kabīr* (Cairo: Dār Ihyā' Al-Kutub Al-'Arabiyyah Isā Al-Bābī Al-Ḥalabī), 3, p. 479.

*ghala* (yield).

The majority of the jurists held the view that the word usufructs applies only to those benefits not perceptible through senses which are derived from things such as a residential house and riding animal. And it does not include materialistic benefits such as milk with regard to animals, fruit with regard to trees and rent with regard to rented property and so on.<sup>187</sup>

The jurists call it *ghala* and they define *ghala* as the income derived from the rent of a house, the emolument of a slave, the produce of some land or the fruit of a tree. This is the literal meaning of *ghala*, as mentioned by the author of *al-Miṣbāḥ*.<sup>188</sup>

From the juridical definitions of *manafi'*, which draw a distinction between the *manfa'ah* and *ghala* comes the definition of Muḥammad bin 'Arafah who said: "The usufruct is what you cannot perceive except that when it has been related to something else. This is because in itself it is not a tangible thing".<sup>189</sup>

#### 1.4.3.1 The School Advocating That Usufruct Is Not Property

The jurists have differed as to whether usufruct is property. Abū Ḥanīfah and two of his disciples held the view that usufruct is not property and this is clear from

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<sup>187</sup> 'Abd al-Karīm Zaydān, *Al-Madkhāl li Dirāsāt Al-Sharī'ah Al-Islāmiyah*.

<sup>188</sup> Aḥmad Ibn Muḥammad Ibn 'Alī al-Muqrī al-Fayūmī, *Al-Miṣbāḥ al-Munīr* (Maṭba'ah Muṣṭafā al-Bābī al-Ḥalabī), 2, p. 289.

<sup>189</sup> See Ibn 'Arafah, *Sharḥ Hudūd* (Al-Qāhirah: Maṭba'ah Al-Sa'ādah), p. 396.

their statements made on many occasions. Taftāzānī said: “In essence, the usufruct is *mulk* (ownership) and not property (*māl*), as it is in the quality of ownership that one can dispose of specifically what one owns, and it is the quality of property that can be stored for taking benefit at times of necessity, and *taqwīm* of a thing necessitates it to be one's property while *mulk* (ownership) according to the Shāfi‘īs.”<sup>190</sup>

Zufar differed from the view of other Ḥānāfī jurists as he regards usufruct as property. One can see in some Ḥānāfī books that usufruct according to them is property. Hence, al-Bābartī, while discussing the rent/wage in *ijārah*, mentions that usufruct is good for rent (*ujrah*) when the kind of usufructs differ like taking a house for rent in exchange for riding an animal. So he said, “*a'yān* and *manāfi'* are properties and it is valid to be wage, rental (*ujrah*).”<sup>191</sup>

Ibn Abidin commented in his Ḥāshiyah by saying, “apparently the definition of usufruct includes *ijārah*, because usufruct is a thing in existence according to Sharī‘ah so that its compensation is to be made in property and this is also the case with regard to its literal usage.”<sup>192</sup>

1. **Narrated authority:** It is related that ‘Umar and ‘Alī passed a judgment in regard to the case of a man who had sexual intercourse with a slave girl belonging to another person after marrying her for paying the price

<sup>190</sup> Al-Taftāzānī, *Fī Talwīḥ ‘Alā al-Tawḍīḥ* (Īsā Al-Bābī Al-Ḥalabī), 2, p. 98. Al-Kāsānī, *Badāi’ Al-Ṣanāi’ fī Tarātib al-Sharāi’*, 9, p. 4429.

<sup>191</sup> Al-Bābartī, Muḥammad Ibn Maḥmūd, *Sharḥ al-‘Ināyah ‘alā al-Hidāyah* (Al-Qāhirah: Maṭba‘ah Īsā Al-Bābī Al-Ḥalabī), 7, p. 150.

<sup>192</sup> Ibn ‘Ābidīn, *Hāshiyat Radd al-Mukhtār ‘Alā al-Durr al-Mukhtār*, 4, p. 501.

of her child and setting him free. The man who had sexual intercourse with the slave girl then returned her to her owner with her dowry. They ('Umar and 'Alī) did not order him to pay for the benefit that he took from the slave girl and her child though they knew that the proprietor of the right demand all his right and the man used the slave girl together with her child. If all these were obligatory upon him 'Umar and 'Alī would not have kept silent.<sup>193</sup>

It is argued on the basis of the Companions' reaction that if the usufruct was property 'Umar and 'Alī would have asked the man to pay compensation to her owner in respect of harm inflicted upon her and her children. As they did not do, so it is an indication that benefit does not require compensation.

## 2. Rational arguments:

- a. The usufruct does not fulfil the requirement of property because it is not capable of being possessed and preserved for it being an accidental (*I'rād*) which can't remain for two periods like the physical property.

If we realise that preservation and possession only refer to things which have an existence and we know that usufruct can't fulfil this

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<sup>193</sup> Al-Zayla'ī, *Tabyīn al-Haqā'iq Sharḥ Kanz al-Daqā'iq*, 5, p. 234.

requirement then, it becomes clear that the usufruct is not property.<sup>194</sup>

If the usufruct does not accept possession it is not regarded as property. Likewise, if it does not accept evaluation (*taqawwum*) because it is non-existent before its existence, and the non-existent is not valuable for it is not a thing, and after its existence it does not accept possession as have noted. Any thing which is not capable of being preserved cannot become valuable (*mutaqawwim*) because the value of a thing depends on its capability of being preserved and it cannot be found without it. Hence, all the wild animals or birds and grass before their preservation are not valuable.<sup>195</sup>

- b. The usufruct is not compensated because it is not possible to commit a wrong it as it is not the subject of usurpation, that is, the removal of ownership from its owner as we discussed. This cannot be conceived of the usufruct because it is accidental and cannot remain for two periods and so its usurpation is impossible.
- c. If the usufructs were property it would necessitate compensation in kind when a wrong is done to it because compensation in kind is more equitable. If it is not compensated in, it is not possible of being

<sup>194</sup> Al-Zayla'ī, *Tabyīn al-Haqā'iq Sharḥ Kanz al-Daqā'iq*, 5, p. 235.

<sup>195</sup> Al-Taftāzānī, *Fī Talwīḥ 'Alā al-Tawḍīḥ*, 2, p. 98. Al-Shaykh al-Khafīf, "Ḍamān al-Manāfi", (Cairo: Ma'hād Al-Buḥūth Wa Al-Dirāsāt Al-'Arabiyyah), *Majallah al-Qānūn*, p. 4 ff.

compensated by physical property because the accidental attribute (*i'rāḍ*) is not like a physical thing. Compensation for a wrong done to property has to be in kind according to textual authority of text (*naṣṣ*) and *ijmā'*.<sup>196</sup>

- d. A sick person on his deathbed (*marāḍ al-mawt*) can lend even all his property and the restriction of one third does not apply. If the usufruct is property he cannot lend more than one third.<sup>197</sup>

#### 1.4.3.2 Second: School Advocating That Usufruct Is Property

In contrast with what we have discussed, the majority of the jurists held the view that usufruct is property and they regard any encroachment upon it as encroachment upon the properties perceptible by the senses.

This is the view point of the Shāfi'īs. Al-Khatīb al-Shirbinī said, "There is a like compensation for the loss of usufruct of a house, book, riding animal and profession because usufructs are valuable and hence are to be compensated like the physical property."<sup>198</sup>

In spite of the Shāfi'ī's statement that usufruct is property, the application of

<sup>196</sup> See Al-Zayla'ī, *Tabyīn al-Haqā'iq Sharḥ Kanz al-Daqā'iq*, 5, p. 234.

<sup>197</sup> Al-Zayla'ī, *Tabyīn al-Haqā'iq Sharḥ Kanz al-Daqā'iq*.

<sup>198</sup> Al-Khatīb Al-Sharbīnī, *Al-Mughnī al-Muḥtāj*, 2, p. 2 and 287; Al-Shirāzī, *Al-Muhadhab fī Fiqh Madhab Al-Imām Al-Shāfi'ī*, 1, p. 367.; *Al-Nawāwī fī al-Rawḍah*, 5, p. 13.

property is figurative according to them. As al-Zarkashī mentions in his *Qawā'id*, if a person takes an oath that he has no property and he has some usufruct due to bequest, lease or hire he does not commit perjury because what is meant as property by them physical property.<sup>199</sup>

Imām Shāfi'ī is related to have said, "The associates have agreed that usufruct does not come within the exact meaning of property but it is said in chapon bequest that property is divided into physical property and usufruct and this indicates the application of property for usufruct." Al-Zarkashī has commented on this by saying, "However, in the strict sense it is not".<sup>200</sup> And this view is also subscribed to by the Mālikīs,<sup>201</sup> Ḥanbalīs<sup>202</sup> and Zāhirīs.<sup>203</sup>

The majority of the jurists who hold the view that usufruct is property argue as follows:

- a. The usufruct has the attribute of property because property is a thing which is naturally desired by man and it is in man's interest. Likewise, usufruct is a thing to which man is inclined and is in a man's interest.<sup>204</sup>
- b. The usufruct is suitable as a dowry and getting married is not legalised

<sup>199</sup> Al-Shirāzī, *Al-Muḥadḥab fī Fiqh Madhab Al-Imām Al-Shāfi'ī*, 1, p. 367.

<sup>200</sup> Al-Zarkashī, *Al-Manthūr fī Al-Qawā'id*, 3, p. 197.

<sup>201</sup> Ibn 'Arafah, *Ḥāshiyat al-Dusūqī 'alā al-Sharḥ Al-Kabīr*, 3, p. 442.

<sup>202</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 5, p. 217.

<sup>203</sup> Ibn Ḥazm, *Al-Muḥllā* (Bayrūt: Al-Maktab Al-Tijārī li-al-Ṭibā'ah wa-al-Nashr), 8, p. 135.

<sup>204</sup> Muḥammad Muṣṭafā Shalabī, *Al-Madkhal Lidirāsāt Al-Fiqh Al-Islāmī*, (Egypt: Maktabat Wahbah), p. 167.



except by some property Allāh (s.w.t.) said:

*Also (prohibited are) women already married, except those whom your right hand possess; thus had Allāh ordained (prohibitions) against you: except for these, all others are lawful, provided you seek (them in marriage) with gifts from your property - desiring chastity, not lust. Seeing that you derive benefit from them, give them their dowers (at least) as prescribed; but if, after a dower is prescribed, you agree mutually (to vary it), there is no blame on you, and Allāh is All-knowing, All-wise.*<sup>205</sup>

If benefit were not property it would not be valid for this purpose.<sup>206</sup> So, the authority for which the benefit was dowry is that the Prophet Mūsā married the daughter of Shu‘ayb (s.a.w.) in consideration for the work he did. Allāh (s.w.t.) said:

He said:

*“I intended to wed one of these daughters to you, on condition that you serve me for eight years; But if you complete ten years, it will be (grace) from you. But I intended not to place you under a difficulty; thou will find me, indeed, if Allāh wills, one of the righteous”.*<sup>207</sup>

Hiring is a kind of benefit. If we accept the contention that this was the law of a previous religion (*shar‘ man qablanā*) we will find an authority in our own religion, that is, the Prophet (s.a.w.) who married one of his companions to a woman in consideration for teaching her the Holy Qur’ān. This means that he considered that teaching the Holy Qur’ān is a benefit as a dowry for the wife of the teacher and therefore it establishes

<sup>205</sup> *Al-Qur‘an, Al-Nisā’* (4): 24.

<sup>206</sup> See Ibn Rajab, *Al-Qawā‘id al-Fiqhiyyah*, p. 213.

<sup>207</sup> *Al-Qur‘an, Al-Qaṣaṣ* (28): 27.

an authority.<sup>208</sup>

- c. Another authority is that *ijārah* by a trading slave is valid and if it were not property its possession would not be valid for him, because he could possess the contract without property.<sup>209</sup>
- d. It is also said that material things become property by virtue of their benefit and the thing that we cannot derive benefit from is not property, and so if the physical thing does not become property except by virtue of its benefit, and how it loses its attribute of being property that is valuable in itself. The proof for this is that evaluation (*taqawwum*) is noble in the eyes of people, and therefore they give the physical property for it, but the evaluation of the physical property is by its own virtue, and so it is impossible that it is not to valuable.<sup>210</sup>
- e. The Shari'ah accords to benefit the status of physical property, as benefit is the evident end in all properties. So if a person appropriates a house whose value is one thousand every year and the property remains in his hands and he gets benefit from it many times more than its value, and if we do not compel the appropriator to compensate the owner of the property for the loss we are far from doing justice which is much

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<sup>208</sup> Muḥammad Muṣṭafā Shalabī, *Al-Madkhal Lidirāsāt Al-Fiqh Al-Islāmī*, (Egypt: Maktabat Wahbah), p. 167.

<sup>209</sup> Muḥammad Salām Madhkūr, *Tārīkh Al-Tashrī' Al-Islāmī*, (Egypt: Maktabat Wahbah), p. 276.

<sup>210</sup> Al-Zayla'ī, *Tabyīn al-Haqā'iq Sharḥ Kanz al-Daqā'iq*, 5, p. 234.

emphasised by the Sharī'ah.<sup>211</sup>

- f. The benefit of the physical property is the same as the physical property itself and in reality the benefit gives to the property a form and shape to achieve its end. An example is that the ceiling of a house is built to protect its inhabitants from the heat and cold and the wall is built to prevent thieves from stealing the things inside it. Likewise, everything has its own form distinct from others, and by which the objective of the property is achieved and that is the benefits. This form is accidental and appears and disappears like other accidentals, that is, the valuable property created for the interest of man and others.

The application of the word property to these accidentals is more deserving than on the thing itself, as the compensation is not called property except if it includes its benefit, and hence the sale of a thing separate from its benefit is not valid.<sup>212</sup>

#### 1.4.4 *Ḍamān* Of Rights

Indeed, any discussion of *Ḍamān* of rights requires the definition of rights. The jurists also found that it is contradictory to talk of the responsibility of man for an act allowed by the Sharī'ah. In al-Mujāmi' it is stated that "permission by the

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<sup>211</sup> Al-'Iz Ibn 'Abd al-Salām, *Qawā'id al-Ahkām fi Maṣāliḥ al-Anām*, 1, p. 155.

<sup>212</sup> Al-Zanjānī, *Takhrīj al-Furū'* 'Alā al-Uṣūl, p. 110.

Sharī'ah excludes liability to make compensation". And also in the Majallat al-Aḥkām there is a general maxim according to which "permission by the Sharī'ah excludes liability to make compensation". For instance, if someone's animal is killed by falling into a well dug by another, on his own (*mulk*) property, compensation is not necessary". The reason is that the digger of the well has committed an act which is allowed by the Sharī'ah and the permission of the Sharī'ah relieves the doer from any responsibility relating to the harm attached to the falling of the animal into the well and its consequent death.<sup>213</sup>

Another example is that it is permissible for a hirer to load a riding animal with the amount that was agreed upon, and if he loads it with the amount that was agreed or less and the animal is destroyed, no liability is placed upon him. This is because it is an act lawful for him.<sup>214</sup>

Indeed, the right is understood by its definition that it is an interest recognised by the Sharī'ah.<sup>215</sup>

It is maintained that so far a man is capable of making use of his right, he cannot use it only to the extent that he is entitled to and allowed under the law.<sup>216</sup>

Therefore, this principle is the *shara'ī* fundamental truth and hence it is the

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<sup>213</sup> *Majallat Al-Aḥkām Al-'Adliyyah*, Article 91.

<sup>214</sup> *Majallat Al-Aḥkām Al-'Adliyyah*; Article 605.

<sup>215</sup> 'Alī Al-Khaṭīb, *Al-Ḥaq Wa Al-Dhimma*, (Egypt: Maktabat Wahbah), p. 37.

<sup>216</sup> Muḥammad Muṣṭafā Shalabī, *Al-Madkhal Lidirāsāt Al-Fiqh Al-Islāmī*, (Egypt: Maktabat Wahbah), p. 170.

general principle in all the legal systems. In the times the Romans said, “Whoever uses his right, he does not harm anyone”.<sup>217</sup>

Indeed, the principle is, as we stated, that the use of a right is lawful and it does not render *damān* obligatory in itself. However, the use of one’s right may cause harm to others and it may be the result of intention just to do harm to others. Is this use of a right to cause harm prohibited and is it a cause for liability?

In other words, it is the principle in which permission by the Sharī‘ah excludes liability to make compensation a general principle or are there exceptions to it?<sup>218</sup>

This is a fine question on which the views and opinions differ and the various schools and laws have taken their own stand. Some have answered it from negative perspective by holding that there is no liability because the rights are absolute. This view is held by the Shāfi‘īs and that is apparent view taken by the Ḥanāfīs.<sup>219</sup>

On the other hand, another group has answered it by considering that rights are based on specific objectives and that they are relative. It is because these rights are relative, then it is not allowed to misuse them.<sup>220</sup>

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<sup>217</sup> ‘Alī Ḥaidar, *Sharḥ Al-Majallah Al-‘Adliyyah*, Article 1197.

<sup>218</sup> *Majallat Al-Aḥkām Al-‘Adliyyah*; Article 91.

<sup>219</sup> Abū Muhammad Al-Baghdādī, *Majma‘ al-Damānāt*, p. 149. Al-Kāsānī, *Badāi‘ Al-Ṣanāi‘ fī Tartīb al-Sharāi‘*, 6, p. 68, 7, p. 272.

<sup>220</sup> Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuhū*, 4, pp. 29-30.

#### 1.4.4.1 Prohibition Of The Use Of Right Due To Abuse

There is a general principle for liberties in Islamic law that every man can utilize his right in a lawful manner and should not cause harm to other's interests be they individuals or societies, though there arose some situations in society, in the course of time, in which the use of rights resulted in harm to others. This phenomenon in moderns time is called abuse of rights. There are numerous of examples and authorities .

#### 1.4.4.2 Proof Of Prohibition Of The Abuse Of Use Of Rights:

There are many proofs of the prohibition of abuse of rights according to authentic sources of Shari'ah. These are discussed as follows:

Allāh (s.w.t.) said:

*"When you divorce women, and they fulfil the term of their ('iddah), either take them back on equitable terms or set them free on equitable terms; but do not take them back to injure them (or) to take undue advantage".*<sup>221</sup>

The Shari'ah has prohibited the use of rights to harm others. As it was the practice in the pre-Islamic times men divorced their wives and when the time of the 'iddah was about to come to an end they took back their wives and then divorced them. So, Shari'ah prohibited this practice even though they have the right to divorce

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<sup>221</sup> *Al-Qur'an, Al-Baqarah (2): 231.*

their wives.<sup>222</sup>

After explaining the shares of heirs, Allāh (s.w.t.) said: "After payment of legacies and debts; so that no loss is caused (to anyone). Thus is ordained by Allāh; and Allāh is All-Knowing, most forbearing."<sup>223</sup>

Allāh (s.w.t.) has prohibited harms from the heirs such as bequest for more than one third of one's property and likewise an abuse of right.

Allāh (s.w.t.) said: "To those weak of understanding make not over your property, which Allāh had made a means of support for you, but feed and clothe them."<sup>224</sup>

Allāh (s.w.t.) has ordered the prohibition of stupid people who extravagantly spend their wealth for it, is an abuse of the right relating to expenditure and so it is prohibited and such people deserve to be reformed and interdicted.

In the *ḥadīth* of 'the ship' on the mutual responsibility of removing evil, the Prophet (s.a.w.) prohibited those who were on board in the lower part of the ship from making holes in it because it causes harm and the eventual death of all. So their act is an abuse and was prohibited.<sup>225</sup>

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<sup>222</sup> Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuhū*, 4, p. 30.

<sup>223</sup> *Al-Qur'an, Al-Nisā'* (4): 12.

<sup>224</sup> *Al-Qur'an, Al-Nisā'* (4): 5.

<sup>225</sup> Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuhū*, 4, p. 31.

It is reported on the authority of Nu'mān bin Bashīr that the Prophet (s.a.w.) said: "Example of execution of Allāh's *ḥudūd* in reality is similar to the case of a group on board of a ship, some sitting in the lower part while others in the upper part. If those who were in lower part try to take water which will pass over those who are in the upper part. And they said: "If we make a hole in our part it will not harm the upper part? If we leave them to do what they want, all will die and if we prevent them we save all."<sup>226</sup>

This implies that there are some situations in which the use of a right is prohibited due to the existence of an abuse of rights

#### A. **Prohibition Of Marriage To Enable The First Husband To Marry Her Again (*Taḥlīl*)**

This type of marriage is intended to make it lawful for a woman divorced irrevocably to marry her first husband. It is stated in the Holy Qur'ān, "He cannot after that, remarry her until after she has married another husband and he has divorced her."<sup>227</sup>

So marriage is prohibited though it is a right of man, because it is intended to make the marriage of the divorcee lawful with her first husband and it is not meant to be a permanent marriage. The Prophet (s.a.w.) said: "Allāh curses *muḥallil* (one who

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<sup>226</sup> Aḥmad Ibn Ḥanbal, *Musnad al-Imām Aḥmad Ibn Ḥanbal*.

<sup>227</sup> *Al-Qur'an, Al-Baqarah* (2): 230.



marries a divorced woman in order to dismiss her, so that the first husband may marry her again and *muḥallal lah* (the person for whom the marriage is made lawful)".<sup>228</sup> The jurists have laid down in this situation a principle (the object of intention is unlawful).<sup>229</sup>

## **B. Prohibition Of Hoarding And Sale Of The Hoarded Property By Force At The Time Of Necessity:**

Hoarding refers to the gathering and storing of a commodity when its price is very low and then selling it at a higher price.

Traders are prohibited from doing such an act which is harmful to the public interest and this is regarded as a precautionary measure against those who do harm to the interest of the country and the people. The Prophet (s.a.w.) said, "The Seeker is prosperous and the hoarder is cursed."<sup>230</sup> He also said, "No-one hoards property except the wrongdoer"<sup>231</sup>. It is the duty of the *qāḍī* to stop the traders from hoarding and to order them first to sell the commodity with them and fix a price for them and if they refuse, then force and reprimand them. It is reported that 'Umar bin al-Khattāb expelled Umayyah b. Yazīd and Mawlā Muzaynah for because both of them

<sup>228</sup> Reported by *Aḥmad, Nasā'i and Ṭirmidhī*.

<sup>229</sup> Al-Shawkānī, *Nayl al-Awḥār*, 5, p. 207.

<sup>230</sup> Aḥmad Ibn Ḥanbal, *Musnad al-Imām Aḥmad Ibn Ḥanbal*, 2, p. 323.

<sup>231</sup> Reported by Imam Aḥmad, Muslim and Abū Dāwūd. It is a *ṣaḥīḥ ḥadīth*.

hoarded foodstuff in Madinah.”<sup>232</sup>

### C. Prohibition Of Making Bequest Of More Than One Third:

The Shari'ah has prescribed the limitation for Muslims to bequeath about one third of their property and not more than that so as not to cause harm to the legal heirs. If he bequeaths more than one third of his property the excess is not executed unless the permission of the legal heirs is obtained. It is reported on the authority of Sa'd that the Prophet (s.a.w.) said, "One third and one third is more if you leave your inheritors rich is better than poor begging from the people." Allāh (s.w.t.) said, "After payment of legacies and debts, so that no loss is caused (to anyone). Thus it is ordained by Allāh; and Allāh is All-Knowing, most forbearing.”<sup>233</sup>

### D. Prohibition From Opening A Window Harmful To The Neighbor

It is regarded as very bad harm to open a window in the house which looks down on the residence of a neighbor's wives except if it is so high that it cannot be seen. Thus, it is up to the *qāḍī* to prohibit the opening of the window and the owner should close it if it is harmful to others in order to avoid slander (*fitnah*) among the Muslims.

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<sup>232</sup> Al-Qisṭalānī, *Irshād al-Sārī Sahīh al-Bukhārī* (Dār al-Fikr), 10, p. 26. See also *Al-Bukhārī*, "Chapter on al-Lubs" and it is also reported by Nasā'ī and Tirmidhī.

<sup>233</sup> *Al-Qur'an, Al-Nisā'* (4): 12.

The Prophet (s.a.w.) prohibited Samrah b. Jundab from entering a garden belonging to one helper (*anṣār*) to check his date palms because the helper would hurt by his entering.<sup>234</sup>

## E. Deprivation From Inheritance And Bequest

The Shari'ah regards murder due to enmity as one of the causes of deprivation from inheritance and bequest. This ruling is on the basis of acting on the *ḥadīth*, "there is no inheritance for the assassin"<sup>235</sup> Likewise, it is said, "Indeed, Allāh has given the proprietor of every right his due right, be aware there is no bequest for the heirs".<sup>236</sup> It is also acting on the Shari'ah principle "Whoever hastens to achieve a thing before its due time is punished by deprivation".<sup>237</sup> This is one of the precautionary and reformatory measures and so a person cannot proceed to commit homicide in order to get his property or to take an inheritance or bequest quickly.

The jurists have differed on the specification of the kind of murder which is a hindrance to inheritance as follows:

Imām Mālik mentioned that the type of killing which is a hindrance to

<sup>234</sup> Reported by Muslim, Mālik and Ahmad. See *Sharḥ Muslim*, 11. 47.

<sup>235</sup> Abū Dāwūd, Sulaymān b. al-Ash'ath al-Sajistānī, *Sunan Abī Dāwūd*, Chapter on *diyāt al-a'dā'*. It is reported by al-Termizī in wording [*Lā yarīth al-qātil*].

<sup>236</sup> Ibn Mājah, *Sunan Ibn Mājah bi Sharḥ Miṣbāḥ al-Zujājah*, "Kitāb al-waṣāyā, bāb lā wasīyyah li wārīth" 2, p. 112.

<sup>237</sup> It is a legal maxim. See Jalāl al-Din Al-Suyūṭī, *Al-Ashbāḥ wa-al-Naẓā'ir fī Qawā'id wa Furu' Fiqh al-Shāfi'iyah*, p. 166.

inheritance is intentional killing whether it has occurred directly or by causation.

Abū Ḥanīfah maintained that killing includes intentional, quasi-intentional and killing by mistake except killing by causation, on condition that the assassin possesses legal capacity (*ahliyyah*).

Imām Shāfi'ī held the view that generally an assassin is deprived of inheritance even though he lacks legal capacity in order to prevent the precipitation of the legator's death.

Imām Aḥmad held the view that killing is to be compensated, that is, killing which is intentional and caused due to enmity, is a hindrance to inheritance whether it is intentional, quasi-intentional, killing by mistake, or by causation, regardless of whether the assassin is an infant, insane or a major and has reached the age of majority or maturity; and the killing which is compensated is not a hindrance to inheritance like killing in self-defence or retaliatory (*qiṣāṣ*) killing.

The jurists have differed on the interpretation of this *ḥadīth* into various schools:

The Ḥanāfis hold the view that the testator's death is a hindrance for the bequest whether the killing has occurred after the bequest or before it, like the situation where one injures a person who then bequeaths for him, and the injured person dies as a result of the injury. They rely on the Prophetic *ḥadīth* "there is no

bequest for the assassin”.<sup>238</sup>

The Mālikīs and Shāfi‘īs held the view that in both situations the killing does not prevent him from receiving the bequest because the *āyah* and *ḥadīth* relating to bequest does not differentiate between the assassin and others. They do not see the *ḥadīth* relied upon by the Ḥanāfīs as being a valid authority.

However, the Ḥanbalīs differentiate between the two situations. They said if the bequest was made before the injury, it is invalid. However, if it occurred after the injury which led to the death of the testator, it is a valid one because the killing is not with intent to hasten the receipt of the thing bequeathed.<sup>239</sup>

#### 1.4.4.3 Rights Related To Property: Right Of Easement (*Irtifāq*)

The jurists have differed on the issue of the right of easement as to whether disposition is permissible in it, or in other words, whether the right of easement is regarded as property so that it is to be purchased, sold and compensated when it is destroyed. The jurists’ opinions are as follows:

First: the majority of the jurists maintain that the right of easement is like property and its sale and gift is valid in contrast to what they said in relation to mere rights.<sup>240</sup>

<sup>238</sup> Al-Zaila‘ī, *Naṣb Al-Rāyah Li Aḥādīth Al-Hidāyah*, (Cairo: Al-Maktabah Al-Islāmiyyah), 4, p. 402.

<sup>239</sup> Muḥammad Abū Hisān, *Aḥkām al-Hurriyah wa al-‘Uqūbah fī al-Sharī‘ah al-Islāmiyyah*, *op. cit.*, p. 493.

<sup>240</sup> *Majallah Al-Aḥkām Al-‘Adliyyah*, Article 37.

Al-Dardīr, a Mālikī scholar, said: “It is allowed for types of storage of water like large (water) containers, types of wells, and places where rain is gathered, that is, the object of the flow of water. He prohibited the sale, gift and endowment of other types.”<sup>241</sup>

He said in another place: “The sale of atmosphere upwards is permissible”. An example is, as he said: “A man says to the owner of the land sell to me ten cubits (*adhra'*) above the house on your land on condition that the building to be described either low or high or customarily it is not unknown and uncertain.”<sup>242</sup>

With respect to Shāfi'ī *fiqh* al-Ghazālī said, “It is allowed to sell the right of flow and drainage of water and the right of passage and all the rights which aim to be permanent”.

The Ḥanāfīs differentiated between each right as they allowed taking compensation with respect to some rights while they did not allow it with respect to other rights. Here, their views are as follows:

- A. The Right of Height ('*Ulū*):** They have made it clear that this right is not permissible to be sold. The author of *Hidāyah* said: “The right of height is not property because it is just air and so its sale is not permissible.”<sup>243</sup>

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<sup>241</sup> Al-Dardīr, *al-Sharḥ al-Kabīr*, 4, p. 72. See also Muḥammad 'Alīsh, *Sharḥ Manḥ al-Jalīl 'Alā Mukhtasar al-'Allāmah Khafīl*, 4; p. 24.

<sup>242</sup> Abū Ḥamid Al-Ghazālī, *Al-Wajīz*, (Egypt: Maṭba'at Īsā Al-Bābī Al-Ḥalabī), 1, p. 108.

<sup>243</sup> See *Sharḥ Hidāyah* published together with *Fatḥ al-Qadīr*, 5, p. 204. Al-Kāsānī, *Badā'ī 'Al-Ṣanā'ī fī Tarṭīb al-Sharā'ī*, 6, p. 353.

**B. The Right of Drip and Flow of Water (*Masīl*):** They also passed judgment that the sale of this right is invalid whether it is on the surface or on the earth. Al-Bābartī said: “The sale and gift of the right of drip and flow of water is invalid.” The reason is that the amount of water flowing is uncertain.<sup>244</sup>

It appears from this argument that if uncertainty is removed then its sale is valid and this can be made by the specification of the amount of water flowing.

**C. The Right of Passage (*Murūr*):** There are two views among the Ḥanāfīs. One view is that the sale and gift of this right is permissible while according to the other view it is not permissible, as opposed to the right of flow. The difference between the two is that the object in the right of passage is certain and that is the way. However, the flow of water over the surface is similar to the right of height and flow over the land is uncertain due to the uncertainty of its object.<sup>245</sup>

The basis for differentiating the right of passage and the right of height according to the view, (i.e. allowing the sale and gift of this right) is that the latter relates to a physical property like, a building which cannot remain permanently and so it is similar to usufructs. However, the right

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<sup>244</sup> Abū Ḥāmid Al-Ghazālī, *Al-Wajīz*, (Egypt: Maṭba'at Isā Al-Bābī Al-Ḥalabī), 5, p. 206.

<sup>245</sup> Munīr al-Qāḍī, *Sharḥ Al-Majallah*, 3, p. 117.

of passage relates to a type of physical property that can remain permanently such as land and so it resembles physical property.<sup>246</sup>

Ibn al-Humām criticizes this distinction as he said, “Indeed, sale occurs to physical property which can remain and sometimes it occurs to physical property that cannot remain. Hence, there appears no distinction between these two types of property. And he cited an example by referring to the right of passage attached to the ownership of the land which is physical property and the right of height attaches to the air which is not physical property and so the right of height is not property.”<sup>247</sup>

**D. Right Of Share From A Stream of Running Water:** The views of the Ḥanafī jurists also differ with regard to the sale of this right. The view that is manifested and subscribed to by Abū Ḥanīfah is that the sale of this right is not valid, though some jurists allowed its sale on the basis of custom. It is mentioned in *Radd al-Mukhtār* and some other authoritative books that according to *fatwā* its sale is not valid.<sup>248</sup>

It appears that, the reason for the prohibition of its sale is related to the passage of the custom. That is, uncertainty and unknownness, and not

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<sup>246</sup> Al-Kamāl Ibn al-Humām, *Fatḥ al-Qadīr*, 5, p. 205. Ibn ‘Ābidīn, *Hāshiyat Radd al-Mukhtār ‘Alā al-Durr al-Mukhtār*, 4, p. 519.

<sup>247</sup> Abū Ḥāmid Al-Ghazālī, *Al-Wajīz*, (Egypt: Maṭba‘at Isā Al-Bābī Al-Ḥalabī), 5, p. 205.

<sup>248</sup> See *Al-Mabṣūṭ*, *Tanwīr al-Abṣār* (Egypt: Maṭba‘ah Al-Sa‘ādah, 1324H), 14, p. 135. *Al-Durr al-Mukhtār wa Radd al-Mukhtār*, 4, p. 132.



because it is not property. Al-Sarakhsī said: “Sale of the right of share from a stream of running water is bad because it is a right of the thing that cannot be individualized and then it is uncertain by itself and incapable of delivery because the seller does not know whether the water flows or not and the execution of which is not within his ability”.<sup>249</sup>

#### 1.4.4.4 Compensation For Rights Related To Property

Indeed, taking compensation for rights of easement and other rights attach with property is possible in two ways. One is taking compensation by way of sale which essentially the transfer of ownership from the seller to the purchaser with all its requirements.<sup>250</sup>

The second is taking compensation by way of reconciliation and compromise. Essentially, the compromiser drops his right but the right is not transferred to the person for whom the compromise is made but it only removes the disturbance by the competitor against him.<sup>251</sup>

Imām al-Qarāfī mentioned the difference between the two ways, as he said, “Know that the disposition in rights and properties is divided into transfer and release. The transfer is divided into that which has consideration like physical

<sup>249</sup> See *Al-Mabṣūṭ, Tanwīr al-Abṣār* (Egypt: Maṭba‘ah Al-Sa‘ādah, 1324H), 14, p. 135. *Al-Dūrr al-Mukhtār wa Radd al-Mukhtār*, 4, p. 132.

<sup>250</sup> Al-Sanhūrī. *Al-Wasā’i‘ fī Sharḥ Al-Qānūn Al-Madanī*, p. 966.

<sup>251</sup> Maḥmūd Shahtūt, *Al-Mas‘ūliyyah Al-Madaniyyah Wa Al-Jinā‘iyyah Fī Al-Islām*, (Egypt: Maktabat Al-Salām), p. 38.

property such as sale and loan and into that which has no consideration like gifts and bequests. However, the release may be with consideration like the foregoing and pardoning of property. In all these situations the established right is dropped and nothing from the sale is transferred from the person to whom the compromise is made to the compromiser. However, it may also be without consideration like the release of debt, *qiṣāṣ*, *ta'zīr*, *ḥadd* slander, divorce and the release of a slave and the endowment of mosques and so on. So with all these conditions the established right is dropped and does not transfer to anyone.”<sup>252</sup>

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<sup>252</sup> Al-Qarāfi, *Al-Furūq*, 2, p. 110.