

## CHAPTER TWO

### EQUIVALENT *ḌAMĀN* IN THE CONTRACT OF *AL-IJĀRAH*

The researcher will focus, here, on the equivalent *Ḍamān* in the contract of renting in a special manner. In doing so, the researcher will have to define renting, explain its legality, discuss the hiring of people and what derives from that of the employees, the associate employees and their rights, and assuring the industries and what are not allowed by them. This part of the research is divided into the following sections:

- Section one - definition of renting (hiring and its legal origins).
- Section two - major questions concerning hiring people.
- Section three - what is related to the abolition of *al-ijārah* (hiring).
- Section four - employees and what is related to them.
- Section five - the associate employees and what is related to them.

## SECTION ONE:

### THE MEANING OF *AL-IJĀRAH* AND ITS ORIGINAL LEGALITY

Before we proceed to the idea of *ḍamān* in the contract of hiring, we must clarify the meaning of hiring according to the lexicographers and the jurists. In addition, we need to discuss the evidence on the legality of hiring in the Islamic Sharī'ah from the Qur'ān and the Sunnah, *ijmā'* (consensus) and the reasoning (logic).

Based on these ideas, this section is divided into the following:

Part one: Linguistic and technical definition of hiring (*al-ijārah*)

Part two: Evidence of the legality of hiring people (individuals)

#### 2.1.1 The Definition Of Hiring According To The Lexicographers

*Al-Ijārah* covers lease and hire. It is linguistically derived from *ajara, ya'jiru*. It is what is given in return for work as pay or a reward, and the owner pays and becomes a payer.

*Al-Ijārah* linguistically comes from the word *Al-ujarah* (compensation) or *Al-Ijārah* (hiring). It means hiring what is to be rented.

It is pronounced *Ajira, ajāra, and ijārah and ijārāt*. They come from the same root and this is what suits the technical meaning. It is said: "if *al-ijārah* is used to denote selling the benefits and not *al-ujrah* which connotes reward, it would be



better. And it is said that *al-ijārah* is derived from *al-ijr*, which is *al-awad*<sup>253</sup> – the reward. Allāh said:

*"If thou hadst wished, surely thou Couldst have exacted some recompense for it."*<sup>254</sup>

It is said that he pays with extension and limitation (shortening). Some deny extension, which is transferable. It is said that the time frame is based on the pay for the job. It is said from the original reality since it is owning a physical known beneficial thing and a known time frame work with a known reward.<sup>255</sup>

## 2.1.2 Definition Of Hiring (*Al-Ijārah*) According To The Jurists

### 2.1.2.1 Definition Of The Ḥanafī School

*Al-Ijārah* generally means owning a benefit from commercial things for a specific period as a reward.<sup>256</sup> Kāsānī<sup>257</sup> said *al-ijārah* linguistically means selling and this is why the people of Madīnah called it selling. It is to sell a known benefit with reward as the compacted substance in *al-ijārah* is the benefit and the hiring of a work – the work of the servant.<sup>258</sup>

<sup>253</sup> Al-Khatīb Al-Sharbīnī, *Al-Mughnī al-Muhtāj*, 2, p. 332.

<sup>254</sup> Al-Qur'ān, Al-Kahf (18): 77.

<sup>255</sup> Al-Fayrūz Abādī, *Al-Qāmūs Al-Muḥīṭ*, 1, p. 361.

<sup>256</sup> Al-Sarakhsī, *al-Mabṣūṭ*, 15, p.74, See also Al-Kāsānī, *Badāi' Al-Ṣanāi' fī Tarfīb al-Sharāi'*.

<sup>257</sup> Al-Kāsānī, *Badāi' Al-Ṣanāi' fī Tarfīb al-Sharāi'*, 7, p.147.

<sup>258</sup> *Majallat Al-Aḥkām Al-'Adliyyah*, Article 420.

It must be known that hiring is a contract of something beneficial known in place for a definite period of time until the marriage is over because periodic marriage is not allowed or will make it void.<sup>259</sup>

### 2.1.2.2 Definition Of The Mālikī School

*Al-Ijārah* is the return on the ownership of the lawful benefits of something for a known time<sup>260</sup> (award) and if hiring becomes the selling of benefits, it will not be allowed by the majority of the jurists – the hiring of a tree and growing it for fruits, becomes a living physical entity. Since hiring is the selling of beneficial things, such physical entities are not allowed to be sold. For example, to hire a sheep for its milk, wool or for its cheese or its offspring do not necessarily meant for sale because all these are physical things. Likewise, it is not allowed to sign a contract or rent (hire) water in a river or well or channel or stream because water is physical material. Furthermore, it is not allowed to rent a fish in the brook or to rent the brook for fishing, because all these are physical entities. Based on this, it is not allowed to rent a well or lagoons for the purpose of fishing.<sup>261</sup>

### 2.1.2.3 Definition of *Al-Ijārah* in the Shāfi‘ī School

*Al-Ijārah* (to rent) is a contract on a known/intended beneficial thing, the

<sup>259</sup> Qāḍī Zādah, Majallat *Fatḥ Al-Qadīr* (Maṭba‘ah ‘Isā Al-Bābī Al-Ḥalabī), 7, p. 147.

<sup>260</sup> Al-Dardīr, *al-Sharḥ al-Kabīr*, 4, p. 2, See Al-Qarāfi, *Al-Furūq*, 4, p. 4, See Ḥāshiyah.

<sup>261</sup> Ibid, 4, p. 2.

lawful subject to be spent on and to be allowed with known compensation. The exclusive elements of the definition are the words (beneficial) physical. But the word restriction (subject to be spent), contract on something beneficial not subject to spending as in the case of marriage which is not included in the real meaning of contract of the benefit of the goods and these benefits are not allowed to be spent without the contractor in the belief that the contract of marriage is not included in the real meaning of the words (contract on a benefit). And the last restriction and opinion that can be rewarded by giving a portion of the benefits through testament and partnership and renting.<sup>262</sup>

#### 2.1.2.4 Definition of *Al-Ijārah* in the Ḥanbalī School

Jurists of Ḥanbalī school said that *al-ijārah* is the contract of a beneficial, lawful and permissible known thing that can be obtained little by little for a precise moment in reward for a known thing. The intended thing is the benefit and not the physical object because the benefit is that which can be sold in return for a wage. This is why it is mentioned without the physical aspect but the contract is added to the physical object because it is the area of benefit and its origin.<sup>263</sup>

#### 2.1.3 Definition Of *Al-Ijārah* (Renting) In Common Law

The jurists define renting as a contract that is intended to enable a person to

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<sup>262</sup> Al-Khatīb Al-Sharbīnī, *Al-Mughnī al-Muḥtāj*, 2, pg. 333.

<sup>263</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 5, p. 398.

benefit from a known something in a known time with a known reward. It is an agreeable contract, which is contracted with the immediate agreement of the two contracting parties with return of benefits.<sup>264</sup>

#### 2.1.4 Analysis Of These Definitions

While looking carefully through these definitions of *al-ijārah* according to the jurists of the Sharī'ah and the jurists of man-made law, it will become clear that some jurists put certain restrictions on their definitions relating to the condition that those definitions of such contract (*al-ijārah*) can be valid. The jurists of the Ḥanafī, the Mālikī, and the Ḥanbalī Schools of law put restrictions in the case of (definitive period). They said that these restrictions are not available in the contract of marriage because it is a contract on benefits with a wage/reward and therefore, hiring or renting is not allowed here.

The Shāfi'ī, Ḥanbalī and some Mālikī jurists impose other restrictions in terms of what is permissible. With this restriction, unlawful benefits are excluded from this definition such as renting a house to commit theft or adultery/fornication because it is renting for an unlawful benefit or an interest that is not considered in the Sharī'ah or recommended.<sup>265</sup>

What can be noticed is that the jurists of the Mālikī School use the term *al-*

<sup>264</sup> See *Sharḥ Aḥkām Al-Ijārah* of Mohamed Labih Shanat, 1975, 1976 p. 27 and 29.

<sup>265</sup> Al-Khatīb Al-Sharbīnī, *Al-Mughnī al-Muḥtāj*, 2, p. 332; Al-Dardīr, *Hāshiyah al-Dusūqī 'alā Al-Sharḥ al-Kabīr*, (Dār Ihyā' Al-Kutub Al-'Arabiyyah), 4 pg. 2; Al Buhūtī, *Daqā'iq Ūla Al-Niḥa'i li Sharḥ Al-Muntahā*, vol.2 pg. 350.

*ijārah* in renting/hiring men. In the case of renting animals, they use the word *al-kirāh*. But the rest of the jurists, including the Ḥanafīs, the Shāfi'ī and the Ḥanbalīs, use the term without any distinction between hiring human beings for work and that of hiring animals, cars, houses, and other things.

### 2.1.5 The Selected Definition

The preferred definition in the contract of lawful *al-ijārah* (hiring) is that it is a contract on a known benefit, intended, lawful, with a known reward. This definition shows the similar contract of *al-ijārah* in that it is the ownership of benefits like a sleeping partnership, or a crop sharing contract over the lease of a plantation.

And the bad hiring is confined to the benefit of which is unknown or the hiring of bad benefits or unintended benefits.

This definition is seen as more general than the real meaning of *al-ijārah* and Allāh has the right knowledge.

### 2.1.6 Evidence Of The Legality Of *Al-Ijārah* (Hiring) And Its Wisdom

#### 2.1.6.1 Wisdom Of The Legality Of *Al-Ijārah*

In general, the contract of *al-ijārah* is legally permissible because it is a way to enable people to get access to beneficial things they need since they do not have

ownership of physical things. The need for beneficial things is like the need for physical things. The poor need the money of the rich and the rich need the service of the poor. And the consideration of the needs of people is the main reason for the legality of contracts. Hiring can be legal in a way that there can be a need and it can be concomitant with the original law. And this is its evidence from the point of view of logic and the wisdom of its legality.<sup>266</sup>

*Al-Ijārah* (hirings) are original in themselves. They are a form of trade, and trade is permissible. Allāh has permitted hiring a lady for wet nursing. However, it is different from breast-feeding because of the variety of breast-feeding of a child and the cessation of milk, and the bounty of milk and unavailability of breast milk. But because of its unavailability, hiring becomes permissible. Since it is permissible on such things then it is also evidently permissible for similar kinds of things.<sup>267</sup>

## 2.1.6.2 Evidence Of The Legality Of *Al-Ijārah*

The legality of *al-ijārah* (hiring) can be deduced from some texts from the Qur'ān, the Sunnah, the unanimous consensus of the jurists and *qiyas* (analogy).

### 2.1.6.2.1 Evidence From The Qur'ān On The Legality Of *Al-Ijārah* (Hiring)

Firstly, there is evidence from the Qur'ān on the legality of *al-ijārah* (hiring)

<sup>266</sup> Al-Kāsānī, *Badāi' Al-Ṣanāi' fī Tartīb al-Sharāi'*, 4, p. 174; Al-Sarkasī, *Al-Mabṣūṭ*, (Egypt: Maṭba'ah Al-Sa'ādah), 15, p. 74; Ibn Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid* (Al-Qāhirah: Maktabah al-Kulliyat al-Azhariyah), p. 24.

<sup>267</sup> Al-Shafī'i, *Al-Umm* (Dār Al-Sha'ab Al-Miṣriyah), 3, p. 250.

when Allāh said: one of the (damsels) said: “O my (dear) father! Engage Him on wages: truly the best of men for thee to employ is the one (man) who is strong and trustworthy”.<sup>268</sup>

The Holy Qur’ān shows that Allāh has given us the incident of hiring of Moses to raise the sheep for a known reward. Allāh legalized a law (before us) that has become a non-derivative law and this shows the legality of the permissibility of *al-ijārah* (hiring).

1. The word of Allāh “and if they breast feed your (offspring), give them their recompense ...”<sup>269</sup>

In this verse there is an order to give a reward to a woman when breastfeeds to a child. And this testifies to the legality of *al-ijārah*.

Shafih, may Allāh have mercy on him, said: “he permitted hiring before breastfeeding which varies because of the many kinds of breastfeeding of babies, the lack of milk, and bounty of the milk and its cessation. But since there is nothing but this, he allowed hiring. Since this is permitted, the similar thing will be allowed too, as it takes the same meaning.”<sup>270</sup>

2. Allāh says: “and ye decide on a foster-mother for your offspring there is

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<sup>268</sup> Al-Qur’an, Al-Qaṣaṣ (28): 26, 27.

<sup>269</sup> Al-Qur’an, Al-Ṭalāq (65): 60.

<sup>270</sup> Al-Shafīʿī, *Al-Umm*, 3, p. 250.

no blame on you provided ye pay (the foster mother) what ye offered, on equitable terms”.<sup>271</sup>

Allāh did not forbid a woman who gives reward to a woman in return for breastfeeding her son. This shows the legality of breastfeeding for reward and this deserves permissibility. Al-Kasimmitah said in his Tafsīr “that you give rewards to those who breastfeed for you with a happy and glad attitude. This means that the birth should be in a mood of happiness during the time of giving rewards, for the job of breastfeeding so as to recognize the goodness of breast feedings.”<sup>272</sup>

Ibn Kathīr said, “There is no sin in accepting a reward and there is no sin when accepting it from her when giving her past rewards in a good manner and, if she breastfeeds the child, in accepting rewards on several occasions.”<sup>273</sup>

3. Allāh said: “And it is we who portion out between them their livelihood in the life of this world; and we raise some of them above others in ranks so that some may command work from others....”<sup>274</sup>

And Ibn Kathīr said in the Tafsīr of this verse: “so as to use each other in

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<sup>271</sup> Al-Qur'an, Al-Baqarah (2): 233. '

<sup>272</sup> Tafsīr Al-Qāsimī called – Maḥāsīn Al-Tawīl, 3, p. 611.

<sup>273</sup> Al-Shafi'i, *Al-Umm*, 3, p. 250.

<sup>274</sup> *Al-Qur'an, Al-Zukhruf* (43): 32.



doing work for a need, and this was also said by Al-Sadiq: and this is evidence of the legality of *ijārah*.

4. His words "...if thou hadst wished, surely thou couldst have exacted some recompense for it."<sup>275</sup>

The meaning of this verse is that Moses said to Al-Kadir, may peace and blessings be upon them: "if Al-Kadir likes he can have a reward for the repairing of the wall."

He said in Al-Ḥawī Al-Kabīr and this shows from the words of Moses, and accepting al-Kadir's permissibility of a reward and allowing compensation.

And Al-Bukhārī has translated this by saying "in a chapter that when a person hires someone to build a wall and wants it to be demolished it is accepted." And what is prescribed shows to us the ideas of the jurists on the verse about allowing the permissibility of *al-ijārah*.

#### **2.1.6.2.2 Evidence From The Sunnah On The Legality Of *Al-Ijārah* (Hiring)**

The majority of the jurists have allowed *al-ijārah* with several places of evidence either in words, actions or justified implications and I am going to limit

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<sup>275</sup> *Al-Qur'an, Al-Kahf*(18): 77.

myself by mentioning some *ḥadīth* that will classify the evidence as follows:

1. The *ḥadīth* of ‘Ā’isha may Allāh accepts her – in the incident of The Hijrah – she said: “and the Prophet (PBUH) and Abū Bakr rewarded a man from Banī Da’il with a gift for guiding them and he is from the religion of the disbelievers of Al-Quraysh.”<sup>276</sup>

And this is evidence of the permissibility of hiring because the Prophet hired a man to show them the way to Madīnah al-Munawwarah.

2. A narration from Abī Hurairah – May Allāh accept him – hearing from the Prophet (PBUH) who said: “In the hereafter there are three people with whom I will have a conflict: a man who betrayed me, a man who sells a slave and eats the price and a man who hired a man and did not fulfill his promise to reward him.”<sup>277</sup>
3. It is narrated that the Prophet said: “Give the hired person his reward before his sweat dries.” These two *ḥadīths* indicate the permissibility of *al-ijārah* because they include an order to give the reward to a hired person if he is hired and to let him be aware of the amount of his pay.
4. It is narrated that the Prophet (PBUH) said: “Whosoever hires a servant

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<sup>276</sup> Al-Bukhārī, Al-Jāmi‘ Al-Ṣaḥīḥ bi Ḥaṣhiyah Al-Sandiyyu, (Damascus: Dār Al-Fikr), Chapter-Ra’y Al-Ganam ala Kararit, 2, p. 32.

<sup>277</sup> Ibn Hajar al-Asqalānī, *Fath Al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī* (Maṭba’ah Al-Bahiyah Al-Miṣriyyah), 4, p. 417.

should tell him about his pay.”<sup>278</sup>

The evidence in the *ḥadīth* shows that there is a warning directed against those who refuse to pay persons they hire, especially a person who works for it. This warning can be concluded to be a clear evidence for the permissibility of hiring because if it had not been permissible, Allāh would not have warned those who refuse to pay by fighting and He would have prohibited it as prevention of a forbidden thing is compulsory.

5. It is narrated that the Prophet said: “All the prophets were shepherds.” His disciples said: “Are you?,” he said: “Yes. I used to look after the sheep for the people of Mecca for a small amount of money.”

And Sued, one of the narrators of *ḥadīth*, interpreted this *ḥadīth* to: “This means every sheep with a unit of Dīnār”.<sup>279</sup>

6. And Ibn ‘Abbās narrated from the Prophet by saying: “The reward that you have been recompensed with is the reward in the Holy Qur’ān.”<sup>280</sup>
7. The prophet (PBUH) was sent and the people were paying for workmanship and they were hiring and he did prevent them from doing

<sup>278</sup> Al-Bayhaqī, *Al-Sunan Al-Kubrā*, (Beirut: Dār Iḥyā’ Al-Turāth Al-‘Arabī), 6, p. 121.

<sup>279</sup> Al-Bayhaqī, *Al-Sunan Al-Kubrā*, (Beirut: Dār Iḥyā’ Al-Turāth Al-‘Arabī), 6, p. 120.

<sup>280</sup> Al-Bukhārī, *Al-Jamī‘ Al-Ṣaḥīḥ*, Bi Ḥāshiyah (Damascus: Dār Al-Fikr), Al-Sandi chapter of raising sheep on the unit of Dinar, 2, p. 34.

so and this shows the permissibility of *al-ijārah* because the prophet (PBUH) did not prevent them and if it was not allowed, the Prophet would have prevented them from doing it and it became a tacit approval which is one of the types of Sunnah.<sup>281</sup>

8. And the jurists justified the permissibility of *al-ijārah* by logic as follows:

*"Wisdom shows that the need for the benefits is like the need for the physical. If the contract is permissible for physical things then it is said that al-ijārah is allowed on benefits and there is no doubt on that."*

Therefore, there must be *al-ijārah*. It is for this reason that Allāh has a way to ration/give and there is no doubt that He can remove the need from our mind because the contract on benefits cannot be achieved because it will disappear with time. There must be a contract before having it like a contract for physical things.<sup>282</sup>

### 2.1.7 Evidence Of A Lack Of Permissibility/Prohibition Of *Al-Ijārah* (Hiring)

Some *mujtahidīn* justify the prohibition of *al-ijārah* with the following evidence:

1. *Al-Ijārah* consists of gambling which is not allowed and hiring in terms of gambling has two faces:

<sup>281</sup> Ibn Hajar al-Asqalānī, *Fath Al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*, 4, p. 452.

<sup>282</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 5, p. 399.

- a) It is a contract on a benefit that does not exist and this makes it wrong based on the analogy of selling because selling of a non-existent thing is wrong according to the agreement of the jurists. Therefore, *ijārah* is void as well as selling because it is a contract that is based on a non-existent thing.
- b) The benefits of the servant are many. They differ according to the variation in activeness, laziness, weakness, and strength. They cannot be known, they involve ignorance and gambling.

A contract cannot be allowed unless its location corresponds to its rules. According to the rules of *al-ijārah*, the delivery of benefits are not on its contract time because these benefits exist little by little. Therefore, the contract on it is void.<sup>283</sup>

### 2.1.8 Discussion Of The Evidence

The majority of jurists discuss the said evidence in the aspect of a lack of permissibility of *al-ijārah* by saying that:

1. *al-ijārah* is gambling and that it cannot be allowed. The answer to them is that gambling is when there is uncertainty between things. But in the case of *al-ijārah* there is safety in the majority of the cases. And if it is

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<sup>283</sup> Ibn Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*, 2, p. 220.

assumed that *al-ijārah* has aleatory aspects, there is only a small portion of it. And the evidence makes the needs and benefits of people in it lawful and because the aspect of gambling in it is little.

When they say that the benefits of the hired person are different and that there is no way to know those kinds, the answer to this is that the benefits are known by time or by work and this will be explained in the means of knowledge through benefits.

And when they say that *al-ijārah* can be void because of the variation in the capability of the hired person from strength to weakness, laziness and attractiveness, this assumption is wrong because hiring a wet nurse is permitted in Qur'ān with the knowledge that the milk may be little or may increase and the amount that a child drinks cannot be known in terms of scarcity or abundance.<sup>284</sup>

2. their analogy of *al-ijārah* is also void because it did not derive from it this is because the selling of a non-existing thing is not allowed since contract does not fall on what is to be sold in contrast to all *al-jārah*, on the known corporeal precisely for the extraction of its benefits. There is a difference between the precise known corporeal and its benefits and that of the contract on something not exist.<sup>285</sup>

<sup>284</sup> Al-Shafi'i, *Al-Umm*, 2, p. 250.

<sup>285</sup> *I'lām Al-Muwāqqi'in*, 1, p. 454 and Beyond, p. 352 Al-Sarkaniyu, 110, p.74, Ibn Qudāmah al-Maqdisi, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 6, p. 2.

In this respect, it is clear that what is said about the impermissibility of *al-ijārah* hiring is wrong and they do not have a considered all the evidence. The truth is what the majority of the jurists have said in allowing it.

### 2.1.9 Nature Of The Legalization *Al-Ijārah*

The jurists differ on the legalization of *al-ijārah* as to whether it is legalized by unanimous agreement or on differences. The majority of the jurists said that it is legalized not on analogy and some jurists of the Ḥanbalī School said that it is legalized according to analogy, and this opinion was supported by Ibn Taymiyyah and his student Ibn Al-Karīm. Some relied on the idea that *al-ijārah* was legalized not by analogy by considering it as selling of a non-existent thing which is not allowed.

But when the legal evidence was issued on its permissibility, it was on an exceptional basis contrary to the origins and the rules on which it was established.

If *al-ijārah* is selling because selling is the exchange of money for money then *al-ijārah* is also selling because it is the exchange of a financial benefit for money which is a “pay”.

And as for the statement that the sale of a non-existent thing is void, there are several pieces of legal evidence from the Prophetic *ḥadīth* which says “Do not sell something that you do not have”.

Some jurists said that *al-ijārah* was legalized based on analogy with two opinions:

The first opinion says that *al-ijārah* is not a sale which has been made void with some evidence. If it is issued on a non-existent item, then it is issued on the physical things that are possible in a contract. But *al-ijārah* is issued on benefits. Therefore, contract cannot be possible on its existence.

The second opinion says that the reason for prohibiting the sale of a non-existent thing is not only because it does not exist but also because it is not existent at the moment and its contract can be delayed until it is found. Based on this, reason the restriction is not liable in benefit. Therefore, it cannot be allowed because of its links with the physical thing.<sup>286</sup>

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<sup>286</sup> Ibn Al-Qayyim, *I'lām Al-Muwāqī'īn*, 1, p. 454 and Beyond, p. 352 and beyond "Al-Ṭibā'ah Al-Manbariyyah" Bi Taṣarruf.



## SECTION TWO

### HIRING PEOPLE AND RELATED ISSUES

After having defined the meaning of *al-ijārah* according to the lexicographers, the jurists in the Sharī'ah and the written laws, and the explanation of the legalization of *al-ijārah* and especially the hiring of people, we are going now to talk about the hiring of people and we will show the difference between the special hired person and the associate hired person and their relations with *al-ḍamān* if a thing perishes in the hands of the worker or the hirer. Based on this, this chapter has been divided into the following:

1. Issues related to the work of the hired person
2. Reward/payment and related issues

#### 2.2.1 Issues Related To The Work Of The Hired Person

From what has been mentioned in the definition of *al-ijārah*, we have found that the jurists use the word *al-ijārah* whether they refer to hiring things or the houses or of human beings. We have noticed that the jurists of the Mālikī school use the word rent for the hiring of things whether for animals or houses. But for the hiring of human beings they use *al-ijārah* (hiring). The hiring of things must entail the existence of three elements:

1. The hired person
2. The owner of the work (hirer)
3. Payment and benefit

The hired person does the work and provides services and will render (give) benefits to the owner of the work; at the same time, he will receive a reward (payment). We shall discuss in this section the responsibilities of a hired person, and the duties of the owner of the work. The issue of the payment and benefit will be discussed in the second section.

### 2.2.1.1 Responsibilities Of The Hired Person

The hired person should fulfill certain responsibilities in favor of the owner of the work and the work is based on the contract that normally provides the following:

1. Good performance of the work in the best possible way: this is considered as one of the important duties of the worker or the hired person – to perform work in the best way. If he does not perform well, this will be seen as a lack of fulfillment of the contract as agreed by the two parties – the hired person/employee and the employer.

Allāh said:

*"And fulfill (every) engagement, for (every) engagement will be enquired into (on the Day of Reckoning)."*<sup>287</sup>

Allāh said:

*"And give full measure when you measure, and weigh with a*

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<sup>287</sup> *Al-Qur'an, Al-Mā'idah (5): 1.*

*balance that is straight.*"<sup>288</sup>

And in the *ḥadīth* "Allāh wants you to do any work in the best form."

And the hired person who does not do this, is seen as betraying the trust and makes the owner of the worker lose the benefits intended from the *al-ijārah*.

2. Doing the work by himself: It is the duty of the hired person to do the job himself especially if it is not allowed for another person to substitute him. This is because people differ in experience, ability, and capability and at the same time this is considered as a personal contract.

The jurists<sup>289</sup> agreed that a special person will have to do the work himself and he is not allowed to be substituted to do the work. But the jurists of the Ḥanafī school,<sup>290</sup> contend that substitution is permitted in the case when there is a better person than him in that job in terms of capability and ability since the aim is to achieve what the owner of the job wants from the worker.

Concerning the associate employee (hired person), the jurists have differed on the rules concerning him doing the work when the nature of the contract is absolute. The majority of the jurists said: He has to work

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<sup>288</sup> *Al-Qur'an, Al-Isrā'* (17): 34. :

<sup>289</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 6, p. 34, Al-Zarbali, *Tarbiyīn Al-Haqā'iq, Sharḥ Kanz Al-Daqa'iq*, 5, p. 112.

<sup>290</sup> Ibn 'Ābidīn, *Hāshiyat Radd al-Mukhtār 'Alā al-Durr al-Mukhtār*, 6, p. 18, Al-Kāsānī, *Badā'i' Al-Ṣanā'i' fī Tarfīb al-Sharā'i'*, 4, p. 208, 209.

himself and his hiring takes place if it is mentioned in the contract with the condition for him to work with his hands.<sup>291</sup> But the jurists of the Shāfi'ī School differ on two opinions. Some said that the worker has to perform the work himself because it is a physical hiring. So the speech is linked with the physical addressee and the address/speech which indicate one may hire someone to do the job because the intention is that the job should be done irrespective of who actually does it.

3. Compulsory obligations of the hired person/worker: Obligation to execute the orders of the owner of the employer. The worker is obliged to execute the orders of the employer according to the limits if the contract agrees upon on the following points:

- a. That it should be what is intended, in the contract.
- b. That it should be legal work because there is no obedience in the disobedience of Allāh. All work is against the Sharī'ah and the general ethics and behavior should the worker cheat in food or medical care or any work that will endanger the life of the people. Allāh says "And do not throw yourselves into destruction."<sup>292</sup> The prophet says "Harm shall not be inflicted nor be reciprocated."<sup>293</sup>

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<sup>291</sup> Al-Khatīb Al-Sharbīnī, *Al-Mughnī al-Muhtāj*, 2, p. 439, 440.

<sup>292</sup> Al-Shawkānī, *Nayl al-Awṭār*, 7, p. 248.

<sup>293</sup> Al-Qur'an, Al-Baqarah (2): 195.

- c. Not revealing the secrets of the work. The worker should not reveal the secrets of the work he is doing either in terms of professional information or future planning or anything of this kind. Everything connected to the work is a trust on the part of the worker. If he reveals any of the information related to the work, this may lead to damage or loss either from the financial or ethical dimension “and Allāh does not like deterioration.”<sup>294</sup>
- d. Preserving the work and the equipment and instruments: The hired person/worker needs to protect the place of work and equipment, instruments and files. Allāh said, “Verily, the best of men for you to hire is the honest, the trustworthy”<sup>295</sup> The worker is considered as being trustworthy in the work he is doing by taking care of the equipment he is using and he has to repair and maintain the equipment.

#### **2.2.1.2 Responsibilities Of The Owner Of The Work Towards The Worker**

As the contract imposes several obligations on the hired person, the owner of the work must also have several obligations, which are mentioned in the followings:

1. Commitment to payment: The owner of the work must pay the worker

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<sup>294</sup> Narrated by Al-Imām Aḥmad and Ibn Mājah.

<sup>295</sup> Al-Qur'an, Al-Qaṣaṣ (28): 26.

based on the work done. Allāh said: "Then if they breastfeed the children for you, give them their due."<sup>296</sup> The Prophet (PBUH) said: "Give the worker his due before his sweat dries." Islam has ordered the owner of the work to pay the hired person his due if he fulfills the work, otherwise he faces the punishment of Allāh in the hereafter. It came in a *ḥadīth qudsī* "I will have conflict with three people in the hereafter: a man who promises but does not fulfill his promise, a man who sells a freeman and eats the price, a man who hires a man and after fulfilling the work the owner of the work refuses to give him his due payment."<sup>297</sup>

2. The employer must provide: part of the condition of contract of *al-ijārah* to perform a job according to what is agreed upon and making the worker continue the work in a normal way, otherwise the worker deserves payment in case the owner of the work does not fulfill those conditions. Ibn Qudāmāh said: make a stable payment for the hired person if he makes himself available to the owner of the work because he will be very busy under his control.<sup>298</sup> And if the owner of the work orders the worker to do a job, it should be the job that the latter can afford to do as usual as it is mentioned in the *ḥadīth* "Do not make them do what they cannot afford"<sup>299</sup>. And it came in the Qur'ān [but I intend not to place you under a difficulty].<sup>300</sup>

<sup>296</sup> Al-Qur'an, Al-Talāq (65): 6.

<sup>297</sup> Ibn Hajar al-Asqalānī, *Fath Al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*, 4, p. 417.

<sup>298</sup> Ibn Qudāmāh al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 6, p. 16.

<sup>299</sup> Al-Shawkānī, *Nayl al-Awṣār*, 7, p. 3.

<sup>300</sup> Al-Qur'an, Al-Qaṣaṣ (28): 27.

3. Treatment of the worker with suitable respect: Islam has made it compulsory for a Muslim to respect his brother because virtue is piety according to Allāh. Allāh said "Verily the most honored of you with Allāh is he who has *taqwā* (pious)."<sup>301</sup> And the Prophet Muḥammad said "There is no virtue for an Arab over a non Arab, and no virtue for a white over a black person only through piety."<sup>302</sup> Allāh said "And had you been severe and harsh hearted, they would have broken away from you"<sup>303</sup>. Therefore, it is not allowed for the worker to be looked down upon, but there should be a better treatment and at the same time if the owner of the job treats his worker better with due respect, he will achieve better results in the work. However, the contrary will be bad.
  
4. Commitment of the owner to take care of the worker and his safety: The owner of the work needs to provide better care for the workers such as medical care and treatment of the worker whether concerning the injury of the worker during work or outside work. Also the provision of social security benefits, assurance, and pension of preventional means from fire and other problems that the workers may encounter.

These are things that the modern day companies and governments have agreed upon. In the past, the jurists used to say,<sup>304</sup> the owner of the money needs to

<sup>301</sup> Al-Qur'an, Al-Ḥujurāt (49): 13.

<sup>302</sup> Al-Shawkānī, *Nayl al-Awṭār*, 5, p. 98.

<sup>303</sup> Al-Qur'an, Āli 'Imrān (3): 158.

<sup>304</sup> Look at Ibn Mawdūd Al-Hanafī, *al-Ikhtiyār li-Ta'ālī al-Mukhtār* (Miṣr: Maṭba'ah Muṣṭafā al-Bābī al-Jalabī, 1951), 2, p. 23.

provide medical benefits for all hired persons.

## 2.2.2 Wage/Reward

### 2.2.2.1 Definition Of *Al-Ujrah*

Wage (*al-ujrah*) linguistically means the reward for a job. The plural is *ujur*.<sup>305</sup> It is also said that it means rent.<sup>306</sup>

Allāh said in the Holy Qur’ān "give them dowry"<sup>307</sup> as a symbol for a dower.

*Al-Ijir* and *al-ujrah* are used in the case of a contract and in a benefit without harm. Allāh said: "their reward is with their Lord"<sup>308</sup> and Allāh said again "His reward is due from Allāh."<sup>309</sup>

### 2.2.2.2 *Al-Ujrah* In The Legal Sense

*Al-Ujrah* is what is obligatory on the hirer to be given as a reward for a benefit, which he possesses, based on the contract of *al-ijārah*. *Al-Ujrah* therefore in a contract of work is what the worker takes in return for a job done to satisfy the

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<sup>305</sup> Ibn Manẓūr, *Lisān al-‘Arab*, Article 1, p. 87.

<sup>306</sup> Al-Fayrūz Abādī, *Al-Qāmūs Al-Muḥīṭ*, 1, p. 362.

<sup>307</sup> Al-Qur’an, Al-Nisā’ (4): 24.

<sup>308</sup> Al-Qur’an, Al-Baqarah (2): 262.

<sup>309</sup> Al-Qur’an, Al-Shūrā (42): 40.



owner of the work for his benefit.<sup>310</sup>

#### 2.2.2.3 *Al-Ajr Al-Musamma* (Specified Pay)

It is the reward that is mentioned and specified during the contract. It might be equal to the same reward, less than it, or more than it.<sup>311</sup>

#### 2.2.2.4 *Ajr Al-Mithl* (Payment According To Custom)

This is what is calculated by the expert deducing from a goal.<sup>312</sup>

#### 2.2.2.5 Types And Kinds Of *Al-Ujrah*

1. Money (cash). Referring to the book of *fiqh*, we will find that there is no difference among the jurists concerning to the *al-ujrah* (payment) in money on condition that it should be known in a way that will prevent ignorance and dispute as indicated by the evidence of the Prophet (PBUH) "Everyone who hires an employee should let him know about his wage/reward."<sup>313</sup>

The knowledge of the return should be made clear by indicating the

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<sup>310</sup> *Majallah Al-Ahkām Al-'Adliyyah*, Articles No. 405, 308.

<sup>311</sup> *Majallah Al-Ahkām Al-'Adliyyah*, Article 415.

<sup>312</sup> *Majallah Al-Ahkām Al-'Adliyyah*, Article 414.

<sup>313</sup> Al-Bayhaqī, *Sunan Al-Bayhaqī Al-Kubrā*, (Beirut: Dār Ihyā' Al-Turāth Al-'Arabī), 6, p. 120. Ibn Abī Shaybah, *Muṣannaf Ibn Abī Shaybah*, 4, p. 660.

amount, such as ten dollars. The jurists said that the amount in a contract of work should be customarily understood. In addition, if it is found that the currency is no longer in use than it is not allowed to be used according to the Shāfi‘ī jurists.<sup>314</sup>

2. *Al-Ujrah al-‘āriyāt* (the physical reward): It is the equivalent of a specified amount to the reward such as an equivalent of the reward to an amount of rice or cereal.

The jurists have agreed that the amount should be physical and that they made conditions in the reward if it is physical that is sold with conditions. It also must be physical that is sold with conditions. It also must be physical or a clearly defined one that prevents ignorance and deception.

3. *Al-Ujrah* with benefit: The two parties entering into a contract can agree that the reward be a benefit that the owner of the work presents to the worker in exchange for transport assurance or medication or housing, for example. Moreover, the benefit can be half or all of the reward. The jurists have agreed that the reward can be a benefit. Nevertheless, they disagree about what is beyond that.<sup>315</sup>

The reward of the employee can be any benefit. In this case the benefit

<sup>314</sup> Qalyūbī and ‘Amīrah, *Hashīyah Qalyūbī wa ‘Amīrah ‘ala Sharḥ al-Minhāj* (Al-Qāhirah: Maṭba‘ah Muṣṭafā Al-Bābī Al-Ḥalabī), 3, p. 68.

<sup>315</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 6, p. 11-13, Ibn Rushd, *Bidāyah al-Mujtahid wa-Nihāyah al-Muqtaṣid*, 2, p. 228.

can either be the same item specified in the contract or of another type on the basis of certain condition.

### The First Condition

This is the case when the agreed reward is not of a type of benefit that is agreed upon. The hiring is right according to the agreement of the jurists.

An example of this is when an employer hires an employee with the agreement that his services will be in exchange for a piece of land to cultivate. Their evidence is in the words of Allāh in the narration of the messenger Shu'ayb with Moses: "He said: I intend to wed one of my daughters to thee, on condition that thou serve me for eight years."<sup>316</sup>

The reward in exchange for the work of the messenger Moses (PBUH) is a benefit different from the work, which is an enjoyable benefit on the contract of marriage.<sup>317</sup>

### The Second Condition

If the reward is a benefit that is different from the type specified in the contract. In this case, the views of the jurists on the credibility of *al-*

<sup>316</sup> *Al-Qur'ān, Al-Qaṣaṣ* (28): 127. Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 6, p. 11-13, Ibn Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*, 2, p. 228.

<sup>316</sup> *Al-Qur'ān, Al-Qaṣaṣ* (28): 127.

<sup>317</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 6, p. 11-13.

*ijārah* can be divided into two schools.

### The First School

One group of jurists, including the Mālikīs, Shāfi'īs, and the Ḥanbalīs, the majority of whom agreed that it is allowed (*al-ijārah*).

The Mālikīs permitted the hiring of a house in exchange for living in another house.<sup>318</sup> Hiring of the same type and of a different type are allowed, as well as renting a house by staying in it, or as in the story of Shu'ayb who was married as the exchange for a reward.<sup>319</sup>

As Ibn Ḥazm Al-Zāhirī said: *al-ijārah* is allowed as a person rents a house in exchange for staying in another house or has the service of a slave in exchange for the service of another slave because there is no text to prohibit this.<sup>320</sup>

And the evidence put forward by the jurists in permitting that *al-ujrah* of a benefit from the same type as in the contract can be seen in the following:

1. Since the benefits take the place of physical things in legal terms, it is allowed to be a reward because it is different in type even if it is

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<sup>318</sup> Ibn Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*, 2, p. 228.

<sup>319</sup> Al-Shirāzī, *Al-Muhadhab fī Fiqh Madhab Al-Imām Al-Shāfi'ī*, 1, p. 522.

<sup>320</sup> Ibn Ḥazm, *Al-Muḥllā*, 8, p. 197.

one in name.

2. The word of Allāh in the Qur'ān about the story of Moses (PBUH) "I intend to wed one of my three daughters to thee, on condition that thou serve me for eight years"<sup>321</sup>. In this verse there is evidence of the permissibility of *al-ujrah* because marriage is made as reward in *al-ujrah*.
3. *Al-Ujrah* is also allowed in the case of the variation of the type of the two benefits. For this reason, it is allowed in the case of the re-union of the two and there is no prevention in terms of differences as long as the benefits are the same.

### The Second School:<sup>322</sup> Ḥanafī School<sup>323</sup>

The majority of their opinion on *al-ijārah* is that it is allowed because they made it a condition that the benefit of the reward be of a different type and not the type of the benefits on which the contract is made as the *ijārah* of specific physical service that he performs or a specific job. It is not allowed that the reward should come from the type of the hirer and not some of the logic or something resulting from work on contract because of the deception involved in it. In such a case, if the work is

<sup>321</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 6, p. 11-13, Ibn Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*, 2, p. 228 bi taṣarruf.

<sup>322</sup> Ibn 'Ābidīn, *Hāshiyat Radd al-Mukhtār 'Alā al-Durr al-Mukhtār*, 5, p. 40, 194 Al-Kāsānī, *Badā'ī 'Al-Ṣanā'ī fī Tarṭīb al-Sharā'ī*, 4.

<sup>323</sup> Review Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 6, p. 11-13, Ibn Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*, 2, p. 228 bi taṣarruf.

destroyed the employee will lose his wages. The messenger has prohibited the throwing away of the miller.

Based on this the employee will not be able to receive his reward and will not be able to do so with the strength of someone else. This, means that if the *Ujrah* is the benefit from some benefit on contract, the *ijārah* of the owner of the thing would be accomplished because of the union of the type and the delay of possession.

They also relied on the evidence of the lack of authenticity of this *ijārah* by analogy with the marriage on compensation. This kind of marriage is not allowed because of the existence of similar benefits of exchange.

### ***Al-Ujrah With Benefit In The Contract Of Work***

The two entering into contract can agree that the *ujrah* of benefit of what is to be presented by the owner of the work to the worker in exchange for his work, as well as a person being able to work for someone in exchange for accommodation and this benefit can be a recompensation of *al-ujrah* as the reward can be complete.

We can notice from what has been discussed that the jurists agreed on the permissibility of the benefit *ujrah*. But they also differed in the condition of the variation of the benefits.

Based on majority of the opinions of the jurists, it is allowed that the benefits should be *ujrah* whether in the case of the same types becoming one or whether they differ.

## SECTION THREE

### WHAT IS RELATED TO THE NULLIFICATION OF *AL-IJĀRAH*

*Al-Ijārah* (hiring) is one of the contracts in the Sharī'ah that consists of invalidity and nullification as do the other contracts. We shall discuss this topic as far as the effects related to the annulment of the contracts of *al-ijārah* or stopping it is concerned and the discussion of the issue of *ḍamān* and if it makes the "*ijārah*" void. We shall divide the topic into two parts:

1: Definition of the annulment (*al-fāsīd*) and invalidity

2: (*Al-Bātil*) and the difference between them, what is related to the invalidity of *al-ijārah*

#### 2.3.1 Definition Of Invalidity And Voidness And The Differences Between Them

If certain conditions and principles are fulfilled in the contract it is said to be correct or sound. The incorrect one is when it comes from means other than what has been mentioned either in violation of one of the principles or the unavailability of certain conditions, whether worship, contract or behavior. This kind includes; both invalidity or voidness are either in worship or transactional activities. The invalid prayer is like the void prayer. It does not make the compulsory thing void.

The invalid selling is like void selling. It does not lead to the transfer of the possessions in two exchanges and it does not relate to the law and this is the opinion



of the majority of the jurists.<sup>324</sup>

The Ḥanafīs said that the idea is similar in case of worshipping. But in terms of contracts and treatment namely the civil transaction they differ in the aspect of invalidity and nullity.<sup>325</sup>

### 2.3.1.1 Invalidity

This is what has a flaw in the origin or in the foundation of the contract such as in its very nature or the two entering into a contract or the item of the contract. No legal effect will be attached to it as in the case of trading with a fool or a child below the age of discretion. In other words, invalidity is what does not have a legal effect in its origin and description such as what is in the womb of females or the spinal cord of men.<sup>326</sup> The origin of the contract is meant to refer to the pillar (offer and acceptance) or the like. The meaning of legality of the pillar means that there should be no flaw in it – legality of the area means it should be supportive. The description of the contract is meant to refer to what is outside the pillar and the area like the violated conditions of the content of the contract or like the area not being capable of receiving or being expensive. It is a description following the contract even if the selling is based on the price. However, the importance in it is what can be sold. This is why the sale can be void with the nullification of it without the nullification of the price because the price

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<sup>324</sup> Rawdat Al-Nazir, 1, p. 67. *Al-Maḍkhal ilā Mazhab Al-Imām Aḥmad*, p. 69.

<sup>325</sup> Ibn ‘Ābidīn, *Hāshiyat Radd al-Mukhtār ‘Alā al-Durr al-Mukhtār*, 4, p. 104.

<sup>326</sup> Al-Mālikī: What in the womb of females, *Al-Maḍāmīn*: What in the spinal cords of men-the opposite.

is not intended but it is only a means to benefit with the corporeal.<sup>327</sup>

### 2.3.1.2 Nullity

This is what has a flaw in the description of the contract such as having a condition or conditions not in line with its definition and pillars and some effects are attached to its definition and pillars or treatment and in some fundamental issues are fulfillment. In other words, the void is that whose foundation was legal but its effects became prevented because of an opposite description. For example, the sale conducted by a child or a fool or an incorporeal thing that is unlawful. But the sale of an unknown price or what is composed with a void condition is void. The marriage of a prohibited lady is invalid. Any marriage without a witness is void. No effect is attached to what is invalid. But in the case of what is void, certain effects are attached to it. This is why the dowry and 'iddah (period of waiting) for a married woman after the death of her husband become necessary. In the latter, if a baby is born, he will be attributed to the father. And the void sale makes possession bad if there is grasping.<sup>328</sup>

### 2.3.2 The Emergence Of The Difference Between The Ḥanafī And The Majority Of The Jurists

The basis of the difference between the majority of the jurists and the Ḥanafīs is their differences on the effect of prevention addressed to the description of the

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<sup>327</sup> Ibn Al-Subkī, *Sharḥ Jāmī' Al-Jawāmi'*, 1, p. 80.

<sup>328</sup> Ibn Badīrān, *Al-Madkhal Ilā Madhhab Al-Imām Aḥmad*, p. 69, 70.

obligatory work to it. This is in case of the prohibition of a sale based on interest, and prohibition on the selling of unknown things or the conditional reception. The Ḥanafīs see that it depends on the nullity of the sale only. But the origin of the work is left on its legality and the majority of the jurists see that it depends the nullity of the original description.<sup>329</sup>

The opinion of the majority of the jurists is the right one based on the text, consensus and meaning. Concerning the text, evidence is gathered from what is narrated by Al-Bukhārī, Muslim and Abū Dāwūd, hearing from ‘Ā’ishah: “Whosoever does work not within the religion will not be accepted: this means that what is prohibited cannot to be right and is unaccepted. There is not doubt that what is being prevented is not to be recommended and it is not also from the religion. All Muslim jurists have agreed on the invalidity of the rejected contracts such as the invalidity of the marrying of the disbelievers based on the word of the Prophet: “Do not marry the disbeliever women”. Prohibition is associated with the order in application and intention, and it is against living since the order is evidence of correctness, then let the prohibition be evidence of invalidity for correctness because of prohibition being correspondent for the order. It is expected that the rule of one of the corresponding points be the rule of the other.”<sup>330</sup>

Based on this, it is clear that the consideration of the validity and the invalidity of the section of the written rules is the right one because while validity is

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<sup>329</sup> Wahbah al-Zuhaylī, *Usūl al-Fiqh al-Islāmī*, 1, p. 107.

<sup>330</sup> Ibid, 1, p. 108.

the one that relates to the legal effects on actions, invalidity is the lack of that relationship. The rule on the correctness of selling, for example, is the rule of reason based on its legal rules. Some said validity and invalidity are rules of reason and not of legality, because correctness is related to the fulfillment of an action as it is the one that feels it.

### 2.3.3 What Is Related To The Invalidity Of *Al-Ijārah*

The jurists have differed on the division of the contracts in terms of their description. The majority of the jurists have held that contracts or transactions are either correct, i.e., the one on which effects are attached, or invalid on which the legal effects do not relate.

Based on the opinion of the Ḥanafīs, they divided contracts and transactions into three parts:

1. Contracts or transactions fulfilling all its pillars and conditions can be correct relating to it all effects. The example of this is *al-ijārah* in which the guided worker connects it with the required conditions.
2. A contract or transaction with a flaw in its pillars and fundamental conditions will be invalid.<sup>331</sup> No legal effects will be related to them. The conditions of a fool or an insane person in a business are regarded as

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<sup>331</sup> Al-Zayla'ī, *Tabyīn al-Haqā'iq Sharḥ Kanz al-Daqā'iq*, 5, p. 121.

invalid *al-ijārah* (hiring).

3. Contracts or transactions where pillars and complete conditions have certain flaws will be regarded as void/null; effects are related on their execution even if the flaw is in them.

In the void *al-ijārah*, fulfilling all requirements will ask for the removal of the void reason. If it is removed then the contract is correct and the effects will be related to it. If the reason for the invalidity is not removed and even if there is advance and no issuance, contract can be related with effect, which is the possession of the worker of his reward. The void *al-ijārah* is the one all of whose conditions lack correctness; the original rule is the actualization of the owner of the payment in its kind and not in the intended. But in the case of the invalid *al-ijārah*, it is the one, which fails to fulfill one of the conditions of the contract. Thus there is no rule.<sup>332</sup>

### 2.3.4 The Effects Of The Void Contract

Based on the opinion of the Ḥanafīs, it can deserve annulment even though there is safety on the original contract because it fulfills the conditions of making the contract as they consider void hiring as that type whose correct conditions have been unfulfilled because according to them what is void is the difference in contracts based on the violation of its legal system.<sup>333</sup>

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<sup>332</sup> Al-Kāsānī, *Badāi' Al-Ṣanāi' fī Tarfīb al-Sharāi'*, 4, p. 218.

<sup>333</sup> Review *Majallah Al-Aḥkām Al-'Adliyyah*, Articles No. 460, 462.

Based on the opinion of the majority of the jurists, the annulment of *al-ijārah* is because they do not differentiate between what is a void and an invalid contract and they see that the contract is missing and what the law has ordered to be prohibited is to be left. And prohibition means the absence of contract legal terms.

This happens because the prohibition has specific conditions of making contracts or condition of correctness. Prohibition in all these results in the lack of related effect on it.<sup>334</sup>

In this effect, the benefit of the employee will be illegal and he is to have customary pay and not the specified one that has been agreed to. If he concludes the contracts, he fulfills the benefits or he spends time that allows him this benefit it is like sale and the benefit is like a corporeal one.

And the judge is obliged to annul the contract if it demands that because contracts becomes void and what is void has to be legally removed.

### **2.3.5 The Demerits Of The Reward In The Contract Of Hiring Of Persons**

Payment is made in the contract of void hiring by fulfilling benefits and not only by entering into a contract and the jurists are divided into two schools on the permissibility of pay in the case of the lack of fulfillment of the benefit.

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<sup>334</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 6, p. 17.

### 2.3.5.1 First School: The Mālikīs, Shāfi'īs And The Opinion Of Imām Aḥmad

Pay is obliged on the hirer in the case of fulfilling the benefit. Their proof in this is that a void sale is like the correct one in maintaining exchange. This is so in the case of hiring. If the contract is concluded on it and time passes, it is possible to benefit from it. Indeed, the pay is the same for the period whether the benefit is enjoyed or not.<sup>335</sup>

### 2.3.5.2 The Second School

The majority of the opinion of the school of Imām Mālik, and the second opinion of Imām Aḥmad agree that the employer does not need to pay rewards in this case because it is a void contract. The reason of the benefit is not fulfilled and he is not obliged to reward as in the case of a marriage that is void. But if the benefit is fulfilled then he is obliged to pay the reward.<sup>336</sup>

I agree with the opinion of the jurists when they say that if one offers work to a worker and fails to give him that work, he should still pay the worker even though he has not done the work.

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<sup>335</sup> Al-Dardīr, *al-Sharḥ Al-Ṣaghīr li Aqrab Al-Masā'il li Madhhab Al-Imām Mālik*, 3, p. 23, Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 6, p. 17.

<sup>336</sup> Al-Kāsānī, *Badāi' Al-Ṣanāi' fī Tarfīb al-Sharāi'*, 4, p. 218. Review *Majallah Al-Aḥkām Al-'Adliyyah*, Article No. 461.

### 2.3.5.3 There Is A Difference In Two Aspects

The case in which the contract is void because pay has not been given or the intended pay is not known. In this case, the employer needs to give similar pay as was agreed to.

The other case is that in which the reason of void hiring is another reason as a condition contrary to the intention of the contract. The example is that when it is imposed on the employee the assurances to do what vanishes either by doing or by doing other thing.<sup>337</sup>

The majority of the jurists are of two opinions: that it is obligatory to pay a similar pay, which has been agreed to even if it increases on the intended pay.

The opinion of Imām Abū Ḥanīfah and two of the Ḥanafīs is that it is obligatory to pay the similar pay and that it should not increase on the intended pay in the contract.<sup>338</sup>

### 2.3.6 The Evidence Of The Majority Of The Jurists<sup>339</sup>

1. That *ḍamān* (guarantee) in exchange for physical things which are based

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<sup>337</sup> Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuhū*, 4, p. 377.

<sup>338</sup> Muḥammad Salām Madkūr, *'Aqd Al-Ījār Fī Al-Fiqh Al-Islāmī Al-Muqāran*, (Cairo: Maktabat Wahbah), p. 228.

<sup>339</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 6, p. 17-18. Review *Majallah Al-Aḥkām Al-'Adliyyah*, Articles No.461, 462.



on its value and it is compulsory to give each value.

2. Analogy on the selling of void physical things as the similar price should be paid whatever it reached.
3. It is narrated that the Prophet (PBUH) said in marriage without a dowry (if he enters with her in marriage, she is entitled to the similar dowry no paper deduction or addition) this *ḥadīth* shows the necessity of the value in the void contracts and it is the similar reward.
4. What has been said by Ibn Ḥazm,<sup>340</sup> in the void hiring, if it is concluded it is annulled, and what is reached to and something passes in it, it is concluded or anything that is concluded with similar pay, based on the word of Allāh “there is the law of equality”.<sup>341</sup> If anyone uses the money of another person in the right way, it is prohibited to take it. He is to be paid the same amount.
5. It is obvious that benefits should have value. In this case, reward is compulsory in both its invalidity and soundness.
6. In the case of the void hiring, it cannot take place unless with a similar reward. It is not a recalled wage because the intended reward cannot exist with an incorrect contract. If the contract is void, the value of the amount

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<sup>340</sup> Ibn Ḥazm, *Al-Muḥllā*, 8, p. 191.

<sup>341</sup> *Al-Qur’ān, Al-Baqarah* (2): 194.

is compulsory.

7. Contracts of the rewards should be based on the equality of the two exchanged things, and the contract of hiring of exchangeable things in quality cannot be valid unless with the similar pay of whatever amount. The similar pay is the one that is obliged here to fulfill justice and equality between the two rewards.

### 2.3.7 Evidence Of Abu Ḥanifah And The Two Disciples<sup>342</sup>

First Proof: Benefits are based on legal necessary contracts and because of serious need. If the two parties entering into a contract evaluate it with pay no increase should be put on it because this increment will be compulsory with the contract and this is what is allowed.

Second proof: Analogy is not allowed on sale because he does not work himself but gets the value of the facility. But the benefits are not valuable (to weight) here is a difference of view.

Third Proof: In this, there is a warning to the contractors who transact it because they have agreed on a specific reward and not on an increment, which is not allowed.<sup>343</sup>

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<sup>342</sup> Al-Zayla'ī, *Tabyīn al-Haqā'iq Sharḥ Kanz al-Daqā'iq*, 5, pp. 121, 122.

<sup>343</sup> Al-Zayla'ī, *Tabyīn al-Haqā'iq Sharḥ Kanz al-Daqā'iq*, 5, p. 122.

The right opinion is that of the majority of the jurists which says that commitment in the void contract is the similar reward in whatever amount, whether the reward is known or not because if the employer agreed with the benefits then the employee will have to produce work similar to the reward because every gain has its liability.

## SECTION FOUR

### THE EMPLOYEE

We shall proceed in this chapter to the definition of employee and the points of contrast between an employee and the associate employee. We shall also explain the opinions of the jurists about the responsibility of the employee and the rule of the *ḍamān* by the manufacturer for what his employee is responsible. This shall be in the following sections:

1. Definition of employee according to the jurists.
2. *Ḍamān* of what can be blamed on the part of the employee.
3. *Ḍamān* of the manufacturer who is blamed by his employer.

#### 2.4.1 Definition Of The Employee And The Associate Employee According To The Jurists

The jurists define an employee as the person who does a specific timely work for a person. The contract will be based on that time and he deserves pay by being present at that time. And if he does not work, his benefits will be under the discretion of the one who employs him at the time of the contract.<sup>344</sup>

The employee is not allowed to work for anybody other than his employer except with the latter's permission, otherwise his pay can be affected, and even if he

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<sup>344</sup> Al-Marghanānī, 'Alī Ibn Abī Bakr. *Al-Hidāyah Sharḥ Bidāyah al-Mubtadī*, 3, p. 245; Al-Shirāzī, *Al-Muhadhab fī Fiqh Madhab Al-Imām Al-Shāfi'ī*, 1, p. 408; Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 6, p. 105.

works for free, the employer has the right to deduct from his pay the amount of work done without his permission because the specific time agreed upon in the contract belongs to the employer. In this case, he is not allowed to use that time for someone else even for voluntary purposes.<sup>345</sup>

The employee is not to be prevented from performing prayers, fasting, performing *jamā'ah* prayer and *'īd* and the employer is not allowed to deduct anything from his pay for performing them.<sup>346</sup>

#### **2.4.1.1 The Difference Between The Employee And The Associate Employee**

##### **2.4.1.1.1 Definition Of The Associate Employee**

He is a person who works for an employer (hirer) like a tailor who sews for people, and as a porter who carries for anybody. It has been defined as a person who does not deserve pay until he works, such as a dyer. In addition, what is agreed upon does not prohibit general work and that the benefits are not reserved for only one person.<sup>347</sup>

This is applied to the hiring of a doctor, the owner of a special clinic, a teacher, a contractor who constructs houses, a driver of all types of transportation –

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<sup>345</sup> Ibn 'Ābidīn, *Hāshiyat Radd al-Mukhtār 'Alā al-Durr al-Mukhtār*, 5, p. 70.

<sup>346</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 6, p. 41.

<sup>347</sup> Review *Al-Fatāwā al-Hindī* (Al-Qāhirah: Al-Maṭba'ah Al-Amīriyah, 1310H), 4, p. 184, and Al-Marghanānī, 'Alī Ibn Abī Bakr. *Al-Hidāyah Sharḥ Bidāyah al-Mubtadī*, 3, p. 243.

air, land, maritime – and the farmer and other services such as trading, brokers, agencies and road guides etc.<sup>348</sup>

Some said that an associate employee is a person who works for more than one person such as tailors and dyers. The explanation for this is that the associate employee is one who is not obligated to work for one person or who is not conditioned to work for only one person. He is an associate since he is not prevented from working for more than one person.<sup>349</sup>

According to the Sharī'ah, it is preferable to say that the associate employee is one whose contract is issued on its benefits and these benefits cannot be known except by mentioning its duration and distance. Its benefits are known in the rule of the physical work. For the associate employee, what is contracted should be described in terms of what happens in the physical sense. In this case, it does not need to mention the duration and it is not prohibited for him to accept. The rule of the associate employee is that he has to accept the work from more than one person and the associate employee is able to work for more than one person.<sup>350</sup>

In reality, the associate employee is a person who makes a contract for known piece of work and the duration of the work will not be mentioned. And *al-ijārah* on the duration is not allowed unless its type is mentioned and if the work and duration

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<sup>348</sup> Muḥammad Salām Madkūr, *'Aqḍ Al-Ījār Fī Al-Fiqh Al-Islāmī Al-Muqāran*, (Cairo: Maktabat Wahbah), p. 230.

<sup>349</sup> Ibn 'Ābidīn, *Hāshiyat Radd al-Mukhtār 'Alā al-Durr al-Mukhtār*, 5, p. 71.

<sup>350</sup> Al-Marghanānī, 'Alī Ibn Abī Bakr. *Al-Hidāyah Sharḥ Bidāyah al-Mubtadī*, 3, p. 243.

are combined, the first will be chosen.<sup>351</sup>

If someone hires a shepherd to look after his known number of sheep for one *dirham* monthly, that person is called an associate employee except when he declares (in his last word) something that shows that he is an employee by saying that he will not raise another person's sheep. And if he mentions the duration first by saying that he hires a shepherd to look after sheep for a month in return for a specific amount of money. In this case, he is an employee unless he mentions something in his bargaining that show that he is an associate employee, as for example, when he says that he will raise the sheep for a number of people.<sup>352</sup>

There is no doubt that this is what Al-Kadiwari has chosen as a definition for the associate and more than that.

Şāhib Al-‘Inayah said: his saying that he is the person who does not deserve pay until he actually works alone and defining him as working alone is not allowed according to most of the commentators. The truth is to say that it is of the literal definitions.<sup>353</sup>

And according to Ibrāhīm, may Allāh have mercy on him, he did not use to insure the associate employee or anyone else and he categorized the associate employee, in his book, among the bleachers, the tailors, the shoemakers and all those

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<sup>351</sup> Ibn Najm, *Al-Baḥr al-Rāiq* (Miṣr: Maṭba‘ah Dār al-Kutub al-‘Arabīyah Al-Kubrā, 1333H), 8, p. 29.

<sup>352</sup> Ibn Najm, *Al-Baḥr al-Rāiq*, 8, p. 30.

<sup>353</sup> Ibn Najm, *Al-Baḥr al-Rāiq*, 8, p. 30.

who accept work from more than one person. Having single employee is to employ a man to work for him for one month or to go with him to Mecca or what resembles that in the sense that he cannot pay another himself.<sup>354</sup>

In reality, the lone employee is one whose contract is issued from the benefits and his benefits are not known until there is a mention of the duration or by the distance its benefits in the physical rule and if he is entitled to the reward contract, he is not able to get the answers from someone else.<sup>355</sup>

The associate employee is the one whose contract is issued on a piece of work that is known by mentioning its place because the contracted item has to describe what happens in the physical work, and he does not need to mention the duration and he is not prohibited from doing that work like the similar work by some one else. This is because what the first deserves in the Islamic rule on his shoulder and it is the similar (peace) by selling the corporeal because the (peace) in it is when there is debt on his shoulder, he does not have any excuse for accepting peace from someone else and selling of what contains corporeal and after he sells it to some one, he does not own its sell from some one else and this is why this is called associate employee and the first the single employee.<sup>356</sup>

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<sup>354</sup> Al-Sarakhsī, *al-Mabṣūṭ*, 15, p. 79.

<sup>355</sup> Ibid, 15, p. 79.

<sup>356</sup> Ibid, 15, p. 80.



## 2.4.2 The Insurance Of The Employee Whose Works Can Be Blamed

There are two major opinions between the jurists of the Sharī'ah who disagree on the issue of *ḍamān* of the employee:

### 2.4.2.1 First, The Opinion Of The Majority

The conclusion of the opinion of majority of the jurists is that the employee is trustworthy so nothing can be insured by him in terms of damage by his acts or by his money or what is destroyed by his knowledge except if he does it intentionally and he has the complete pay because the physical act is trust in his hand which is being acquired from his master and there is no insurance for this.

He<sup>357</sup> said that there is no *ḍamān* for an employee for what is destroyed in his hand or something damaged in his work, concerning the first, because the physical work is a trust in his hand because he acquired it with the permission of his master and this is the same as Abī Ḥanīfah and the two have similar ideas about it because the insurance of the associate employee is a kind of *istiḥsān* to them to protect the wealth of the people and the single employee does not accept work and safety most of the time. The analogy is taken. In the second, it is because the benefits are owned for the employer and if he acts in his belongings and will become his deputy to do things on his behalf as if he does it by himself, and this is why he cannot insure him.

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<sup>357</sup> Mālik, Abū Ḥanīfah wa Zufar Abu Thawr, wa Aḥmad, wa Ishāq wa al-Muzani wa Abu Sulayman wa Ibn Ḥazm al-Zāhirī wa al-Imāmiyyāt wa Al-Zaydiyyah wa Madhhab al-Imām al-Shāfi'ī another statement has been narrated on him that states that all those to pay are equal (they are insured).

As far as the employee is concerned, he is the one who is employed for a period; there is no insurance on him as long as nothing is done intentionally. What he destroys by his action as long as it is under the supervision of the owner and in his presence.<sup>358</sup>

There is no insurance on the associate employee and the non associate employee and not on the manufacturer in the absolute sense unless what he does is confirmed to be an offence or loses.<sup>359</sup> And their evidence is the word of Allāh and eat up not another's property unjustly (in any illegal way).<sup>360</sup>

If the leg of a carrier slips on the road or he falls and his thing spoils, even if that is in a crowd of people, he cannot be insured based on the consensus because he cannot prevent this from happening and this is also the case in absolute burns, or absolute drowning in water and even if the carrier is surrounded by people.<sup>361</sup>

#### 2.4.2.2 Second, The Opinion Of The Shāfi'ī Jurists

According to them, the employee can be insured as the associate employee. Imām Shāfi'ī, may the mercy of Allāh be on him, said that the payers are the same and that he is to protect the wealth of the people; he used to say that people cannot be

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<sup>358</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 6, p. 108, 462.

<sup>359</sup> Ibn Ḥazm, *Al-Muḥllā*, 8, p. 201.

<sup>360</sup> *Al-Qur'ān*, *Al-Baqarah* (2): 188.

<sup>361</sup> Al-Kāsānī, *Badā'ī' Al-Ṣanā'ī' fī Tarfīb al-Sharā'ī'*, 4, p. 211.

good unless by that.<sup>362</sup>

And the reality is what is said by the majority: because the special worker is a trustworthy person whose boss has given him the equipment and the things he works with, he is permitted to act and to work. He becomes the deputy of his boss and he is not insured for that reason. He is also not insured if the damage happens beyond his control. If the damage is done intentionally, this is considered as a shortcoming on his part and the justice requires him to be insured in this case.<sup>363</sup>

If the associate employee employs an employee and his clothes are torn, there is no insurance on him and the associate employee will be insured. He is the one whose benefits have been evaluated by the work, which is destroyed as the cut of the bleacher, or the split of the carrier whether he works in the house of the employer or somewhere else.<sup>364</sup>

Therefore, nothing which is destroyed by someone else or by the offense of another is insured. And he is not allowed to give him his pay except in return for what he does in the house of the employer and he does not have to pay unless concerning the building in the house of another person. He is entitled to the absolute pay and the transfer pay with condition of his work in his house. If he damages it or holds him for the pay, it is damaged and the owner is to insure the work done and he has to give him his pay or the value of what is not done and he

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<sup>362</sup> Al-Shirāzī, *Al-Muhadhab fī Fiqh Madhab Al-Imām Al-Shāfiʿī*, 1, p. 543.

<sup>363</sup> Ibid, 1, p. 544.

<sup>364</sup> *Al-Kāfi*, 2, p. 331.

does not have a pay.<sup>365</sup>

### 2.4.3 The *Ḍamān* Of A Manufacturer Whose Boss Blames Him

In most of the cases, the workers such as porters, marins, weavers, tailors, cotton carders, dyers, shoemakers, shepherds, cuppers, masons and diggers start to work with the assistance of some employees and assistants. If damage occurs with these people, the jurists have not agreed on the rule of the insurance about a worker whose employer blames him.

The goods in his hand are not guaranteed from destruction, which means that he is not insured whether damages occur because he can prevent it like theft or because of something, which cannot be prevented like absolute burning and major disasters.<sup>366</sup>

#### 2.4.3.1 The Reasoning Of Abū Ḥanīfah

According to Abu Hanifah, there is no insurance on him like an agreement. It is not allowed to insure something that cannot be avoided such as death, rape and even if it is insured based on the different situation, we cannot say that contracted item is protection but the work and protection together are different from farewell on pay because protection is intended obligatorily. And based on what is destroyed

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<sup>365</sup> *Al-Kāfi*, 2, p. 331.

<sup>366</sup> *Al-Kāsānī, Badāi' Al-Ṣanāi' fī Tarfīb al-Sharāi'*, 4, p. 211.

because of his work and that contract means the protection of the contracted item, which is the work, so if he is not safe he is insured. It is narrated by 'Umar and 'Alī that they did not use to insure the associate employee and that Ibrāhīm Al-Nakha'ī said and the narration is different from them and the evidence is not necessary.<sup>367</sup> It is said that this is the difference of the time and era and it is mentioned that the difference exists between the disciples and our Imāms, may Allāh accept them. The difference is that they have the protection of what is contracted about and what does not lead to obligation cannot be obligatory and the contract becomes insured from it and the similar thing has been said that there is a judgment in this era because of the changes of the situation of the people and the condition of *ḍamān* on the employee is that there is no *ḍamān* on something that cannot be prevented. Therefore there is no consensus because it is a condition that cannot be a contract even if what can be prevented can be allowed in contrast to the view of the Imām.<sup>368</sup> Some made a rule with reconciliation on the half of the value of what is destroyed in the hand of the associate employee that can be prevented in his work and he restricted with damages so as to prevent the mistake.<sup>369</sup>

#### 2.4.4 Implementation And Issues

If he gives a cloth to a bleacher to cut it and he comes to get his cloth and the bleacher gives him some cloth thinking that it his, he is insured for him and

<sup>367</sup> Al-Ṭahḥāwī, *Sharḥ Ma'ānī Al-Āthār*, (Egypt: Maṭba'at Al-Sa'ādah), 2, p. 149.

<sup>368</sup> In the narration the Faqīh Abī Al-Layth fī Al-Ajīr al-Mushtarik with the word of the Imām and he made rule with it and in al-Mazariyat wa al-Mu'āmalah fatwa on their words for necessity.

<sup>369</sup> Ibn 'Ābidīn, *Hāshiyat Radd al-Mukhtār 'Alā al-Durr al-Mukhtār*, 6, p. 35.

whosoever takes something thinking that it is his and it does not belong to him, he is insured and even if the owner of the cloth sends someone to collect the cloth there is no insurance on the messenger, even if the messenger takes the cloth in the absence of the bleacher, the owner of the cloth has the choice. If he likes, he can insure the bleacher or the messenger and anyone of them, insurance cannot return to the other.<sup>370</sup> If he insures to both of them, and if the damage is done before the work, he can insure the value of the work which is not done and there is no pay on that and if it is after the work, the owner of the cloth, can either insure its value that he did not work for and there is no pay or give him its value and will give him his pay.<sup>371</sup>

He said in *Sharḥ Al-Ṭaḥāwī* that he will leave with him an amount of the pay and if he claims to have returned it to its owner and the owner denies his word, then the truth is what comes from the employer according to the Imām. But he will not believe in the word of the other and both of them have the word of the owner of the cloth.<sup>372</sup>

He said, may the mercy of Allāh be on him, that if a damage happens in the work of a person such as the tearing of the cloth because of inaccuracy, and the slipping of the camels and the cutting of the rope that it is pulling and the sinking of the ship – these answer all the questions.<sup>373</sup>

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<sup>370</sup> Al-Marghanānī, 'Alī Ibn Abī Bakr., *Al-Hidāyah Sharḥ Bidāyah al-Mubtadī*, 3, p. 245.

<sup>371</sup> Ibid, 6, p. 16.

<sup>372</sup> Al-Ṭaḥāwī, *Sharḥ Mānī' Al-Athar*, (Egypt: Maṭba'at Al-Sa'ādah), 2, p. 150.

<sup>373</sup> Ibid, 2, p. 152.

Imām Shāfi'ī and Zāfir said that it cannot be insured because he was permitted to do it so he becomes like the assistant and the absolute issue is that the work can be organized by the type of the blame, and the safe one is what cannot be prevented.

Accordingly, damage is done by the work not complete permission, which is safer than its kind, by custom and tradition. In this case, it can be insured and in the Muḥīṭ, if there is damage caused because of shortcomings in his work and because of a lack of knowledge of the work, he can be insured according to Zāfir and us and he limited it by saying that by his work. So his work includes himself and the work of his employer because it is legally his work. He said in the Muḥīṭ that the associate employee could insure what is damaged in his hand based on three conditions <sup>374</sup>

The first: that he should possess in his ability a part in that damage. If he does not have ability in that as in the case of the sinking of the ship because of waves or wind collision with land, there is no insurance on the seamen.

The second: that the place of the work be under his command completely. If the place of the work is not given to him as to find the owner of the place in the ship or his deputy and then the ship is wrecked because the rope is pulled by the seamen, he is not to be insured. <sup>375</sup>

The third: That the content should be something that is allowed by contract. If

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<sup>374</sup> Al-Sarakhsī, *al-Mabṣūṭ*, 3, p. 30.

<sup>375</sup> Ibid, 3, p. 29.

he hires an animal to carry a small or a big slave there is no insurance on the goods from which he gets his earnings.

He said in the Muḥīṭ, if damage takes place by the work of the employee (a bleacher) without intention the insurance is on the bleacher not on the employee because damage is caused by the bleacher and if he moves his cloth and it tears by looking, if he was moving like him there is no insurance because he is allowed to take care and if he is not moving as to be soft, he is insured. And if a lamp falls from the bleacher's hand and burns the cloth he is or carrying something and it falls on the cloth of the bleacher and it tears, therefore, the insurance is on the master.<sup>376</sup>

If he hires a man to work for him and something from the house falls from his hand and is destroyed he is not insured, even if the damage falls on the cloth of the master and tears. In this case the employee is insured because he is not in charge of the place.<sup>377</sup>

It is understood that if the instrument falls from the hand of the employee and it hits something, the insurance is on the bleacher. Jurists said that if the cloth is damaged by the hammer in the dying process, it is the employee who is insured and if it damages the cloth of the bleacher, the master is insured without the employee because this work is not under him and the master is insured. Based on this, if a human being is affected and they said if a guest falls on the carpet of his master and

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<sup>376</sup> Al-Sarakhsī, *al-Mabṣūṭ*, 3, p. 31.

<sup>377</sup> Al-Marghanānī, 'Alī Ibn Abī Bakr. *Al-Hidāyah Sharḥ Bidāyah al-Mubtadī*, 3, p. 246.



tears because of his walking, he is not insured because he is not in charge of it and the same applies in the case of falling and breaking of the utensils, in contrast to the case if the utensils slip and a damaged he is insured because he is not in charge of them.

If the bleacher dries the cloth on the rope and something destroys it, the insurance is on the carrier. And if the shepherd raises the sheep and it dies or someone falls on others and dies. If it is an associate employee he is insured and if he is an employee there is no insurance.<sup>378</sup> For example, a man hires a carrier to carry for him something to a place and the carrier falls on the road, if he intentionally did it with his hand, it is insured but if something happens that he cannot avoid, he is not insured according to the Imām but according to them it can be insured.<sup>379</sup>

In the case of the bullet, if it spoils on the way and if his leg slips after reaching the intended place he has a reward and there is no insurance on him. And if it rains and the load spoils or it is affected by the sun and it spoils there is no insurance based on the word of the Imām and according to Abū Yūsuf it is insured. A person hires an animal to carry on it a load and it falls, the owner is not insured and the load is insured. Jurists said that he can insure the load if the boy is incapable of taking care of it. The load will not be insured if he makes the animal pass over a bridge and a rock and heavy thing fall on it, then it is insured.<sup>380</sup>

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<sup>378</sup> Ibid, 3, p. 248.

<sup>379</sup> Al-Sarkhasī, *Al-Mabsūṭ*, (Egypt: Maṭba'ah Al-Sa'ādah, 1324H), 3, p. 31.

<sup>380</sup> Ibn Najm, *Al-Baḥr al-Rāiq*, 8, p. 31.

commotion was brought to him saying that a man rented his house to him and he left his keys in the middle of the month and Shāriḥ said that he is innocent of the house and this used to be the School of Shāriḥ in *al-ijārah* because it does not depend on compulsion. Each one of them is alone with his void because this is a contract on inexistence in the level of loan because permission is for need and there is no need to prove the description of necessity and we will not take the aspect of *al-ijārah* of contract in reward. Necessity is originally in rewards because rewards are to be from two sides and there is no balance without looking at the description of necessity.<sup>388</sup>

Shāriḥ made a rule by the double of the contract but he made this double as a reason as he said that he can be alone with the void whether he has a reason or not or if he does not have and who says that he will not be alone with the void with the existing excuse he has made it a strength and in the two sides there is the meaning of harm. There is a balance in seeing it and the harm will be out, as we say, because with the void he seeks an excuse with the intention of removing the harm from him and in terms of void without excuse others are intended with harm.

We argue that it is annulled by excuse because the peculiarity of exchange does not prevent annulment when necessity to repel harm arises. For example, a buyer who returns the commodity he purchased because of a fault or defect in it. And it is obvious from what he says that the contract is annulled when an excuse arises resulting from the action of the buyer.<sup>389</sup>

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<sup>388</sup> *Al-Fatāwā al-Hindī*, 4, p. 184.

<sup>389</sup> Ibn Najm, *Al-Baḥr al-Rāiq*, 8, pp. 30-32.

## **SECTION FIVE:**

### **SHARED LABORER AND ITS RULES**

After having discussed both private and shared laborers in the previous chapter, it is appropriate at this juncture to explain the rules regarding what becomes faulty or lost in his hands. We will also explain the rules regarding disagreement between the workman and the tenant and whether it is permissible for the workman to hold the asset in order to recover his fee? This section will be divided as follows:

**Part 1:** Compensation for what is lost in the Hands of a Shared Laborer.

**Part 2:** Disagreement between the Employee and the Employer.

**Part 3:** Holding the Asset to recover the Fees.

**Part 4:** Responsibility of Doctors for Carelessness.

#### **2.5.1 Compensation For What Is Lost In The Hands Of A Shared Workman**

This issue is discussed under the following points:

- Stipulation of Guarantee.
- Insuring a Shared Workman.
- What is Obligatory in guarantee and the Considered Time for evaluating the Guarantee.

### 2.5.1.1 Stipulation Of Guarantee

The Islamic jurists are of two opinions with regard to the guarantee of a shared laborer.

#### 2.5.1.1.1 First: The Opinion Of The Majority<sup>390</sup>

As far as the supporters of this view are concerned, the employer of the workman stipulates the guarantee over the workman in things whose guarantee is not originally obligatory on him. This is because any condition on trust is void if it contradicts to the nature of the very contract of trust. As it is impermissible to deny guarantee from the laborer because it makes the contract void, in this case, the workman will receive the fee according to custom. Their evidence for prohibiting the condition of guarantee is as follows.

It is reported from Imām Aḥmad that he said “in the condition of guaranteeing the asset: hiring with guarantee is not recommendable” it is also reported from the jurists of Madīnah that they said: “no renting with guarantee”.<sup>391</sup>

#### 2.5.1.1.2 The Second View

The Ḥanbalīs express a view according to which a condition is considered

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<sup>390</sup> The Ḥanafīs, the Mālikīs, Zaydis and some Hanbalis.

<sup>391</sup> Ibn Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*, 2, p. 174.

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obligatory and acting accordingly is obligatory. It is reported that Imām Aḥmad was asked once about this and he replied "Muslims are bound by their conditions". And this alludes to the fact that conditions create obligation for guarantee.<sup>392</sup>

#### 2.5.1.1.3 Guaranteeing A Shared Laborer

To the legal maxim which says that every action that causes harm on others should be removed, the jurists have formulated the maxim "harm shall be removed". The origin of this maxim is the Prophetic saying "harm shall not be inflicted nor reciprocated".<sup>393</sup>

And if it becomes impossible to remove harm, it becomes obligatory to compensate its effect whether it is physically or morally. There is no disagreement between the Muslims jurists on the obligation incumbent upon the shared laborer who negligently causes harm to the thing in his hands. However, in the event of breakage not caused by negligence on his part, the two companions of Abū Ḥanīfah, the Ḥanbalīs, some later Mālikī jurists, and a single view from the Shāfi'ī say that if decay takes place whether intentionally or unintentionally like being eaten in a natural fire, he would also be responsible for its compensation if he happened to have been in a situation in which he could have prevented it from happening. This is based on the practice of both 'Umar bin al-Khaṭṭāb and 'Alī bin Abī Ṭālib. And some Mālikīs and Zufar, the Ḥanafīs stipulate an intolerable negligence on his part. But if

<sup>392</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 6, p. 118.

<sup>393</sup> Imām Aḥmad has reported this ḥadīth in his *al-Musnad* and Imām Mālik in *al-Muwattaʿa*.

the loss happens due to a cause beyond his control like fire or theft, he will not be responsible based on the doctrine of *istiḥsān* (plea of preference).<sup>394</sup>

### Their Evidence

The workman, they state, takes possession of the thing in favor of a third party, and he who does so, like an agent, will not be responsible for its loss. The analogy may be drawn between a simple laborer and the tenant. The latter's possession of the thing under him is regarded as trust and so is the possession of the simple laborer. Analogy can also be drawn between a simple laborer and a shared laborer.

The work, they say, and protection is an obligation in subordination to the work. And the work will not be possible except by keeping the asset with him. Responsibility cannot arise except by deliberate aggression. "No aggression except on those who commit injustice" the Qur'ān says and the Prophet (PBUH) removed the responsibility of guarantee from those who are hired".<sup>395</sup>

And Abū Ḥanīfah has ascribed to the saying of Prophet Ibrāhīm that if an asset is caused to decay by someone other than its handler, then he will not be responsible for compensation whether the workman is simple or shared. Abū Yūsuf and Muḥammad have also ascribed to this view. Based on contradictions reported

<sup>394</sup> Al-Kāsānī, *Badāi' Al-Ṣanāi' fī Tarātib al-Sharāi'*, 4, p. 20.

<sup>395</sup> Al-Kāsānī, *Badāi' Al-Ṣanāi' fī Tarātib al-Sharāi'*, 4, p. 21; Al-Shirāzī, *Al-Muhadhab fī Fiqh Madhab Al-Imām Al-Shāfi'i*, 1, p. 534.

from the companions of the Prophet like 'Umar and 'Alī, the later jurists have adopted a *fatwā* that stresses reconciliation (*ṣulh*) on a fifty-fifty basis.

It is reported from Shāriḥ<sup>396</sup> that he used to hold navigators responsible for everything except what is caused by fire or sinking. A navigator is a shared laborer and we have explained the position of Shāriḥ earlier in which he said a shared laborer is held responsible for loss. Ibn Abī Laylā took the same view. He however, exempted navigators from that rule.

It is reported from Shāriḥ that a man came to him with dyeing materials saying that I gave this person my clothes for dyeing and the fire burned them. And Shāriḥ asked him for compensation and the dyer asked Shāriḥ how he was to be held held responsible since they burned when his house was set on fire? Shāriḥ replied: what if his house was set on fire, would you do the work for him without pay? That fire was caused by negligence and in the school of Shāriḥ if the shared laborer's negligence caused the fire he is to be held responsible for the loss.<sup>397</sup>

As for Abū Ḥanīfah, if his house burns down caused by his negligent action, he will be held responsible. But if a third party causes it, he will not be held responsible. A simple shared laborer cannot be held responsible unless and until he fails to follow the instructions of his employer.

It is reported from Abū' Ja'far that 'Alī ibn Abī Ṭālib used to hold a tailor,

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<sup>396</sup> Al-Sarakhsī, *al-Mabṣūṭ*, 15, p. 80.

<sup>397</sup> Ibid, 15, p. 81.



manufactures and the like responsible so as to prevent negligence. It is also reported from Abū Ja'far that 'Alī did not hold them responsible.<sup>398</sup>

His saying "the most acceptable" implies that a shared laborer is not responsible but al-Ramlī issued a *fatwā* stressing his responsibility in the margins of the book *Al-Fuṣūlayn*. His reason for adopting this position was that to him saying otherwise would mean causing loss to innocent people.<sup>399</sup>

This however, contradicts what is mentioned in *Jami' al-Fuṣūlayn Wa Nūr al-'Ayn* and other books.

#### 2.5.1.1.4 The View Of Ibn Abī Laylā

Ibn Abī Laylā held shared laborers responsible for everything and in all cases. His evidence for this<sup>400</sup> is as follows:

The Prophet's saying, "a hand is under the obligation to return what it takes".<sup>401</sup>

The Rightly Guided Caliphs gave their judgments in support of holding these people responsible even if they do not act negligently.

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<sup>398</sup> Al-Sarkhasī, *al-Mabsūṭ*, (Egypt: Maṭba'ah Al-Sa'ādah, 1324H), 15, p. 18.

<sup>399</sup> Ibn 'Ābidīn, *Hāshiyat Radd al-Mukhtār 'Alā al-Durr al-Mukhtār*, 6, p. 647.

<sup>400</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 6, pp. 106-107.

<sup>401</sup> This has been reported by the Four compilers of the Sunnah and al-Hākim. See Al-Shawkānī, *Nayl al-Awṭār*, 6, p. 40. Also see Al-Ṣan'ānī, *Subul al-Salām, Sharḥ Bulūgh al-Marām*, 3, p. 68.

They also add that holding these people responsible for loss is in accordance with public interest.

In Al-Mughnī, Ibn Qudāmah<sup>402</sup> says: al-Shāfi‘ī reported in his Musnad from ‘Alī that he held the workman responsible. It is also mentioned in Al-Mughni that what was passed down from Ja‘far ibn Muḥammad from his father was that he used to hold dyers and blacksmiths responsible. And he, in giving his reasons for this says that people can only be deterred by making them responsible.

#### 2.5.1.1.5 The Preferred View

The researcher supports those who hold them responsible because such a contract is a contract of labour and safekeeping. The proof of what we say is that the workman deserves no commission until he returns the work and that holding them is responsible in the interest of the employer. It is also in the interest of the workman because it prevents him from *ẓulm* (injustice).

#### 2.5.1.2 What Is Obligatory In Guarantee

The majority of the jurist say that when a guarantee becomes obligatory upon the shared laborer, two cases should be distinguished:

1. In the case in which the asset is lost after the work is done. In this case,

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<sup>402</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, pp. 109-110.

the employer has a choice either to hold him responsible for the value of what is not done and what does not have a commission.

2. In the case in which it lost before the work is done. The workman will be held responsible for the value of the remaining part because he did not do anything to deserve a fee.<sup>403</sup>

### 2.5.1.3 The Time For Guarantee Evaluation

For this, three views have been traced:

- i. The Ḥanafīs, the Ḥanbalīs, and a view among the Shāfi'īs, say that what is considered in estimating compensation is the day on which the cause of this responsibility happens.<sup>404</sup>
- ii. The Mālikīs state that the day of estimation is the day of delivery of the work to the shared laborer.<sup>405</sup>
- iii. This view is adopted by the Shāfi'īs. They hold the view that the estimation period lasts from the day that the possession starts to the day the destruction or loss takes place. But if it is said that there is no guarantee without negligence, then the estimation day is the day that

<sup>403</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 6, pp. 109-110.

<sup>404</sup> Al-Zayla'ī, *Tabyīn al-Haqā'iq Sharḥ Kanz al-Daqā'iq*, 5, p. 136.

<sup>405</sup> Ibn Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*, 2, p. 33.

aggression takes place.<sup>406</sup>

### 2.5.2 Disagreement Between The Workman And The Employer Over The Workmanship

According to Imām Abū Ḥanīfah, it is reported that Imām al-Shāfi'ī said that when disagreement between the laborer and the employer takes place, we rely on the statement of the latter under oath. Abū Yūsuf said: I would accept the statement of the employer under oath if their disagreement is not major. But if it is a major one, I will not accept his statement. I will rather impose workmanship according to custom if the workman produces an oath.

Imām al-Shāfi'ī observes that in the event of disagreement over the amount of the workmanship before the work is done, they will terminate the contract. But if the work is performed, they will both produce oaths and the workman will then be paid according to custom. He also said if a man rents a house for an animal for a period of one month and uses it more than that the agreed fee is only for that period specified first and he will then be responsible for the additional time.<sup>407</sup>

Imām al-Shāfi'ī used to say that if a man hires an animal in order to load it with a specific load and then loads it with more than that and the animal dies, he will then be responsible for the value of the animal. Imām Abū Ḥanīfah, however, said

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<sup>406</sup> Al-Shirāzī, *Al-Muhadhab fī Fiqh Madhab Al-Imām Al-Shāfi'ī*, 1, p. 534.

<sup>407</sup> Al-Shāfi'ī, *Al-Umm*, 7, p. 139.

that he will be responsible for the additional load.<sup>408</sup>

If the parties to a contract of lease or hiring disagree over the amount of the benefit or the specific amount of the fee<sup>409</sup> without proof, they will exchange oaths because it is a compensatory contract and as such similar to sale. The ruling (*hukm*) of the oath is the *hukm* of annulment of the contract of sale. And if they disagree over whether the loss was a result of negligence, the statement of the employer is considered. If the asset is consumed and the workman claims that its destruction took place after the work was done and that he deserves a fee and the employer denies that, what will be considered is the statement of the latter.<sup>410</sup>

### 2.5.2.1 The Ḥānāfī Jurists

If disagreement takes place between a tailor and the owner of a dress on the question of returning the dress, the considered statement is that of the tailor because according to Abū Ḥanīfah, he is a trustee. However, if the disagreement is over the payment, the statement of the owner is considered. This is because the work has already been under the workman's responsibility and there is no evidence to prove that it was returned.<sup>411</sup>

The explanation of what converts it from the status of trust into that of

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<sup>408</sup> Al-Khatīb Al-Sharbīnī, *Al-Mughnī al-Muḥtāj*, 2, p. 354.

<sup>409</sup> Al-Shirāzī, *Al-Muḥadḥab fī Fiqh Madhab Al-Imām Al-Shāfiʿī*, 2, p. 409.

<sup>410</sup> Al-Shirāzī, *Al-Muḥadḥab fī Fiqh Madhab Al-Imām Al-Shāfiʿī*, 2, p. 489.

<sup>411</sup> Al-Kāsānī, *Badāiʿ Al-Ṣanāiʿ fī Tarfīb al-Sharāiʿ*, 4, p. 211.

responsibility is that the conversion is done through a number of things; among them is negligence of keeping, because safekeeping is a part of the contract. Among them is also corruption and destruction if the workman carelessly causes that to happen. If he does not cause that to happen, he will not be held responsible in any sense. If he acts as a private laborer, he will be held responsible in some cases according to one view of Imām al-Shāfi'ī. However, according to jurists, a shared laborer will also not be held responsible in any sense. This is because he is permitted to have access to thing to be worked on and he is, therefore, not responsible just like a private laborer.<sup>412</sup> It is, however, said in response to this view that the permission given to the workman is the permission to work and not the permission to destroy. And also a mistake in the actions of a human is not an excuse to deprive people of their rights. Nevertheless, even if a private laborer causes some destruction, his work is under the category of non-existence in the legal sense because he does not deserve workmanship by merely performing the work but by surrendering himself during a specific period. Based on this disagreement, if a porter falls down while carrying certain goods and they break, he will not be held responsible for their destruction because it happens unintentionally in a similar way to when a raging fire burns.<sup>413</sup>

In breach of agreement by the employer; if the workman uses a different road or goes beyond the agreed workmanship, he will be paid according to custom.<sup>414</sup>

If one hires an animal to use it for a specific distance and then uses it beyond

<sup>412</sup> Al-Zaila'ī, *Tabyīn Al-Ḥaqāiq*, (Beirut: Dār Al-Ma'rifah), 5, p. 137.

<sup>413</sup> Al-Kāsānī, *Badāi' Al-Ṣanāi' fī Tarfīb al-Sharāi'*, 4, p. 211.

<sup>414</sup> Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 6, pp. 57-82.

that, he will be obliged to pay the agreed fee and then pay the fee of the additional distance according to custom. But if the animal dies as a result, he will be held responsible for its value.<sup>415</sup> But both al-Thawrī and Abū Ḥanīfah say that he will not be responsible for the additional distance because benefits shall not be guaranteed except when he uses it for more harmful things and it dies even if that distance was shorter.<sup>416</sup>

However, the opinion of the researchers that if the hirer goes beyond the agreed distance, the owner will have an option either to receive the average fee or its value on the day the act took place.

### 2.5.2.2 Means Of Transport In The Hands Of The Employer Is A Trust

A means of transport whether an animal or something else in the hands of the one who hires it is a trust during the period of the contract. He, therefore, will not be held responsible if the means breaks. That is so even if a guarantee was stipulated, as long as he does not deliberately cause its destruction. Imām Aḥmad, however, held the opposite view and Imām Abū Ḥanīfah states that a person who hires a donkey to go to a specific place and agrees to pay one *dirham* but does not mention the nature of its load and then loads it with what people normally load their donkeys with and then the donkey dies, will not be responsible but the

<sup>415</sup> Al-Shirāzī, *Al-Muhadhab fī Fiqh Madhab Al-Imām Al-Shāfiʿī*, 1, p. 404.

<sup>416</sup> *Al-Fatāwā al-Hindī*, 4, p. 490.

contract in this case ceases and is annulled.<sup>417</sup>

This is the same view adopted by the Mālikīs and the Shāfi'īs. They add that if he is held responsible, he will be paid the fee of the distance walked.<sup>418</sup> And in the event of disagreement over the death of the animal, his statement will be considered.

In another view from the Mālikīs and the Shāfi'īs, the person who hires is always responsible in the absolute sense. And as to whether this person is also responsible for what goes wrong from benefits after the end of the period, they hold two views the most correct of which is that there is no responsibility for that.<sup>419</sup>

### 2.5.3 Keeping The Asset To Recover The Fee

One of the fee recovery guarantees is to keep the asset until the workmanship is paid for. The jurists have divided laborers into manufactures, self-carriers (porters) and persons who add quality to the asset like dyers, tailors and carpenters. The following is the position of the jurists:

#### 2.5.3.1 A Workman Who Influences i.e., Who Adds Quality To The Asset

The jurists disagree as to whether this workman has a right to withhold the

<sup>417</sup> Al-Marghanānī, 'Alī Ibn Abī Bakr. *Al-Hidāyah Sharḥ Bidāyah al-Mubtadī*, 3, p. 244.

<sup>418</sup> Al-Khirshī, *Sharḥ al-Khirshī*, (Cairo: Al-Maṭba'ah Al-Amīriyyah, 1333H), 7, p. 26.

<sup>419</sup> Ibn 'Arafah, *Ḥāshiyat al-Dusūqī 'alā al-Sharḥ Al-Kabīr*, 4, p. 24.



asset to recover the fee for his workmanship. Their disagreement covers three views; a group answer in the negative, another answer in the affirmative with conditions and another which permits it without conditions:

The first group:<sup>420</sup> they express the view that it not impermissible to withhold the asset. The reason, they say, is that the workmanship should be paid for; it is a responsibility but not a mortgage in return for the asset. They add that the asset used belongs to the employer and the fee he should pay is a debt to which the asset is mortgaged. As a result, the workman will have no right to keep it except with the consent of the owner.

Al-Zayla'ī takes this position as a proof. He says "because the object to which the contract is concluded becomes surrendered to the owner of the object by virtue of his ownership and as such no one has the right to keep it from him."<sup>421</sup>

The second group:<sup>422</sup> they say that it is permissible for the one who hires to keep the asset to recover its fee provided that he is in real need of that money. This is because the work performed, which is the return for that deserved fee, is in the asset in which the work is done. And since that is the case, if the workman is bankrupt and the employer refuses to pay, he will have the right to keep it until his fee is recovered.<sup>423</sup>

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<sup>420</sup> This is the view ascribed to Zufar from the Hanbalīs, some Shāfi'īs and the Hanbalīs if the one who hires it is not bankrupt.

<sup>421</sup> Al-Zayla'ī, *Tabyīn al-Haqā'iq Sharḥ Kanz al-Daqa'iq*, 5, p. 111.

<sup>422</sup> This is held by the majority of the Hanbalīs jurists.

<sup>423</sup> This is held by the Mālikīs, Abū Hanīfah and his two companions and some Shāfi'īs.

The Third group:<sup>424</sup> they state that keeping it to recover the fee for workmanship is something permitted whether the one who works is bankrupt or not. Because the work of a tailor, for example, belongs to him and since what belongs to him is attached to the asset, the asset can then be kept in return for his fee.<sup>425</sup>

### 2.5.3.2 A Workman Who Does Not Add Any Quality To The Asset

The Ḥanafīs, Shāfi'īs and Ḥanbalīs maintain that it is not permissible to keep an asset in which no quality is added like the work done by a porter and navigator because the subject of the contract is the very work, which does not last. And as such, you cannot withhold it. And the Mālikīs maintain the contrary. The laborer, they say, will submit the work with his hand, and as such, the work becomes like a commodity that he has the right to withhold.<sup>426</sup>

## 2.5.4 Holding Doctors Responsible For The Mistakes They Commit

### 2.5.4.1 Definition Of Medication

*Al-Ṭibb* (medication) has a number of literal meanings. Of those meanings is *al-mudāwāh*, taking medicine to cure oneself from disease or pain. The term *al-ṭabīb*

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<sup>424</sup> Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuhū*. Also see Al-Shirāzī, *Al-Muhadhab fī Fiqh Madhab Al-Imām Al-Shāfi'ī*, 1, p. 417.

<sup>425</sup> Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuhū*. Also see Al-Shirāzī, *Al-Muhadhab fī Fiqh Madhab Al-Imām Al-Shāfi'ī*, 1, p. 417.

<sup>426</sup> Mālik b. Anas, *Al-Mudawwanah al-Kubrā*, 3, p. 440.

(doctor) was originally used to refer to a skilful and experienced person, and as a result, the person who cures people came to be known as *al-ṭabīb*, a doctor.<sup>427</sup>

#### 2.5.4.2 Conditions Of Medication

That he is an actual practicing doctor who has obtained a medical certificate and official permission to practice. And that he uses instruments and methods generally used by the community of doctors. If he fails to fulfill any such conditions and makes a mistake, he will be held responsible.

#### 2.5.4.3 Are Doctors Responsible For Damages?

As already elaborated, if the doctors fail to fulfill the required conditions and attempts to treat a patient and causes him harm they will be held responsible. They will also be held responsible if they fulfil those conditions but carelessly cause harm to a patient.

Ibn Qudāmah maintained that if he injects a patient according to the normal medical procedures, he will not be responsible if two conditions are met:

- That he is has enough knowledge in the field.
- That he does not go beyond the normal practices.<sup>428</sup>

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<sup>427</sup> *Al-Mawsū'ah Al-Fiqhīyah*, 16, p. 59.

<sup>428</sup> *Al-Mawsū'ah Al-Fiqhīyah*, 18, p. 15.

#### 2.5.4.4 Some Examples Of Medical Errors

Prescribing wrong medicine or a slip of the hand of a doctor while circumcising a child. In these cases, if the patient dies his death is by accident, the responsibility will be a collective one borne by the family of the doctor i.e., they will pay *al-diyah* (blood money). For example, taking out a wrong tooth necessitates responsibility and so does cutting off a glans penis without permission .In this case, he will be fully responsible for full *diyah*.<sup>429</sup>

#### 2.5.4.5 Types Of Medical Errors

Medical mistakes are of two kinds, error in estimation and error in action. The first type occurs when an able doctor diagnoses a disease and prescribes a medicine, which under the normal circumstance cures such a disease and it later turn out that the actual disease was not what is diagnosed and that the medicine was wrong and as a result, the sickness lasts and necessitates, for example, the amputation of an organ.

The second type is errors in action, which occurs when an able doctor opts to, for example, amputate an organ and after doing so, it results in the death of the patient, like circumcising a child, which leads to his death.<sup>430</sup>

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<sup>429</sup> Ibid., p. 140.

<sup>430</sup> Muḥammad Abū Zuhrah, *Al-Jharimah wa al-'Uqubah fī al-Fiqh Al-Islāmī*, p. 456.

#### 2.5.4.6 Cases In Which Doctors Are Not Responsible

The jurists have agreed to the effect that doctors cannot be held responsible for harm, which resulted from their attempts to cure. They, however, disagree over the reasons for their innocence. The opposing views are as follows:<sup>431</sup>

1. Social necessity. This is because holding them responsible will scare people away from practicing medicine.
2. The permission of the victim or his guardian. Both together necessitate their innocence.<sup>432</sup>

Imām al-Shāfi'ī maintains that the reason that their responsibility in this case is lifted is that they are permitted to conduct this profession and that their aim is to do well. It is the same view that Imām Aḥmad maintains.

But Imām Mālik explains that their responsibility is waived due to the permission of the ruler in the first place and to the permission of the victim second. The doctor, he states, is allowed to treat the patient in good faith.

Based on the above, the conditions of innocence are as follows

1. That he is a doctor.
2. That he treats the patient in good faith.
3. That he treats him according to the normal rules of the medical profession.

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<sup>431</sup> Aḥmad Hibah, *Mūjaz Aḥkām al-Sharī'ah al-Islāmīyah* (Miṣr: Maktabah Wahbah), p. 456.

<sup>432</sup> Al-Ṭahāwī, *Ḥāshiyat Al-Ṭahāwī* (Al-Qāhirah: Maṭba'ah Isā al-Bābī al-Ḥalabī), 4, p. 276.

4. That he is permitted to do so by the patient or his guardian.

The fulfilment of those conditions collectively waive his responsibility.<sup>433</sup>

#### **2.5.4.7 Massive Error**

As has already been explained, there is no responsibility in cases of light and insignificant errors. But the jurists have held that a doctor is held responsible for a massive error i.e., errors of carelessness and negligence. For example, when he fails to follow the normal medical procedures. In this case, he will be held responsible privately and publicly by disqualifying him.<sup>434</sup>

#### **2.5.4.8 Judicial Verdicts Pertaining To The Responsibility Of Medical Errors**

##### **2.5.4.8.1 The Opinion Of Ibn Qayyim:**

As far as the responsibility of doctors is concerned, Ibn Qayyim divided it into the following:

Experienced and skilful doctors who are committed to the profession, permitted by the ruler or the patient, will not be held responsibility for death or the

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<sup>433</sup> Aḥmad Hibah, *Mūjaz Aḥkām al-Sharī'ah al-Islāmīyah*, p. 456.

<sup>434</sup> Muḥammad Abū Zuhrah, *Al-Jharīmah wa al-'Uqūbah fī al-Fiqh Al-Islāmī*, p. 456.

perishing of an organ if he does not commit an error, if the permission given to him is the permission of safety and the doctor accepts, then that permission annuls the conditions of safety and the doctor remains innocent.<sup>435</sup>

1. An experienced, committed doctor with permission will be held responsible if he commits an error, which results in harm. This is because, to him it, is equal to massive error.
2. If an experienced doctor prescribes the wrong medicine for a patient and that causes harm, he will be responsible for his *diyah* according to one view and according to another, the *diyah* is paid by the Public Treasury.
3. An experienced and committed doctor, who makes an error that results in death or loss of an organ, after permission will be held responsible.
4. An experienced and committed doctor, who causes the loss of an organ of a child or mad man without permission, will be held responsible because of lack of permission.
5. An ignorant doctor who causes harm to someone, who knew that he was ignorant of the profession, will not be held responsible.<sup>436</sup>

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<sup>435</sup> Shams al-Din Muhammad b. Abī Bakr, *Al-Tibb Al-Nabawi* (Dār Ihya' Al-'Arabīyah), p.110.

<sup>436</sup> Shams al-Din Muhammad b. Abī Bakr, *Al-Tibb Al-Nabawi*, p.110.

## 2.5.4.9 Medical Error In The Contemporary Jurisprudence

There is a consensus of opinion that doctors are responsible for any harm they cause their patients due to negligence. The problem here lies in the definition of an error? Some jurists maintain that there should be a difference between an ordinary error and a professional error. An ordinary error is that which is caused by a professional without that having anything to do with the technicalities of his profession. Like a drunk doctor conducting surgery.<sup>437</sup>

### 2.5.4.9.1 Nature Of Medical Error

Contemporary jurisprudence does not differentiate between an error of contract and an error of negligence in human action. As a result, medical error can be defined as:

“Negligence in the action of a doctor that will not come from a conscious doctor under the same circumstances.”<sup>438</sup>

‘Abdullāh b. Sālim al-Khāmīdī mentions in his book, *Mas’ūliyyah al-Ṭabīb al-Mihniyyah*, the opinions of some specialists in the field and they say that error is a type of negligence caused by a culprit in breach of a legal obligation incumbent upon him.<sup>439</sup>

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<sup>437</sup> ‘Izz Al-Dīn Al-Manṣūr and ‘Abdu’l Ḥamīd Al-Shawarbi, *Al-Mas’ūliyyah Al-Madaniyyah fī Daw’ Al- Fiqh wa Al-Qaḍā’*, 1381-1429.

<sup>438</sup> Abū Jamīl Wafā’ Hilmī, *Al-Akhtā’ Al-Ṭibbī* (Bayrūt: Dār Al-Ma’rifah), p. 41.

<sup>439</sup> ‘Abdullah b. Sālim, *Mas’ūliyat al-Ṭabīb al-Mihniyyah* (Al-Qāhirah: Dār al-Fikr al-‘Arabī), ibid.



#### 2.5.4.9.2 Form Of Medical Error

An error is either an individual error or a collective one. The former is an individual responsibility and the latter is a collective one.

Al-Sanhūrī maintains<sup>440</sup> that the difference between a material and technical error has no justification in some cases. A professional person should be held responsible for his technical as well as his material errors. They should be held responsible even for insignificant mistakes, since the principle rules of a profession is well-established and as a result, breaking them necessities responsibility.

#### 2.5.4.9.3 The View Of The Majority Of The Jurists

The obligation of a doctor in relation to his patient is merely an obligation of care and an attempt to cure him in good faith and not that of a guarantee for his complete health. The doctor, therefore, will not be held responsible if his patient does not recover but the error regulated by the contemporary man-made law, as discussed earlier, is that which the Muslim jurists have referred to as a massive error, that which necessities responsibility.<sup>441</sup>

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<sup>440</sup> Abū Jamīl Wafā' Hilmī, *Al-Akhtā' Al-Ṭibbī*, p. 46.

<sup>441</sup> See Al-Sanhūrī. *Al-Wasā'iq fī Sharḥ Al-Qānūn Al-Madani*, 1, p. 821. Also see 'Abd Al-Salam Al-Nutijī, *Masū'liyyah Al-Ṭabīb*, p. 91. Husayn Amīr, *Al-Masū'liyyah al-Madaniyyah*, p. 98.