

# REVISITING THE CONCEPT OF LEGAL GUARANTEE IN ISLAMIC LAW FOR STRUCTURING ISLAMIC FINANCIAL PRODUCTS

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## *Abstract*

**Purpose of Study:** In the modern Islamic financial products and services, legal guarantee is becoming increasingly important in the structuring of products, particularly those used in the investments. As a result of the increasing importance of the concept of guarantee, this paper specifically revisits the conceptual analyses of legal guarantee in Islamic law with a view to providing the basis for the use of this concept in structuring relevant Shari'ah-compliant products.

**Methodology:** The study adopts a comparative legal analysis of the views of classical Muslim jurists. The researchers examine the principles relating to guarantee, such as the meaning of guarantee, its authority, its pillars and conditions. Other principles include modes of guarantee and its objective. The paper also examines the principles and terms of guarantee necessitates an assessment of the effect of the guarantee contract on the contracting parties, particularly whether the guarantor has the right of recourse to the guaranteed person for a refund. The researchers adopt qualitative research methodology to analyse and examine the data. Results: It was found that although guarantee is permissible in Islamic law, it is not absolute. In fact, to make it more Islamically acceptable or Shari'ah compliant there are other terms and conditions that the contract has to fulfil especially by the guarantor, guaranteed person as well as guaranteed asset.

**Results:** Legal Guarantee is permissible in Islamic law to prevent harm that may happen to the traders and investors, and protect the public interest. Classical and contemporary Muslim scholars' views are that guarantee is not limited to guarantee for debt, but extended to the guarantee for other commercial transactions like guarantee of future liability and physical punishment. Guarantee has its own pillars and conditions, which should be met in order for a guarantee contract to be a valid one. The researchers suggest to conduct empirical research in order to have a clear picture on the concept of legal guarantee for structuring Islamic financial products.

**Keywords:** *Islamic law, Legal guarantee, Pillars of guarantee, Mode of guarantee, Islamic financial products.*

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## INTRODUCTION

Guarantee is not a new issue in Islamic commercial transactions. Muslims have been dealing with guarantee issues in Islamic commercial transactions since the era of the Prophet *Salla Allahu alaihi Wassalam* (S.A.W). Since that time, debts and other types of financial contracts have been guaranteed. The general concept of guarantee in Islamic law is to facilitate dealings among Muslims in their commercial transactions by securing the debt for the creditor without taking any fee from the guaranteed party. In large-scale transactions or transactions involving various parties, a legal guarantee will often advance such a transaction. In this regard, legal guarantee is a form of guarantee that affects a party who is different from the investors or the contracting parties. In most circumstances, it is the company, government or individual, which guarantees any loss that may happen to another party's properties or capital or profit. The question that may arise is whether this legal guarantee can be done without taking a fee, because it may be guaranteeing a huge amount of money that an individual may not be able to afford. The purpose of legal guarantee is to provide financial compensation for any loss that may arise, or to provide security for the capital and profit of the investment.

In view of this, this kind of guarantee is essential in any form of investment to help to forestall economic crises. This, however, must be in conformity with the principles of Islamic law that regulate investments and commercial transactions.

## REVIEW OF LITERATURE

The rules of guarantee in financial matters by extensively discussing matters relating to guarantee in commercial transactions and its permissibility, including whether the subject matter is known or unknown, forms of guarantee and the extent to which it is valid. This is in addition to its rules in Islamic law, especially its concept and rule in the *Qur'an*, the *Sunnah* and *Ijma'*, as well as the issue of guarantee in debts and work. Their discussion on guarantee focused on general matters without further elaboration on the guarantee in financial matters. However, this can help to conceptualise guarantee and its role in Islamic law, (Abd al-'Aziz al-Khayat and Ahmad, 2004; Okon, 2017) highlight legality of guarantee and the different points of view of scholars. They highlight guarantee in debt and multiple guarantors to debt. They also analysis the rule of guarantee in case of the death of the principal debtor or guarantor, the rule of guarantee in case the debt is deferred or immediate, and the time period that the guarantor is to be discharged from the guarantee. Furthermore, (Okpechi, 2018) discusses guarantee of investment accounts and says that the bank should guarantee them for investors. discuss the contract of guarantee in debt and highlight the definition given to guarantee by the four schools of *fiqh*. They discuss pillars, conditions and permissibility of guarantee and extend their discussion to future liability of

guarantee (*Daman al-Dark*) and how it works. Their contribution would be useful for understanding the basic concept and principles of guarantee.

(Al- Kasani, 2005) discusses guarantee, its pillars, conditions and rules, and when can a guarantor return to a guaranteed person for a refund. He defined the words *Kafalah* and *Daman* as well as their synonyms. His discussion is confined to guarantee of debt. However, his work will be useful for the discussion on the concept of guarantee in the Hanafi school of *fiqh*. They discuss the pillars of guarantee, its types and legality in Islamic law, and guarantee safe keeping contract. Their discussion contains the issue of guarantee in *Sukuk al-Mudarabah*, and highlights resolution no. 30/5/4 of the *Fiqh* Academy pertaining to voluntary guarantee in *Sukuk al-Mudarabah*. They discuss guarantee in partnership contract, in loan contract and expenses of the loan, and highlight the approaches of scholars on those issues. They also analyze the effect of contract of guarantee, its termination and conditions and highlight the causes of guarantee in several types of transactions.

It can be observed that most of the existing literature on this theme focuses on guarantee in general. Classical and contemporary jurists agree that guarantee should be done voluntarily. Therefore, there is a crucial need to conduct research on this topic in order to determine a clear picture on the theme. Islam encourages investment of wealth and discourages the hoarding of wealth. A large number of works on guarantee are in the form of books and articles which did not cover some of the major issues to be examined in this study. Hence, there is a need for scholarly research that will cover all the relevant issues raised in this study.

## METHODOLOGY OF RESEARCH

The study adopts a qualitative approach wherein legal analysis of the views of classical and modern Muslim jurists are approached through the collection of relevant data from the literature such as textbooks, encyclopaedia, and articles in academic journals, seminars, conference papers, online databases. This method of data collection is based on library research in order to examine the legal issues relating to legal guarantee and the opinions of scholars of Islamic law.

In order to achieve this method, the researcher resorts to initially highlighting the views of jurists on issues pertinent to legal guarantee, after which the arguments of the Muslim scholars on the issues are examined and analysed. Thereafter, the researcher extracts the legal rules that are in accordance with the principles of the Islamic law.

In addition, the researcher highlights the *fatwa* of prominent scholars and the resolutions of *Fiqh* Academies on the topic. The researcher then offers his view supported with evidence either from the *Qur'an* or *Sunnah* or the scholars' points of views. This method of analysis is adopted in order to make a comprehensive understanding of legal guarantee in structuring Islamic financial products.

## MEANING OF GUARANTEE

Literally, the term guarantee in Arabic refers to *al-Kafalah*, *al-Daman*, *al-Za'amah*, *al-Taghrim* and *al-Iltizam*. According to (Ibn Munzur, 1990; Muhammad bin, 2008) *al-Kafalah* is derived from the verb *kafala* which means to guarantee, warrant, ensure, secure, and sponsor, to be responsible or liable for something. In describing the word *kafalah*, al-Raji further illustrated it with the following statement: *wa kafala 'anhu bi al-mal ligharimihi, wa akfalahu al-mal dammanahu iyyahu wa kafahu iyyahu* This means that the guarantor has guaranteed the properties for the creditor, or a person in whose favour the guarantee contract is made on behalf of the guaranteed person, and who is responsible or liable for the payment of the debt that is in the obligation of the guaranteed person (Ibn Munzur, 1990; Muhammad bin, 2008). The term is used in the *Qur'an* where Allah (S.W.T) says, "And Zakariya guaranteed to take care of her" (*wakafalaha Zakariya*) ( *al-Qur'an*, 3:37).

Ibn Manzur says, *al-Daman* derives from the root word *damina* (Ibn Munzur, 1990; Muhammad, 2007), which refers to guarantee, warrant, ensure, secure, sponsor, or to vouch for something. Ibn Manzur further illustrated the word *damina* with the following statement: *damina al-Shai'u wa bihi daminan, kafala bihi, wa dammahu iyyahu: kaffalahu, wa fulanun damin wa damin ay kafil wa kafil* (Ibn Munzur, 1990; Muhammad, 2007) which means that somebody has guaranteed something by undertaking to guarantee it. The term is mentioned in the *Sunnah* where the Prophet (S.A.W) is reported to have said that any benefit from any investment or commercial transaction is accompanied by a guarantee for damage or loss (*al-Kharaj bi al-Daman*). This means that in Islamic law, it is impermissible for a trader to benefit from any investment or commercial transaction without taking the risk of loss or damage. In another *Hadith*, the Prophet (S.A.W) says that whoever treats someone or presents himself as a medical doctor while he is not known to the people in the society to be such, then he is a guarantor for any medical injury that may happen to the patient.

(Al-Zawi, 1990; Abd al-'Aziz al-Khayat and Ahmad, 2004) observed that *al-Za'amah* derives from the root verb *za'ma*, which refers to guarantee, warrant, secure, ensure, to be liable for something. In describing the word *za'ma* they further illustrate it as follows: *wa za'ma bihi za'man wa za'amah*. This means that a man has guaranteed something if he says the thing is guaranteed by him. In addition, *al-Za'im* means *al-Kafil*, which refers to guarantor. The term is mentioned in the *Qur'an* and the *Sunnah*. In the *Qur'an*, Allah says: "Whoever brings the beaker of the king has a reward of a camel load, and I am the guarantor (*Za'im*) for that" (*Waliman Ja'a bihi himlu Ba'irin wa ana bihi Za'imun*) (*al-Qur'an*, 12:72). In the *Sunnah*, the Prophet (S.A.W) is reported to have said that the guarantor is liable for what is guaranteed by him (*al-Za'im*

*Gharim*). Furthermore, (Ruhi al-Ba'labaki and Munir al-Ba'labaki, 2004) observed that *al-Taghrim* derives from the root verb *tagharrama*, *ghurrima*, *ulzima bigharamah*, which means "to be fined, to be mulcted, and to be amerced respectively. All of these terms refer to compensation or what is obliged to be paid, which is to guarantee something for someone. For example, if one says that somebody guarantees something, it means that its compensation is obliged on him (*A'ni qawluka dammanat hu al-shai'u tadminan fatadammanahu 'ani bima'na: Gharramt hu fal tazahu*).

*Al-Iltizam* originates from the verb *iltazama* which is synonymous verb to *irtibata*, *ta'hhada*, *takaffala*. These all mean to bind oneself or to put oneself under an obligation to do something for another person (Ruhi al-Ba'labaki and Munir al-Ba'labaki, 2004; Önder, 2018). Anis Ibrahim also observed that *al-Iltizam* means obligation or commitment, which refers to guarantee. For instance, when one can say, "The property is guaranteed by somebody", it means that he is obliged to guarantee any damage or loss that may happen to that property (*dammanat hu al-Mal, ay 'Alzamat hu bihi*) (Anis, 2004).

From the foregoing, one can say that *al-Kafalah*, *al-daman*, *al-Za'amah*, *al-Taghrim* and *al-Iltizam* are synonymous and they all refer to "guarantee" (Abu al-Hasan, 2003). Therefore, *al-Kafil*, *al-damin*, *al-Za'im*, *al-Gharim* and *al-Multazim* are also synonymous and they refer to "the guarantor" (Ibn Hazm, 2001). However, this study chooses the term *al-Kafalah* in reference to guarantee because it is more appropriate than the other terms. For contemporary use, the word is more commonly used in financial matters. Thus, wherever "guarantee" is mentioned in this study, it refers to *al-Kafalah*.

Technically, there are several meanings for the word guarantee (*Kafalah*), as presented by different Muslim scholars, which are highlighted below:

According to one of Shafi' jurists, it refers to an undertaking or commitment to a right or debt that exists under another party's obligation, or to bring a guaranteed asset or guaranteed person who must be present at a specific time in a specific place face to face. In his view, guarantee is a combined commitment between the guarantor and the guaranteed person in which both parties are liable for the right or debt that is guaranteed, until it is settled.

Maliki jurists are of the view that it is an obligation that one party has taken towards the right of the other party. In other words, the guarantor has preoccupied himself with the right of a creditor in respect of which both the guarantor and guaranteed person are responsible. According to the Maliki jurists, a guarantee contract cannot exempt the guaranteed person from the liability of the guaranteed asset.

Hanbali jurists take the view that it is a joint obligation of the guarantor and guaranteed person in the commitment that exists over the guaranteed party. Therefore, the creditor's right becomes the obligation of both parties. The owner of the right can henceforth claim from either the guarantor or the guaranteed party. The Hanbali jurists define guarantee as the combined responsibilities of the guaranteed person and the guarantor over the guaranteed asset, and both parties are liable for the asset.

Hanafi jurists on their part say that it refers to a joint obligation of the guarantor and the guaranteed party (principal debtor) in claim of the debt only. The creditor can claim the debt from both parties. Nevertheless, he has no right to request payment of the debt from the guarantor; its payment is obliged only on the guaranteed person (Al-Sarakhsi, 2001). Based on this it can be said that, according to the Hanafi jurists' definition for guarantee, the guarantor is only required to secure the debt, not to pay it. Its payment is in liability of the guaranteed person.

From the abovementioned meanings given to the guarantee by the jurists, it can be observed that according to Shafi', Maliki and Hanbali jurists (majority of Muslim jurists), guarantee is a combined obligation of a right between the guarantor and the guaranteed party. In claiming his right, the owner is entitled to claim from either the guarantor or the guaranteed party, as long as the right is unsettled. By looking at the meanings given by them, the guarantee contract does not remove the guaranteed party from his liability. Thus, the obligation is binding on both the guarantor and the guaranteed party until it is settled. However, according to the Hanafi's meaning for the guarantee, the guarantor is only liable to make the debtor pay the debt guaranteed by him. Thus, the creditor has the right to demand the debt from the guarantor, but has no right to demand payment from him. Hence, the meaning of guarantee by the majority of Muslim jurists is preferable and more appropriate to this study.

From the foregoing, according to the meanings given by Muslim jurists, the contract of guarantee is not a sale contract or a transfer of debt contract. This is because when the terms and conditions of a sale contract has been concluded and ownership is transferred, only the buyer takes responsibility for the sold item. In a transfer of debt contract, when the terms and conditions of the contract are fulfilled, only the transferee is responsible for the transferred item, the transferer is free from any obligation or liability. This means that in the sale contract and transfer of debt contract only one party is bound by the contract, while in the guarantee contract both the guarantor and the guaranteed person are bound by the right that is guaranteed.

Furthermore, contemporary Muslim scholars, such as ((Al-Zuhaili, 2006) define guarantee as an obligation to compensate the other party financially due to the damage or loss that may be incurred to him from the act of a human being. His definition is comprehensive as it can cover any compensation, be it financial or physical. Mustapha al-Zarqa defines it as an act to undertake financial compensation for damage that may occur to another party (Al-Zuhaili, 2006). Besides this, Article 612 of *Majallah al-ahkam al-'adliyyah* defines it as: "to add obligation to obligation in respect of a demand for

something. That is to say, it is someone adding himself to another person and himself undertaking a demand which is binding on that person". This includes self-guarantee, debt or tangible asset (Tyser, 1980). Therefore, both parties are liable for the thing that is undertaken to be guaranteed until its settlement is affected by one of them.

By looking deeply at the abovementioned meanings, it can be deduced that from the perspective of Islamic law, guarantee is to undertake an obligation to pay or compensate a financial value or physical value for a damage or loss that may occur to the other party. Classical scholars also define guarantee as a combined obligation between the guarantor and guaranteed party. Their definition for guarantee is not limited to debt guarantee. In a similar vein, the contemporary scholars' definition is not confined to compensation for financial loss to the other party. As a result of this, it can be observed that the meanings of guarantee by classical and contemporary Muslim scholars are not limited to debt guarantee, but it includes any compensation, either financial or physical, for any loss or damage that may occur to a person or property.

#### **AUTHORITY OF GUARANTEE IN ISLAMIC LAW**

In Islamic law, guarantee is made permissible by the *Qur'an*, *Sunnah* and '*Ijma'*'. For example, in the *Qur'an*, Allah says on behalf of the workers of Yusuf: "they said we have lost the beaker of the King, whoever has found it, has a reward of a camel load, and I am a guarantor (*za'im*) for it" (*al-Qur'an*, 12:72). *Za'im* in this verse means *Kafil* which refers to guarantor. The interpretation of this verse is that the workers of Yusuf guaranteed a camel load for anyone who brought the beaker of the King (Al-Shawkani, 2000). In another verse of the same *Surah*, Allah says on behalf of the Prophet Ya'qub (A.S): "Never will I send him with you until ye swear a solemn oath to me, in Allah's name, that ye will be sure to bring him back to me unless ye are yourselves hemmed in (and made powerless)" (*al-Qur'an*, 12:66). In another verse, Allah says Zakariya has guaranteed her education (*al-Qur'an*, 3:37). This means that Zakariya had undertaken to take care of Mariyam and join her to his family. This shows that the laws of the previous generations of believers are still applicable in Islamic law, provided that they do not contradict with the fundamental principles of the Islamic law.

In the *Sunnah*, the Prophet (S.A.W) is reported to have said: "the guarantor is liable for the loss and damage of the thing that is guaranteed by him." (*Al-za'im gharim*) (Al-Bukhari, 1981). Ibn 'Abbas says that *al-Za'im* means *al-Kafil* which refers to guarantor. In another *Hadith* reported by Salmah bin Al-akwa' (may Allah be pleased with him) he says, "While we are sitting with the Prophet (S.A.W) then they brought a dead man to the Prophet to pray on him, they said: O Prophet please pray on him, the Prophet asked them, has he left something? They replied no. The Prophet asked again has he left any debt, they reply that he has left a debt of three *Dinar*. Then the Prophet said, pray on your friend, because he is not going to benefit from my prayer. Then Abu Qatadah said: O Messenger of Allah pray on him I am a guarantor of his debt, and then the Prophet prayed on him" (Al-Bukhari, 1981). This *Hadith* shows that guarantee is permissible in Islamic law and there is no need to have permission from the guaranteed person if the contract of guarantee is performed as a charity (voluntary).

It was reported in another statement that: "Shurayh detained his own son for the sake of a man guaranteed by the son until the man was brought back to the person in whose favour the guarantee was made". This statement denotes that self-guarantee, which is to bring the guaranteed person himself to the Court face to face, is also permissible in Islamic law (Al-Baihaqi, 1999). Muslim jurists unanimously agree that guarantee is permissible in Islamic law due to the needs of the people for their commercial transactions. In addition, it is also necessary to prevent any damage that may result to the debtor or the contracting parties, and to facilitate commercial transactions for those who are in difficulties (Al-Zuhaili, 2006).

It can be deduced from the above-mentioned verses, *Ahadith* and '*Ijma'*' that guarantee is permissible, not only to compensate the financial value for damage or loss to investment, but also to deliver a person who must be physically present at a specific time at a specific place. In addition, the guarantee does not remove the guaranteed person from the responsibility of the guaranteed item or the subject matter of the guarantee contract. Both the guarantor and guaranteed person are liable for the subject matter of the guarantee contract until one of them discharges the liability of the guarantee.

#### **OBJECTIVES OF GUARANTEE IN ISLAMIC LAW**

There are various objectives of guarantee such as securing payment of debt, protection of wealth and promoting Islamic brotherhood among Muslims. The main thrust of guarantee in Islamic law is to secure payment for the creditor or the person in whose favour the guarantee contract was made. It also seeks to secure reimbursement for any loss that may occur while making use of property. Thus, Islamic law permits guarantee to secure the rights of contracting parties and to pay reimbursement wherein the guaranteed property is damaged, otherwise there will be no cause for reimbursement. Although reimbursement for damage to the guaranteed property is allowed, this does not permit the creditor or the person claiming under the guarantee contract to cause harm or damage to the guaranteed person or guarantor. This can be found in the Islamic legal maxim that says: "there should be no damage and no reciprocal damage" (*La darara wa La dirar*) (Ibn Nujaim, 1980).

At this juncture, it is pertinent to say that Islamic law permits guarantee for the parties dealing with each other to secure their interests, establish justice between them and promote a stable atmosphere for commercial transactions. The guarantee contract is binding on the guarantor, but this does not mean that damage should be caused to him or any of the contracting parties. Thus, the objective of guarantee is to safeguard the benefits of the parties involved in the contract and the interest

of the public at large. In addition, guarantee is allowed in Islamic law in order to protect the wealth that moves from hand to hand, because the protection of wealth is one of the five objectives of Islamic law (*Maqasid al-Shari'ah*). Guarantee on property (*daman al-mal*) may be required for proper circulation of property or wealth among the people in society. However, the guarantee must be voluntarily in order to ensure that wealth circulates in accordance with the principles of Islamic law. It is also to maintain confidence in commercial transactions and to protect the right of the contracting parties. For example, in a loan contract, the right of a creditor to claim payment from the guaranteed person is protected by the guarantor. In Islamic law, the objective of guarantee is to safeguard commercial transactions between parties in order to facilitate the movement of wealth, not only among Muslims, but also between Muslims and non-Muslims because Islam permits Muslims to deal with non-Muslims according to the parameters of Islamic law.

Notwithstanding the above, any guarantee in Islamic law is considered as a voluntary act to help each other and to instill the spirit of Islam into the Muslim society. This is due to the fact that Islam is a religion which considers the welfare of the people in the society at large. Islamic law has given rights of guarantee to the creditor in order to secure the debt, but these rights are not absolute. They must be exercised in accordance with certain terms and conditions, such as not causing harm to others while a person is exercising his rights. Again, a person must exercise his rights within the framework of the principles of Islamic law in order to avoid violating other people's rights. Hence, one of the objectives in guarantee is to promote Islamic brotherhood in the Muslim society and to secure the obligation of other parties. The guarantor will not only secure the performance any lawful obligation towards the creditor in transactions, but also to promote the spirit of Islam, which includes helping each other. Islam encourages the willingness to support each other where the situation requires it. In relation to this, the Prophet (S.A.W) is reported to have said that whoever relieves a believer from a difficulty in this world, Allah will relieve him from difficulty both here and in the hereafter. Whoever facilitates a Muslim who is in difficulty, Allah will facilitate for him in this world and the hereafter. Whoever conceals or veils (*satar*) a Muslim, Allah will conceal or veil him both here and in the hereafter. Allah is in help of a man (al-'Abdu), as long as the man is in help of his Muslim brother.

As a result of that, the guarantee contract has different circumstances in which the guarantee is performed. Firstly, guarantee can be obliged (*wajib*) on the guarantor if a guaranteed person wants to use the money to prevent hunger. Secondly, it can be forbidden (*haram*) if the guaranteed person wants to conclude the guarantee contract for expending the money in prohibited things. Thirdly, it can be an abomination (*makruh*) if a guaranteed person wants to expand the money on unnecessary things. Fourthly, it can be recommended (*mandub*) if a guaranteed person wants to expand the money in charitable ways. Muslim jurists unanimously agree that a guarantee contract is binding only on the guarantor, but not on the person in whose favour the contract is concluded (creditor). He (creditor) can rescind or terminate the contract at any time he wants without the guaranteed person's consent or the guarantor's consent. This can be done by exempting the guarantor from liability of the guarantee contract.

In connection to this, the objective of guarantee is to secure and protect the benefits of an individual in the community, and to facilitate the improvement of the conditions of life of human beings in the world. As a result, it can be observed that guarantee attempts to promote a crucial objective in Islamic law that can be considered as a means of promoting the economy and stability of financial activities. This is because the rights of contracting parties are protected.

### PILLARS OF GUARANTEE IN ISLAMIC LAW

According to the majority of Muslim jurists, there are five pillars of guarantee, namely the guarantor (*Kafil*), guaranteed person (*Makful anhu*), a person in whose favour the guarantee contract is made (*Makful lahu*), expression (*Sighah*) and subject matter of guarantee contract (*Makful bihi*).

Firstly, the guarantor can be any person who can act upon his properties in accordance with the principles of Islamic law without any legal constraint, such as due to insanity or minority. Secondly, the guaranteed person refers to anybody who is required to pay some money or right to another party whether alive or not. For example, the principal debtor in debt contract or a manufacturer in the case of a manufacturing contract or service provider when the contract is concluded on performance of a service. Thirdly, a person in whose favour the guarantee is made or the creditor can refer to a person who is entitled to the debt or right that is guaranteed. Fourthly, expression, which is the offer from the guarantor, and it must be obvious and clear without any ambiguity. For instance, it can be done by the expression: "I guarantee the debt that a person owes to the other party (*Takafaltu*, or *Damantu*)" or "I am a guarantor of the right or debt that is binding on the other party (*Ana Kafil* or *Damin* or *Za'im*)" (Abd al-'Aziz al-Khayat and Ahmad, 2004).

According to the majority of Muslim jurists, the acceptance from the person in whose favour the guarantee contract is made is not required because it can be a unilateral contract or action from the guarantor. Thus, in the *Hadith* of Abu Qatadah, the offer of Abu Qatadah to guarantee the debt was sufficient to establish the guarantee contract on him, and the Prophet (S.A.W) accepted it. The acceptance of the creditor was not mentioned in the *Hadith*, thus, his acceptance is not necessary. Fifthly, the subject matter of the guarantee contract can be anything which can be done by a person on behalf of another. In other words, the subject matter of guarantee contract can be anything in respect of which an agency contract is permissible, or any task in respect of which a person can appoint an agent to act on his behalf. (Al-Zuhaili, 1989).

The Hanafi jurists are of the view that there are two pillars of guarantee contract which are offered from the guarantor and acceptance from the person in whose favour the contract of guarantee is concluded. According to them, offer and acceptance are necessary to exist in the contract of guarantee to be a valid one (Al- Kasani, 2005).

From the aforesaid, the preferable view is that of the majority of jurists because the goal of guarantee is to settle the right of the person in whose favour the contract of guarantee is concluded. His right can be settled either by the guaranteed person or by the guarantor. In the *Hadith* of Abu Qatadah the Prophet (S.A.W) did not request the acceptance of the creditor. Mere offer and acceptance are not sufficient for a guaranteed contract to be concluded in conformity with the principles of Islamic law. The reason is that a contract of guarantee has its own terms and conditions that should be observed.

## CONDITIONS OF GUARANTEE IN ISLAMIC LAW

In Islamic law, for a guarantee to be regarded as valid and executable, it must fulfil certain conditions, including conditions of guarantor, conditions of guaranteed person, conditions of creditor, conditions of subject matter and conditions of offer and acceptance.

### Conditions of Guarantor

There are four main conditions to be fulfilled by the guarantor. The first condition is that the guarantor must have reached the age of puberty and have complete legal capacity to act upon his property because guarantee is a voluntary contract, which is binding with financial value. It is impermissible for a person who does not have complete legal capacity to act upon a voluntary donation (*Tabaru'*) to guarantee another person. For instance, minors, insane persons and bankrupt persons are not eligible to be involved in the guarantee contract because they do not have authority or legal capacity to carry out a voluntary donation in their own properties.

The second condition is that a guarantor must have freedom to make a commercial transaction, and this is a condition for the executability of a guarantee contract. It is impermissible for a person who is constrained from performing a commercial transaction in his properties to be a guarantor because guarantee is a voluntary contract, and this person would not be authorized to perform a voluntary donation, even on his own properties, without having permission from an authorized person or his guardian.

The third condition is that according to Maliki jurists, the guarantor must not be a married woman if she wants to guarantee a debt, which is more than 1/3 of her properties. In Islamic law, it is impermissible for a married woman to guarantee a debt or an asset, valued at more than 1/3 of her properties, without permission of her husband. If this occurred, it is permissible for her husband to cancel the contract. The fourth condition under Islamic law is that the guarantor must not guarantee an asset or a debt, which is more than 1/3 of his property, if he is terminally ill. If this occurred, the heirs have the right to rescind the contract because he is not allowed in this situation to act in over 1/3 of his properties without their permission or consent.

From the above-mentioned conditions of the guarantor, it is clear that not just anyone can be a guarantor. A person can reach the age of puberty, but not be eligible to be a guarantor in a commercial transaction due to certain legal obstacles such as minority, insanity and duress. In a nutshell, to be a guarantor in a commercial transaction or an asset is not absolute. It is subject to certain terms and conditions to be fulfilled by the guarantor for the contract of guarantee to be considered as a valid contract in Islamic law.

### Conditions of Guaranteed Person

There are two conditions to be fulfilled by the guaranteed person. Firstly, the guaranteed person must be able to deliver the guaranteed item, either by himself or through an agent. Secondly, the guaranteed person must be known to the guarantor because it is not advisable to guarantee an unknown person. The jurists stipulate this condition to assist the guarantor in knowing whether the guaranteed person is wealthy and can pay his debt at the required period, or is a person who needs extra time to settle his debt. However, Muslim jurists agree that the contract of guarantee can be concluded without the guaranteed person's consent or permission. This is because his consent is not a condition for executability of a guarantee contract and it is permissible for the guarantor to settle the debt voluntarily without having permission from the guaranteed person. For example, one can settle a dead person's debt without having permission from the heirs, as the case in the *Hadith* of Abu Qatadah (Al- Zuhaili, 1989).

From the foregoing, it can be extracted for a guaranteed contract to be consistent with the principles of Islamic law; the guaranteed person must be capable of performing a contract or commercial transaction without any obstruction and must be known to the guarantor.

### Conditions of Creditor

There are three conditions to be fulfilled by the creditor as follows:

Firstly, the creditor must be known to the guarantor because it is impermissible in Islamic law to guarantee a debt for an unknown person. Thus, if the creditor is not known to the guarantor, the objective of guarantee, which is to ensure the

payment of the debt for the creditor, might not be achieved in such a situation. This view is attributed to the Hanafi and Shafi' Schools of *Fqh* (Ibn Nujaim, n.d). However, according to the Maliki and Hanbali Schools of *Fiqh*, it is permissible to guarantee a debt for an unknown creditor. Their proof is the verse in *Surah Yusuf* (A.S) wherein Allah said on behalf of Yusuf's workers, "They said, we miss the great beaker of the king; for whoever produces it is the reward of a camel load; I will be bound by it" (*al-Qur'an*, 12:72). They said that in this case the guarantor is an agent of Yusuf (A.S), but he promised a camel load for whoever found the beaker and he is responsible for it on behalf of Yusuf (A.S). In this verse the person in whose favour the contract of guarantee is made is not known to the guarantor. Based on this, knowing the creditor or the person in whose favour the contract of guarantee is concluded is not necessary in the contract of guarantee (Ibn al-'Arabi, 2003).

In view of the foregoing, the preferable view is that of the Hanafis and Shafi's, where the creditor must be known to the guarantor because how will the guarantor pay the debt if the creditor or his agent is not known to him. Even though the creditor's consent is not necessary to be stipulated in the contract, he must be known to the guarantor so that the settlement of the debt will be easy for the contracting parties.

Secondly, the creditor must be present at the signing session of the contract of guarantee. In case he is not able to be present while the contract is concluded, he can appoint an agent to stand for him in his absence. According to Abu Hanifah, the contract of guarantee is not valid if the creditor or his agent is not present at the conclusion of the contract because guarantee is a kind of transfer of ownership, therefore, there must be an offer and acceptance to complete the expression of the contract. However, the majority of Muslim jurists are of the view that the contract is valid based on the view that the contract of guarantee can be concluded only by an offer from the guarantor (Al- Kasani, 2005).

It can be observed from the aforesaid that the preferable view is that of the majority of Muslim jurists. This is because in the *Hadith* of Abu Qatadah the Prophet (S.A.W) accepted Abu Qatadah's offer without requesting the acceptance from the creditor.

Thirdly, he must be of a sound mind or sane. This is because an insane person, like a minor, is not eligible to be a creditor, because they do not have complete legal capacity to declare an acceptance, which is one of the pillars of the guarantee contract. This view is based on that of Abu Hanifah and Muhammad that stipulate acceptance from the creditor who is an eligible person and this is one of the pillars of the contract of guarantee (Al- Kasani, 2005). According to them, a contract of guarantee is not valid if the creditor's status is one of incomplete legal capacity.

### Conditions of the Subject Matter of Guarantee

Three conditions attached to the subject matter of guarantee contract are as follows:

Firstly, the subject matter must be something that is binding on the guaranteed person. For example, a usurped asset that is in the hand of the usurper or an action (*Fi'l*) to deliver the subject matter, such as defective sold item in case of sale contract or debt that is bound on the guaranteed person in case of debt contract. However, if the subject matter is something that is not binding on the guaranteed person, for instance, safe keeping asset or partnership item, they are not allowed to be the subject matter of the guarantee contract. In the event of any damage or loss that is beyond the capability of the guaranteed person, he is not liable for that.

Secondly, the majority of Muslim jurists are of the view that it should be possible to collect the subject matter from the guarantor. For instance, it is possible to collect money owed on a loan contract. However, it is impermissible to 'collect' physical punishment and retaliation (*Qisas*) from another one, just as it is impermissible in Islamic law to receive physical punishment in lieu of another person. Based on that, in view of the majority of Muslim jurists, the subject matter of the guarantee is confined to financial matters.

Thirdly, the subject matter must be a valid financial debt, which is binding on the guaranteed person. For example, in debt obligation, the creditor may request from the debtor a guarantor who can guarantee the payment of debt for him (creditor) in case the debtor is not able to pay at the due date. This is because the debt that is binding can only be waived through payment or exemption from the debt. In addition to this issue, the majority of Muslim jurists are of view that it is permissible to guarantee an unknown subject matter of the contract if the guaranteed item has financial value. On the other hand, according to the Shafi's, the subject matter of the guarantee must be known and be definite (in specific manner and attributions) because guarantee is to establish a financial value or right in the obligation of a human being, such as price of a sold item. For this reason, it is impermissible for the guarantor to guarantee unknown item because it may lead to dispute between the contracting parties (Al- Kasani, 2005). In addition, the subject of the contract of guarantee must be valuable property that has a similarity, which is considerable in Islamic law (Ibn Nujaim, n.d). This is because it is impermissible in Islamic law to guarantee something that is not valuable and has no consideration.

From the foregoing, for a guaranteed contract to be valid, the subject matter must be something that is obliged on the guaranteed person and must be valuable property. Nevertheless, it is not necessary to be known to the guarantor. Based on this, the preferable view on the issue is that of the majority of Muslim jurists. For this reason, it is permissible in Islamic law to guarantee the unknown price of a sold item or debt that will be realized in the future. This is because the wisdom behind the contract of guarantee is to make commercial transactions flexible among Muslims, so that everyone in the

society can access to his needs without any difficulties. If it is impermissible in Islamic law to guarantee an unknown subject matter, this will cause harm to the people in the society.

### Conditions of Offer and Acceptance

Offer and acceptance must be clear and there must be continuity between them without any interruption until the contract is concluded. According to the Hanafi jurists, for a guarantee contract to be valid, there must be an offer from the guarantor and acceptance from the creditor or the person in whose favour the contract of guarantee is concluded. This is because guarantee contract is like a sale contract in which transfer of ownership is obliged, but this cannot be done without offer and acceptance from the contracting parties. Based on this, offer and acceptance must exist in the guarantee contract (Al- Kasani, 2005). However, according to the majority of Muslim jurists, acceptance of the creditor is not a necessary condition in the contract of guarantee. This is based on the *Hadith* of Abu Qatadah in which the Prophet (S.A.W) accepts the guarantee of Abu Qatadah for the debt of a dead person without requiring the acceptance of the creditor. Furthermore, Muslim jurists also agree that the acceptance of the guaranteed person is not a necessary condition in the guarantee contract because it is permissible to settle someone's debt without having permission from him.

From the foregoing, it is clear that in the guarantee contract, the acceptance of the creditor and guaranteed person is not necessary. This is because the guarantee contract is a voluntary contract that is obliged on the guarantor until the right or the debt is settled. The guarantor can guarantee the debt and settle it voluntarily without taking permission from the contracting parties (debtor and creditor). This is in accordance with the view of the majority of Muslim jurists, who do not require the acceptance of creditor and principal debtor in voluntary guarantee contract. However, if the settlement of the debt is not voluntary, the acceptance of the guaranteed person must be obtained. In other words, if the guarantor wants to guarantee the debt and settle it so that he can later return to the guaranteed person for reimbursement, then the acceptance of the guaranteed person must be specified in the contract in order to avoid conflict between the contracting parties. This is in conformity with the view of Hanafi jurists, which requires offer and acceptance of contracting parties in the contract of guarantee. In a nutshell, the preferable view is that of the majority of Muslim jurists which says that the acceptance of the guaranteed person is not necessary in the contract, if the guarantor wants to guarantee the debt and settle it voluntarily. However, if the guarantor guarantees the debt and settles it with the intention to return to the guaranteed person for reimbursement, then the acceptance of guaranteed person must be obtained in the contract.

### EFFECT OF GUARANTEE CONTRACT

There is no doubt that the guarantee contract has an effect on the contracting parties, which are as follows:

#### Right of Creditor to Claim from Guarantor

The majority of Muslim jurists agree that a contract of guarantee gives the creditor the right to request the guarantor to pay what he has undertaken. However, the right of the creditor to claim his debt from the principal debtor (guaranteed person) is not waived through this action. Therefore, the creditor has the right to claim his debt from any one of them, but he does not have the right to take more than what he deserves in terms of his debt (Ibn Hazam, 2001).

Maliki jurists are of the view that the creditor does not have the right to claim his debt from the guarantor, if he is able to take his debt from the principal debtor's properties. However, if he has stipulated that he has the right to take his debt from the guarantor even though he is allowed to take it from the principal debtor's properties, then he can claim from both of them. The preferable view out of those mentioned above is that of the majority of Muslim jurists. This is because by looking deeply into the definition of guarantee, which is the joining of the obligation of guarantor to the obligation of principal debtor in order to settle the debt, the creditor has the right to claim the debt from the guarantor, in the event that the principal debtor is not capable of settling the debt. Therefore, if the creditor does not have the right to claim his debt from the principal debtor, then the objective of Islamic law in permitting guarantee contract would not be realized. Consequently, guarantee would be limited to those who know each other, and the spirit of Islamic law would be affected. Thus, the circulation of wealth would be among those who trust each other and this may cause harm to the society, whereas it is impermissible in Islamic law to cause any harm to the society.

In addition, if the guarantee contract removed the guaranteed person from the liability of the right or the debt, this would convert contract of guarantee to contract of transfer of debt. It is obvious in Islamic law that contract of guarantee and contract of transfer of debt are two different contracts. In a contract of transfer of debt, the transferor is removed from liability for the transferred item while in a guarantee contract the guaranteed person is not removed from responsibility for the guaranteed items. Both guarantor and guaranteed person are required to pay the debt because guarantee contract is not a transfer contract. It is a combined obligation between the guarantor and guaranteed person where the creditor has the right to claim his debt from both of them until the debt is settled.

#### Right of Guarantor to Claim from the Guaranteed Person (Principal Debtor)

If the guarantor has settled the debt voluntarily without having an intention to return to the guaranteed person, then the latter will be free from obligation for the debt. In this circumstance, guarantee of debt and its settlement may be done by the permission of the guaranteed person or without his permission, and the guaranteed person would be free from liability for the debt. This is due to the fact that the guarantor has settled the debt voluntarily.



However, in a case where a guarantor has settled the debt with the intention to return to the guaranteed person to refund what he has paid, then it may lead to one of the following four circumstances. Firstly, if the guarantor guaranteed the debt with the permission from the guaranteed person and settled it with his permission. The guarantor has the right to return to the guaranteed person to refund what he has paid, irrespective of whether the permission comprises the statement “on my behalf or not”, i.e. “settle the debt on my behalf”. In this case, the guarantor has the right to return to the guaranteed person whether the guaranteed person has stipulated this or not. This opinion is attributed to Maliki, Shafi‘, Hanbali and Abu Yusuf.

However, Abu Hanifah and Muhammad argue that the permission must comprise of the statement “on my behalf” otherwise the guarantor has no right to return to the guaranteed person for a refund. Secondly, if the guarantor guaranteed the debt and settled it without the permission of the guaranteed person, the Malikis said that the guarantor has the right to return to the guaranteed person to refund what he has paid. In contrast, Ahmad, Shafi‘ and Abu Hanifah are of the view that the guarantor has no right to return to the guaranteed person for a refund. In supporting this opinion, Ibn Qudamah observed that in the *Hadith* of Abu Qatadah, if the guarantor has a right to return to the guaranteed person, the debt which is in the obligation of the guaranteed person will become the guarantor’s own debt and the Prophet (S.A.W) would not pray for the dead man. Therefore, Ibn Qudamah is also of the view that the guarantor has no right to return to the guaranteed person for reimbursement. Thirdly, if the guarantor guaranteed the debt with the permission of the guaranteed person, but settled it without his permission, Maliki, Ahmad and Shafi‘, are of the view that the guarantor has the right to return to the guaranteed person for reimbursement. This is because giving permission for the guarantor to guarantee the debt is customary to settle it without having permission from the guaranteed person. Fourthly, if the guarantor guaranteed the debt without the permission of the guaranteed person, but settled it with his permission, Maliki and Ahmad are of the view that the guarantor may return to the guaranteed person for reimbursement. This is because his permission to settle the debt can be considered permission to guarantee the debt on behalf of the guaranteed person. However, the Shafi‘’s argue that the guarantor has no right to return to the guaranteed person for reimbursement because the debt is obliged on the guarantor without the guaranteed person’s permission. Therefore, his permission for settlement has no effect on the guaranteed person (Al-Nawawi, 2000).

All of the abovementioned opinions show that the relationship between the guarantor and guaranteed person is that of embedded agency, in which the guarantor has the right to return to the guaranteed person for reimbursement in case the guarantor is not able to settle the debt voluntarily. In the guarantee contract both the guarantor and guaranteed person are responsible for the guaranteed item until one of them exercises responsibility over whether the guarantee contract is voluntary or with intention to return to the guaranteed person for reimbursement.

The preferable view out of those mentioned regarding permission to guarantee and settlement of the debt without permission is that of the Malikis. Since permission to guarantee the debt is given by the guaranteed person, his permission to settle the debt is by custom, unnecessary.

In case there are multiple guarantors for a debt and each one has guaranteed a part of the debt, he will be obliged to pay only the part guaranteed by each. However, if each one has guaranteed the debt, the creditor has the right to claim the debt from all or any of them. If the first guarantor has guaranteed the second guarantor and the second guarantor guaranteed the third guarantor, the first guarantor is considered as principal for the second guarantor, while the second guarantor is considered as principal for the third guarantor.

From the foregoing, it can be observed that in Islamic law, it is permissible to have many guarantors for a debt and each one is responsible for what he has guaranteed. Where each of them guarantees the whole debt, the creditor has the right to claim his debt from anyone of them.

## MODES OF GUARANTEE

Modes of guarantee are regarded as the way by which the guarantee contract is expressed or carried out and it is classified into four categories. The first is unrestricted guarantee, which is valid in all guarantee contracts. However, this is subject to the terms and conditions of the contract; either it is a debt to be paid on the spot or a deferred payment. The second is restricted guarantee, which is attributed to a specific period, whether it is a deferred contract or it is subject to maturity period. In Islamic law, it is permissible to guarantee an immediate debt on deferred payment and to guarantee deferred debt on immediate payment. This is because guarantee is a voluntary contract. Therefore, it is permissible to guarantee a debt or property according to the terms and conditions of the contract of guarantee. The third is restricted guarantee, which is subject to a valid condition that can suit the performance of the contract, such as the condition that can cause an obligation of the right on the guarantor or possibility to deliver the subject matter of the contract. The Hanafi jurists say that this condition is permissible if it is included in the contract of guarantee as a condition or obligation because it is suitable for the contract. The fourth is temporary guarantee for specific period. The Hanafi jurists are of the view that this mode of guarantee is permissible because it is the basis of the guarantee. In a nutshell, subjecting the guarantee contract to a future condition which is customary in the society is acceptable in Islamic law (Abd al-‘Aziz al-Khayat and Ahmad, 2004).

From the foregoing, all modes of guarantee contract are permissible in Islamic law if the terms and conditions of the contract are in accordance with the principles of Islamic law. As the Prophet (S.A.W) says: Muslims are bound by their conditions with the exception of a condition that makes what is lawful unlawful and what is unlawful lawful (Al-Uthaimin, 2002). Furthermore, in the case of immediate debt, the guarantor has the right to return to the debtor after he has paid the debt to the creditor. He has also the right to claim the debt from the guaranteed person if the creditor claims his debt from him. However, in the case of a deferred debt payment, he has no right to return to the guaranteed person until the period of the contract has matured, even though he might have settled the debt before the maturity date (Al-Uthaimin, 2002). Hence, the guarantor has no right to claim for a refund in case where he has guaranteed a debt or an asset for a specific period, even if he has settled the debt or delivered the asset before maturity of the period that is specified in the contract.

## RESULT AND DISCUSSION

It was found in this study that, guarantee plays a crucial role in structuring Islamic financial contracts particularly contracts that involve financial rights, deferred payment and debts. Guarantee contract is not absolute, contracting parties are obliged to adhere to the terms and conditions which are articulated in the contract. For example, for a guarantee contract to be a valid the subject matter of the contract must be *halal* thing which should be paid to the person in whose favour the contract is concluded. Guarantee contract is different from contract of sale and transfer, for instance, in a sale contract once ownership of the asset is transferred, only the buyer is responsible for the asset. Majority of Muslim jurists unanimously agree that once a guarantee contract is concluded the creditor has right to claim the debt from the debtor or guarantor both of them are liable for the payment of debt. Indeed, guarantor also has right to claim the reimbursement from the debtor in case the settlement of debt is done by him with intention to return to the debtor for reimbursement. It was discovered in this study that, it is permissible in Islamic law to have multiple guarantors for the subject matter of guarantee contract, this can refer to *takaful* and *retakaful* model. Muslim jurists argue that guarantee contract is voluntary contract in which it is not permissible for the guarantor to take any consideration for the issuance of the guarantee contract.

It is worthiness to say that guarantee contract plays a significant role in formation and development of Islamic financial instruments. Thus, it can create an atmosphere of confidence between traders and non-traders in Islamic commercial transactions. It also can create healthy economic system in the society particularly in Muslim society in which contract of guarantee is concluded voluntarily without any pecuniary consideration.

## CONCLUSION

Guarantee is permissible in Islamic law to prevent harm that may happen to the traders and investors, and protect the public interest. Classical and contemporary Muslim scholars' guarantee are not limited to guarantee for debt, but extended to the guarantee for other commercial transactions like guarantee of future liability and physical punishment. Guarantee has its own pillars and conditions, which should be met in order for a guarantee contract to be a valid one. The guarantor and guaranteed person are under some conditions that must be met while concluding the contract. Thus, not everyone can be eligible to be a guarantor or a guaranteed person. The guaranteed asset has to meet some criteria to be in an instrument that can be guaranteed. This is because not any contractual instrument can be guaranteed.

In addition, the guarantee contract has its effect on contracting parties, such as the right of a creditor to claim from the guarantor and the right of guarantor to claim for refund from the guaranteed party. These rights are not absolute. The guarantor has no right to claim a refund from the guaranteed person if the contract is subject to a specific period, even if the guarantor settled the right or the debt before the maturity date. The contract of guarantee is a unilateral contract as regards to the person in whose favour the contract is concluded or the creditor. He has the right to terminate the contract at any time without the permission of the guarantor and the guaranteed person. In addition, the guarantee contract can be absolute or restricted to a certain period of time in accordance with the terms and conditions of the contract. The researcher suggests to conduct empirical research on the topic in the hand in order to have a comprehensive understanding on the theme.

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