



## Acquisition of Ownership Due to Guarantee in Comparative Legislations

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### **Abstract:**

Compensation is one of the fundamental topics addressed by the rulings of Islamic law and the principles of civil law. Compensation has its own regulations within the realm of civil liability, in both its contractual and tortious forms, especially concerning personal rights. Furthermore, it plays a role in property rights, as it serves as a cause for ownership according to the provisions of some civil laws. This notion aligns with a perspective in Islamic jurisprudence that has its own rules and applications. This study aims to shed light on "compensation as a cause of ownership due to guarantee in comparative legislations," following a descriptive, analytical, and comparative methodology. The study clarifies the concept of guarantee as a cause of ownership, the origin and conditions of ownership due to compensation, the stance of contemporary legislations on acquisition of ownership through guarantee, and the position of Islamic law regarding ownership through guarantee. The research concludes with several key findings, including: the Saudi legal system has stipulated guarantee as a cause of ownership, provided that its conditions are met. A similar approach has been adopted by several Arab civil laws, while the majority of Arab laws have not embraced this concept. Additionally, a school of thought in Islamic jurisprudence holds that guarantee is a cause for the acquisition of the guaranteed and damaged property if it is something that can be owned, cannot be returned, and is not used as a pretext for deceit, manipulation, or unlawful acquisition of assets. May God grant success.

**Keywords:** Guarantee, Compensation, Causes of Ownership.

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### **Introduction:**

The right of ownership is the most significant and broadest of all property rights, serving as the foundation for other rights derived from it. For this reason, civil laws are keen on regulating its provisions and stipulating the causes that establish and transfer it. With the issuance of the Saudi Civil Transactions Law by Royal Decree No. (M/191) dated (29/11/1444H), the law enumerated seven causes for ownership: acquisition of unclaimed property, guarantee, inheritance, will, accession, contract, and pre-emption. Regarding guarantee as a cause of ownership, Article (644) states, "Any property for which compensation is obligatory becomes the property of the person responsible for compensation if they pay an equivalent or its value to the original owner, and ownership shall be retroactive to the time of the cause of compensation, provided that the property is capable of ownership." In this research, I will explore the cause of guarantee under the title, "*Acquisition of Ownership Due to Guarantee in Comparative Legislations.*" May God grant success.

### **Research Importance:**

The importance of this research lies in the significance of ownership and its connection to practical reality, as well as its impact on economic development.

### **Research Problem and Questions:**

Comparative legislations have varied in their stance on the concept of acquiring ownership due to guarantee and whether it is considered one of the causes of ownership. This research aims to clarify the position of the Saudi legal system, which recognizes guarantee as a cause of ownership, compare it with contemporary civil laws, and examine the stance of Islamic law. The study seeks to answer several key questions, including:

1. What is the concept of guarantee as a cause of ownership, and what are its conditions?
2. What is the stance of contemporary legislations on the idea of acquiring ownership due to guarantee?
3. What is the position of Islamic law on the matter of acquiring ownership through guarantee?

### **Research Methodology:**

The study follows a descriptive, analytical, and comparative methodology, examining the position of laws on this concept, exploring the opinions of legal scholars, and analyzing the stance of Islamic law on the subject.

### **Research Structure:**

The research is divided into an introduction, a preface, four sections, a conclusion, and a list of references. The introduction covers the importance of the research, its problem and questions, the research methodology, and the structure. The preface provides a definition of contract waiver. The first section is titled: *The Concept of Guarantee as a Cause of Ownership*. The second section is titled: *The Emergence of Ownership Due to Compensation and Its Conditions*. The third section is titled: *The Stance of Contemporary Legislations on Acquisition of Ownership Due to Guarantee*. The fourth section is titled: *The Stance of Islamic Law on Ownership Due to Guarantee*. The conclusion presents the main findings of the research, followed by the list of references.

Preface: The Concept of Ownership Acquisition Causes and Their Classifications, (Al-Sanhouri, 1987).

A cause is defined as something whose existence necessitates the existence of another thing, and whose absence results in its non-existence. It is external to the essence of the subject. Material occurrences (such as appropriation) or legal acts (such as contracts) represent causes that establish the acquisition of ownership of an item, whether it be real estate or movable property. In the absence of these material or legal occurrences, ownership cannot be acquired. These occurrences are external to the essence of the owned object and are not part of it.

In the context of ownership rights, there are various legal classifications of causes, which legal scholars have discussed based on different perspectives:

- From the perspective of the nature of the ownership cause itself, it originates from legal occurrences, which include both material occurrences and legal transactions. These may occur through human will and choice, or independently of them.
- From the perspective of the causes of ownership in terms of their establishment of this right, they are either original or transferring causes. Original acquisition of ownership occurs when the property had no owner at the time of acquisition, and this is referred to as an original cause of ownership, exemplified by the appropriation of unclaimed items. On the other hand, transferred ownership happens when ownership passes from one owner to another, which is the case with causes other than the appropriation of unclaimed property.

This transfer can either occur due to death, such as through inheritance and wills, or between living persons, as in the case of guarantee, accession, contract, and pre-emption. In some laws and in jurisprudence, this transfer is referred to as "succession.", (Al-Zarqa, M. (1967).

When considering the position of guarantee among these causes, it serves as a transferring cause of ownership rather than an original one, like appropriation. While the regulatory text in Article (641) initially mentions the appropriation of unclaimed property (appropriation) as a cause for original acquisition of ownership, it subsequently lists the causes for ownership based on succession, which include guarantee, inheritance, and wills.

In this context, guarantee transfers ownership of the guaranteed property to the guarantor, and it does not transfer ownership due to death, as in the case of inheritance and wills. Instead, it serves as a cause for transferring ownership between living persons. Guarantee is a transferring cause of ownership, akin to a material occurrence, similar to inheritance and accession, rather than a legal act arising from will, as is the case with ownership through contracts and wills.

Some researchers argue that even in the case of guarantee arising from contractual liability, it does not fall within the framework of legal acts since it is merely a consequence of such liability. Responsibility may arise without the guarantee being established due to the absence of a claim or for other reasons, (Al-Badri, (P-14).

### **Section One: The Concept of Guarantee as a Cause of Ownership**

The term *guarantee* or *indemnity* is used by Islamic jurists to refer to various meanings, including *suretyship* (Al-Zarqa, 1967) -1035/2 ) and *compensation*, as referred to in civil laws (Al-Badri, (P-12). It has been defined as "an obligation on a person's liability to fulfill either monetary or non-monetary duties, whether immediate or deferred", (Al-Khafif, A. (2000). Compensation is also called *civil liability*, which encompasses both contractual and tortious liability (Al-Alfi, 2018), P-170). The domain it operates in relates to the private rights of individuals (persons), and the penalty resulting from it is subject to reconciliation, discharge, compensation, and inheritance, unlike criminal liability, which pertains to *public rights*. The latter cannot be discharged, reconciled, or compensated for, nor can it be inherited (Al-Zuhaili, 2018), P-16). Guarantee serves as a basis for ownership, whether arising from contractual or tortious liability (Al-Badri, (P-14).

For example, if someone seizes or damages the property of another or causes harm to it, they are obligated to compensate for the damage caused, following the principles of harm prevention. In such cases, the compensated party (the harmed party) acquires the compensation as a replacement for the harm suffered, while the usurper or damager gains ownership of the property they seized, damaged, or harmed, (Al-Qudat, 2015).

For example, if an insured vehicle is damaged, the insurance company will repair it for the owner according to the terms of the insurance policy. If the vehicle cannot be repaired due to severe damage, the insurance company will compensate the owner by paying the value of the vehicle at the time of the damage, and ownership of the vehicle will revert to the insurance company. The owner cannot simultaneously seek to repair the vehicle and receive full compensation for it, which affects the claim for compensation and its valuation according to Article (140) of the system.

### **Section Two: The Establishment of Ownership through Compensation and Its Conditions**

The guarantor retroactively owns the guaranteed asset from the moment the reason for the guarantee occurs, establishing ownership for the guarantor based on the time of the wrongdoing and their guarantee. This is because it is the moment when the obligation arises, and the wrongdoer's liability for compensation becomes effective. Before this time, there was no basis for the emergence of liability, (Al-Badri, (P-13), thus the ownership here is grounded in the moment of the material event that led to the compensation.

To ensure the validity of the wrongdoer's or destroyer's ownership of the appropriated or damaged property due to the guarantee, several conditions must be met, as stipulated in Article (644) of the system. These conditions limit the exploitation of the guarantee principle to seize protected properties and claim ownership thereof. These conditions are: **(Al-Ahmad, 2021)**

1-The existence of a guarantee requires the fulfillment of the essential elements for compensation, which are fault, damage, and a causal relationship, along with the absence of fraudulent intent on the part of the guarantor. This condition includes:

- The occurrence of the guarantee's cause must be accompanied by an intent to acquire ownership of the guaranteed asset. This matter is assessed by the judge based on the facts and circumstantial evidence.
- Damage to the guaranteed property must be established, evidenced by a reduction in its value, impairment, or the inability to reclaim it without the owner's consent.
- The absence of fraudulent intent on the part of the guarantor is crucial; this means the guarantor must not intentionally harm the property to justify claiming ownership if the owner does not consent to its return.

2-The property must be capable of establishing ownership, which is contingent upon the fulfillment of two conditions:

- The legitimacy of benefiting from the property from the outset. This cannot be imagined in the context of guaranteeing benefits from body parts, as the guarantor cannot be considered the owner of such benefits. Furthermore, the property cannot be subject to ownership if specific legal provisions prohibit the establishment of ownership rights over certain items. Such prohibitions may include:
  - Items that are explicitly prohibited and whose ownership is forbidden by law, such as carrion, pork, and narcotics.
  - Items whose ownership is restricted due to their connection with public order.
  - State-owned properties, as per Article (72) of the Civil Transactions Law **(Al-Ahmadi & Al-Qarni, (2024), (P-320))**.
- There must be no impediment to the guarantee, such as the consent of the harmed party to the damage, their permission, or their reclaiming of the property.

### **Section Three: The Stance of Contemporary Legislation on Acquisition by Guarantee:**

Acquisition by guarantee as a cause of ownership is a principle absent from the majority of contemporary civil laws, such as those of Egypt, Iraq, Algeria, Kuwait, Yemen, and others **(Al-Ahmad, 2021), (P-311)**. Some legal scholars argue that although these laws lack explicit provisions for this principle, they implicitly accept it. This is evident through certain applications that can only be understood in light of the acknowledgment of ownership by guarantee, in accordance with the principle of not combining full compensation with the compensated item **(Al-Badri, (P-18))**. In contrast, laws derived from Islamic jurisprudence, such as the Jordanian Civil Code (Article 1085), the Emirati Civil Code (Article 1218), and the Unified Arab Civil Code (Article 1039), recognize guarantee as a cause of ownership.

The Saudi Civil Transactions System has classified guarantee as one of the causes of ownership in accordance with Article 644. One of its applications within the Civil Transactions System is found in Article 691(1), which states that the right of usufruct terminates "upon the destruction of the usufruct asset. However, if compensation is paid for it, the right of usufruct shall transfer to the compensation, and the usufructuary must return the original asset or its substitute—depending on the circumstances after the termination of their right to usufruct." Here, the subject of ownership has become the compensation (guarantee) paid in lieu of the original asset, and it is subject to the same legal provisions.

### **Section Four: The Position of Islamic Legislation on Acquisition by Guarantee:**

Some schools of Islamic jurisprudence have provided applications where (compensation) serves as a cause for ownership, whether due to permissible actions such as loans and deposits when the borrower or depositary neglects their safeguarding duties, or due to prohibited actions such as usurpation and aggression against the property of others. They have presented various scenarios in which the owner of the damaged asset can choose between claiming the value or the equivalent while leaving the damaged property with the guarantor, **(Al-Khafif, A. (2000) (P-102)** or retaining their property while demanding compensation equivalent to the damage incurred. This applies to both movable and immovable property. Additionally, they have cited instances where compensation is obligatory, and the concepts of returning the guaranteed asset or paying for damages do not apply, particularly in cases of total loss of the guaranteed asset or when it has merged with other properties, **(Milhem, (P-8)**.

Islamic jurisprudence has also introduced another form of acquisition by guarantee beyond the guarantee of property specifically the guarantee of lives and the benefits derived from bodily members. Scholars have considered **diyya** (blood money) as a cause of ownership, whereby the money received in compensation for a life or bodily injury becomes owned by the recipient, **(Al-Suyuti, 1987)**.

Conversely, there exists a viewpoint within Islamic jurisprudence that rejects the notion of ownership arising from guarantee, primarily to safeguard property and prevent it from becoming a pretext for aggression and subsequent appropriation in exchange for a guarantee. Under this perspective, the guarantor is entitled to compensation for any deficiency (known as **arsh al-naqs**), **(Al-Badri, (P-21)**.

### Key Findings:

1. The Saudi legal system has explicitly recognized guarantee as a cause of ownership, subject to certain conditions, and several Arab civil laws have adopted a similar approach; however, most Arab laws have not accepted this principle.
2. There is a prevailing view in Islamic jurisprudence that considers guarantee as a cause for acquiring the guaranteed and damaged asset, provided it is something that can be owned, its return is impossible, and this does not serve as a pretext for fraud, deceit, or wrongful appropriation of property.
3. Guarantee serves as a cause of ownership as a material event that facilitates the transfer of ownership between living individuals.

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