THE CLASSICAL ISLAMIC LAW OF GUARANTEE AND ITS APPLICATION IN MODERN ISLAMIC BANKING AND LEGAL PRACTICE

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ABSTRACT

The guarantee has been regarded as an important method of securing the performance of future obligations. In modern banking lending transactions the practical use of the guarantee has been accepted with full recognition. This is also true in the Islamic banking sector. However, due to its constant reliance upon classical formulations, the business of Islamic banking that relates to the guarantee seems inconsistent with modern developments. This thesis examines classical interpretations on the guarantee and the extent to which it has influenced the modern decisions of Islamic banking and legal practices. A wide range of Islamic legal sources has been consulted and this includes both classical and modern legal literature. The classical legal source represents legal formulations and legal explanations (fatwas) that have been constructed during the 8th century A.D. The modern legal source represents modern legal writings and some of the Arab civil codes. In order to understand the legal position of the classical Islamic guarantee in common law jurisdictions a reference has been made to the English and Malaysian common laws. The thesis demonstrates that there are more similarities than differences between classical Islamic law and modern common laws with regard to the function and objective of the guarantee. The thesis also argues that classical Islamic law of guarantees has a profound influence in both modern Islamic banking and Muslim legal practices. The factors that contribute to this are perceived to be the movement of the reassertion of Islamic Shari’a and the belief that classical texts, which were formulated upon calculated deductions, offer great information about rules that reflect the will of the Islamic Shari’a. This, however, does not mean that classical interpretations on the guarantee are perfect; it has its own strengths and weaknesses. Hence, adaptation and modification in the classical Islamic law of guarantee are still possible for the betterment of legal practice.
DECLARATION

This work has not been previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.

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This thesis is the result of my own investigations, except where otherwise stated.

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CHAPTER ONE

INTRODUCTION

1.1 Introduction

The modern business of Islamic banking shall not be restricted to Muslims alone. It must involve the business of international arena that includes both Muslims and non-Muslims. This presupposes that the law, which regulates the business of Islamic banking, is also not constrained within the context of the Muslim but encompasses the international commands of businesses.

In practice this deduction, however, seems to be too idealistic. To most international legal observers general application of Islamic law at international level is almost impossible. This is because the law is rather seen as a state-centered law, too rigid and inflexible. Further, there is a skeptical as to whether the Islamic law could adapt the modern changes. The fact that the Islamic law is attributed to divine revelation, this prolongs the skeptical. Again, it is also doubtful as to whether the law could be amended to suit the modern circumstances.

These issues need clarifications. The first step that needs to be considered is whether the whole regime of the Islamic law is immutable. In other words, is the Islamic law too rigid, a state-centered law and intolerable to the modern commands of social needs? All these need to be clarified in order to correct the misunderstandings and further, to construct a workable Islamic law in modern world.

Thus, an entire revision on the Islamic law seems to be an urgent appeal. In-depth research is vital to achieve the above objective. Hence, the regime of classical doctrines that relate to business transactions needs to be studied in order to understand the
theoretical basis of the law. It is suggested that the extent to which the classical doctrine is adaptable to modern changes could only be appreciated when a careful study is made through modern practices. At this point, modern forces of the business nature shall be the main focus as a theoretical foundation for the study. Foreign jurisprudences are also useful as a comparison for a future development of the law. It might also involve the process of modification, harmonization and unification of the law in order to make it adaptable in modern world. If this was accepted, it is believed that the application of the Islamic law outside the sphere of the Muslim world could be a 'realistic' rather than an 'idealistic'.

The present research is the reaction to the above sentiments. It is an attempt to investigate the classical interpretations of the law of guarantee that relates to the banking lending transactions. Further, it is also an attempt to prove that the Islamic law is not a state-centered law, rigid or intolerable to the modern commands. It is also the aim of the research to find out feasible features of classical Islamic law of the guarantee that can be offered for practical references. In a similar vein, the research also aims at finding out method(s) that have been used in the past with regard to the adaptation of the classical rules in the modern positive laws. Last but not least, it is hoped that the outcome of the research could contribute to future development of Islamic law.

1.2 The Islamic Legal Background

As the theme of the research suggests, classical Islamic law occupies a major focus of the research. Thus, it is pertinent to provide the reader a brief introduction to the Islamic legal tradition.

At the outset, a definition on Islamic law will be highlighted in order to clarify misunderstandings around the law. Further, the role of interpretation will also be discussed to show its significant contribution to the development of Islamic legal theories.
and its response to social needs. Modern revival movement will also be discussed to show the status of the law within Muslim populace.

1.2.1 Islamic Shari'a and Islamic Law

The word Shari'a in Arabic could mean the path to the truth. In theological discussion the word Shari'a is referred to as divine revelation. It is provided to all mankind of all nations to reach at the objective of God, i.e., the truth. The essence of the Shari'a is therefore the guidance that leads to the objective.

In Islam, the Shari'a is defined as the path to the will of God. It composed of abstract rules that are laid down in both the Qur'an and the Sunnah of the Prophet Muhammad. God has revealed these abstract rules through His Prophet with a specific objective to guide mankind as to what is right and what is wrong. However, due to its abstract nature, man sometimes has to interpret and construct the meaning to understand the divine will of God.

Since the application of the Islamic Shari'a is general, which embraces all human actions that include devotional duties it could not be regarded as law in the modern sense. At this point, the general precept of the Islamic Shari'a is conveniently referred to as a guide

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1 See Muhammad 'Ali al-Sais, Tarikh al-Fiqh al-Islami, pp. 5-10 (n.d.)
2 In the Qur'an it is mentioned, 'He (Allah) has ordained (shara'a) for you the same religion (Islam) which He ordained for Noah, and that which We have inspired in you (O Muhammad) and that which We ordained for Abraham, Moses and Jesus'[The Qur'an; 42:13]; 'To each among you We have prescribed a law (shir'at) and a clear way'[The Qur'an; 5:48]; 'Then We have put you (O Muhammad) on a clear path of (Our) commandment (shari'at min al-amr) [like the one which We commanded Our Messengers before you, i.e., legal ways and laws of the Islamic Monotheism]. So follow you that (Islamic Monotheism and its laws), and follow not the desires of those who know not'[The Qur'an; 45:18]. Italics added by the writer. These English translations of the Qur'an have been referred to Muhammad Taqi-ud Din al-Hilali and Muhammad Muhsin Khan, Interpretation of the Meanings of the Noble Qur'an in the English Language (1994)
3 The Shari'a contains both religious ethics as well as legal schemes.
4 It is submitted that the term Islamic Shari'a is wider in scope than the term Islamic law. See, for further reading, Ahmad Bin Mohamed Ibrahim, Sources and Development of Muslim Law, p. 1 (1965)
to moral conduct\(^6\) rather than a law that is enforceable in the court of justice. The closest Islamic term to the modern concept of law is, however, the *fiqh*.

The *fiqh* or Islamic law is a human interpretation upon the general precepts of Islamic Shari’a. When a Muslim seeks to understand the rules in the Islamic Shari’a and apply the conclusion of that learning to his current situation, the whole process of understanding, including interpretation and deduction, could be equated to the modern exercise of legal practices. The *fiqh* also contains rules that are enforceable in the court of justice. Thus, the *fiqh* could be regarded as law in the modern sense.

In short, the *fiqh* is more specific if compared to the Islamic Shari’a. It is subordinate to the Islamic Shari’a where its role is to interpret the general precepts of the Islamic Shari’a. It is a situational inference to God’s will; and it is upon interpretation and deduction that the rules in the Islamic Shari’a could be appreciated and developed to suit modern circumstances.

### 1.2.2 Islamic Law in the Classical Works

The practice of deducing the rules in the Islamic Shari’a has been known since the period of the Prophet, but only came to be crystallized during the period of the ‘Abbasid. Due to the diversities and complexities of life, deduction and reasoning has been extensively employed to understand and to adapt the principles of the Islamic Shari’a to current situations.

Indeed, deduction and reasoning were the main cause for the development of Islamic legal theories. As society changes, these methods have been increasingly significant to create new devices of law that suit the modern commands of the people. It was well

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\(^6\) See Ahmad bin Mohamed Ibrahim, *Sources and Development of Muslim Law*, p. 1 (1965)

\(^7\) At this point, *fiqh* includes legal interpretations that can be found in various academic books, fatwa and court decisions. See Bernard Weiss, ‘Interpretation in Islamic Law: The Theory of Ijtihad’, [1978] *The American Journal of Comparative Law* 203
accepted that the two basic sources of the Islamic law, i.e., the Qur’an and the Sunnah of the Prophet Muhammad, do not provide a comprehensive code to be used as a sole reference for every single problem. Therefore, human intervention was needed to materialize the abstract rules of the Islamic Shari’a.

On the humanistic nature of Islamic law, Badr observes,

“The Qur’an is far from being a legal code. In fact it contains very few legal provisions. Out of a total of 6237 verses only 190 verses or 3% of the total can be said to contain legal provisions. Most of these deal with family law and inheritance. In its [commercial transactions] branch, which is all that other legal systems deal with, Islamic law is indeed a man-made law and has no pretense to being a religious law except that it may be said to lay more emphasis on moral considerations than is usually the case with other legal systems”.

Therefore, in the classical period, we find that the duty of the classical jurists was not only to interpret the abstract rules of the Islamic Shari’a but also to develop further rules that suited the demand of social needs.

The method of interpreting and deducing the rules of the Islamic Shari’a, therefore reigns supreme in the history of Islamic jurisprudence. It gains its first recognition in the period of the Prophet Muhammad. In one hadith it was reported that Mu’adh was sent to Yemen as a judge. On the sending of Mu’adh, the Prophet asked him, “On what will you base your judgment?” “On the Book of God”, Mu’adh replied. “But supposing that there is nothing therein to help you?” “Then”, said Mu’adh, “I will judge by the Sunnah of the Prophet”. “But supposing that there is nothing there neither to help you?” “Then I will follow my own opinion”. From the hadith the words ‘I will follow my own opinion’ indicate that the practice of interpretation and deduction of the rules of Islamic Shari’a

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was known since the period of the Prophet, and it was approved as a useful method to develop the law to accommodate the needs of the people.

It was upon this hadith that the classical jurists were encouraged to use their own judgment in cases if there were no explicit legal rules to deal with some issues of law. This practice of the classical jurists is called 'ijtihad', i.e., to interpret and devise a law within the spirit of the divine revelation. The ijtihad has to be constructed through a strict procedure to maintain the divine nature of the law. Therefore, a strict rule of analogy or qiyas was deliberately introduced to monitor the subjective opinions of the classical jurists. In the Islamic legal tradition, analogical deduction is a legal device through which a rule that is contained in the Qur'an or the Sunnah can be extended to some similar, but not identical, situation. It is through this device that the Islamic law is guaranteed to develop within the spirit of the divine ordinance.

It is also worth mentioning that through the process of ijtihad, different Sunni schools of thought have begun to crystallize. These schools continued to be composed of private individuals. At first, these schools were geographically determined, such as the Iraqi School and the Hijazi School. Later, when the schools reached their full development, they became known by the name of the individual master whom the members of the school followed. Eventually, four Sunni schools were not only formed but also survived in modern Muslim world. The four Sunni schools include the Hanafis, Malikis, Shafi’is and Hanbalis.

As distinct from the above, the Shi’a, however, has developed upon a political and constitutional appeal.\(^\text{10}\) It was upon the doctrine of the Imamate that differentiates the jurisprudence of the Shi’a and the Sunni. However, the Shi’a with the exception of the Isma’ilis also recognizes ijtihad as a method to develop the Islamic Shari’a. In relation to this Coulson suggested;

\(^{10}\) See for detail discussion on the emergence of the Shi’a Schools in S. Mahmassani, *The Philosophy of Jurisprudence in Islam*, pp. 35-39 (1987)
"Legal scholars of [sic] Shi’ite persuasion were inspired by the same purpose as the Sunnite jurists; the raw material of their jurisprudence, the local popular and administrative practice, was the same; they shared the same general method of juristic speculation, were subject to the same influences, and evinced the same trend to ascribe their doctrines to their own representative authorities in previous generations; and thus, not surprisingly, their law emerged in the ninth century having the same broad pattern, recognizing the same principal institutions and expressed in the same literary form as Sunnite law".  

On the role of *ijtihad* in the Shi’a legal development, Coulson mentioned that during the protracted interregnum the exposition of the law has been the task of qualified scholars (*mujtahids*), and however much they may have been regarded as the agents of the Imam and working under his influence, their use of human reason (’*aqil*) to determine the law has been accepted as necessary and legitimate.  

The emergence of these classical schools has a great contribution to the *fiqh* development as a sophisticated law in Muslim history. As mentioned above, rules and principles were developed upon Islamic scholasticism, which began from the fixed principle of revelation, contain in the Qur’an and the Sunnah of the prophet Muhammad, to form a sophisticated legal rule. These works of the classical jurists started to appear as established works by the early eighth century.

### 1.2.3 Modernization of the Classical Islamic Law

The classical Islamic law was framed within this context of legal historical development (i.e., c.749-1850). By 1850, the Islamic law has begun to accept foreign influences, especially from the European legal systems; and it is during this period that the Islamic law was modernized through the introduction of some Islamic codifications by the Ottoman authorities. Anderson remarks,

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12 N.J. Coulson, Id. at p. 108; see also Ahmad bin Mohamed Ibrahim, *Sources and Development of Muslim Law*, p. 72 (1965)
"These reforms [sic] represent a phenomenon of outstanding significance [in the history of Islamic jurisprudence]. [It] provides at once a mirror of social change in the Muslim world; a measure of the progress of modernism in Islam, where law and theology always go hand in hand; and a fascinating example of [the adaptability of Islamic Shari’a to social needs]." 13

Beginning from the 14\textsuperscript{th} century Islamic law ceased to develop. It is believed that there were various factors that contributed to the stagnation of the Islamic law. However, the two main factors were the closure of the gate of \textit{ijtihad} and the state of capitulation.

In the wake of independence Muslim governments were urged to restore Islamic law as the law of land. In this context, classical doctrines, which were regarded as the past greatest achievement in the Islamic civilization, were meant to be the main reference for such restoration.

1.2.4 Reassertion of the Classical Islamic Law

In recent years, especially during the last three decades the world has awakened with the reassertion of the classical Islamic law in modern Islamic life. It has witnessed that the application of the law was not restricted to family matters but has broadened to other areas of Muslim life including the fields of contract and commercial transactions.

The emergence of Islamic banks was one of the manifestations that reflect the reassertion of classical Islamic law in the field of contract and commercial transactions in the Muslim world. During the 1970s efforts were made in various Muslim countries to establish Islamic banks. The objectives of these banks in general have been to promote, foster and develop the application of Islamic principles, law and tradition to the transaction of financial, banking and related business affairs. 14 In this regard, principles

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14 See Ahmad Ibrahim, ‘Legal Framework of Islamic Banking’, \textit{Jurnal Undang-undang} 1
that have been developed through classical formulations have been the main source for the law that governs the business of Islamic banks.

To date the business of Islamic banking continues to progress so much as to dominate the business of banking in the Muslim world. Beginning with the establishment of Mit al-Ghamr in 1963, Islamic banking continues to make progress and dominate the discussion in the economic spheres. Today, with estimated assets of more than $230 billion and operating in over 75 countries, the Islamic financial and banking institutions continue to grow. In fact it has been predicted that the institution will experience a double-digit growth in the coming decades.\footnote{See Emma Davey, 'Meeting the Challenges: An Industry Insight on Islamic Finance', a paper presented at The International Islamic Forum in the United Arab Emirates on 7-9 March 2004, \texttt{http://www.iiff.net/page.cfm/T=m/Action=PressId=12}, (20\textsuperscript{th} March 2004).}

Modern Islamic banking has come into being to meet the human needs for financing from capital belonging to others, other than one's self. These take the form of either equity financing or debt-financing. In financial transactions, similar to the practice in conventional banking, before disposing its assets to customers, the banks will always consider the safe aspect of the finance. At this point, the guarantee has been regarded as one of the useful methods to safeguard the assets.

1.3 Guarantees, the Banks and Economic Development

Now, we shall consider the meaning of the guarantees as intended in this study as well as it functions in modern economic development.

1.3.1 Personal Guarantees as Distinguished from Other Similar Instruments

This study focuses on the guarantees that are given by a third party to secure the loans and advances, which are forwarded by commercial banks. In this context, the guarantees shall mean personal guarantees whereby a person undertakes to perform the obligation of
another in case that the other person fails to perform his principal obligation. It appears, that the obligation of a promisor arises only if there is a default on the part of an original obligor. Therefore the obligation of a guarantor is collateral to that of an original obligor who primarily assumes the principal obligation. In other words, under a contract of personal guarantee, the obligation of a guarantor is dependent upon the obligation of a principal debtor. This has made personal guarantees differ in concept from that of indemnities, demand guarantees and letters of credit.

a. Personal Guarantees and Indemnities

There is a conceptual difference between contracts of personal guarantee and contracts of indemnity although both may perform similar commercial functions, in providing compensation to the creditor for the failure of a third party to perform his obligation. Under a contract of indemnity, the promisor undertakes an original and independent obligation to indemnify, which does not depend upon the existence of any other obligation of any other obligor. A contract of indemnity is a contract by one party to keep the other harmless against loss. It has no reference in law to the obligation of any third persons.

By contrast, there can be no contract of personal guarantee unless there exists a principal obligation of a principal obligor. Hence, it refers to a tripartite relationship of guarantor, creditor and principal debtor. Under a contract of personal guarantee, the guarantor assumes a secondary liability to the creditor for the default of the principal debtor who remains primarily liable to the creditor. At this point, default must have first occurred before the creditor is given the right to claim from the guarantor.

b. Personal Guarantees and Demand Guarantees

Similar to indemnities, an obligation under demand guarantees is also considered as original and independent. Under the demand guarantees, a guarantor, normally an issuing
bank, undertakes to perform the obligation of a principal obligor upon a simple demand. At this point, the bank’s obligation is unconditional and it arises as soon as demand is made and it has no regard to the underlying principal contract. To quote the words from Lord Denning:

“It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if stipulated, without proof or condition ...” 16

It appears therefore that demand guarantee is different in concept from that of personal guarantee. As mentioned above, the obligation of a guarantor under a personal guarantee is dependent upon a principal obligation of an obligor. This, however, is different from that of demand guarantee. Under a demand guarantee, a guarantor bank is obliged to fulfill his promise without proof or condition as his obligation is independent of the underlying commercial contract.

c. Personal Guarantees and Letters of Credit

Another similar device that has the same commercial function as a personal guarantee is the letter of credit. In this context, a letter of credit is normally used to secure the performance of a contractor or an exporter’s obligation in favour of a customer. The usual form of a letter of credit is that an issuing bank will provide a guarantee that the obligation of a contractor will be performed provided that certain conditions have been met. At this point, the conditions may include the production of a document showing that a judgment or award in favour of the customer has been made; a certificate issued by an independent third party showing that the customer has become entitled to the guarantee, or a written statement of the customer in proper form, if any, stating that the other party has defaulted.

16 Edward Owen Engineering Ltd v Barclays Bank International Ltd and Umma Bank [1978] 1 Lloyd’s Rep 166, at 171 and 172
As such, the obligation of the issuing bank is original and independent to the underlying contract. Roskill LJ said;

"[T]he obligation of the bank is to perform that which it is required to perform by that particular contract, and that obligation does not in ordinary way depend on the correct resolution of a dispute as to the sufficiency of performance by the seller to the buyer or by the buyer to the seller as the case may be under the sale and purchase contract". 17

Here, the issuing bank is obliged to make payment as soon as stipulated conditions have been met such as the above mentioned. Therefore, a letter of credit is different from that of a personal guarantee since it is an independent contract as compared the secondary nature of the personal guarantee.

1.3.2 Personal Guarantees in Modern Economic Development

Guarantee has a significant role in the economic development of a nation. A vast amount of credit has been successfully extended to capital users through the strength of the guarantee. Credit, which will be used as working capital, investment and business enterprise, not only generate profits but also contribute to the economic development of a nation.

In the business of conventional banks, the guarantee forms a useful instrument to secure the loans offered to its customers. The readiness of a guarantor to undertake the liability of a principal debtor could save the creditor banker from suffering loss. In this context, the guarantee as personal security stands as an alternative recourse to the debts advanced to the customers. McGuinness said,

"[I]n most cases obligations of this sort are meant to provide the person for whose benefit they are intended with a secondary source of performance. If a person guarantees the debt of another, in most cases the

17 Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd [1978] 1 Lloyd's Rep 161, at 165
creditor to whom that guarantee is given will still look to that other for payment. It is only when the principal debtor defaults that the creditor will normally look to the guarantor for performance. Thus a guarantee is usually a form of performance security. However, unlike other forms of security such as mortgages, guarantees provide security by providing the creditor with an alternate source of performance, rather than with a specific property to which resort may be made to obtain compensation in the event that there is a default". \(^\text{18}\)

As such, the guarantee is not only considered as economical and efficient but also simple in terms of both its execution and enforcement.

"[The] guarantee is a good security document because it can be realized by making a simple demand on the guarantor provided care has been taken when executing the document to maintain its validity". \(^\text{19}\)

On the part of the capital users, a legal recognition to the scheme is more than welcomed; it helps the capital users to obtain loans from financial institutions. Since the guarantee involves no asset from the capital users the practice is common in banking lending transactions. People like those who are involved in the Small and Medium Enterprises (SME's) find it a very useful instrument especially when their credit history has yet to be established. It is not surprising therefore that the practice of guarantee is common in banking lending transactions.

The importance of the guarantee would be more appreciated when the value of the asset, which was at first created as collateral, begins to depreciate. At this point, the guarantee, which was created as a 'double protection', acts as a 'contingent' instrument to rescue the creditor banker against a possible irrecoverable debt. When there are two collaterals provided, the creditor banker has the choice to enforce the one s/he desires. Siti Norma Yaakob J said,

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“The plaintiff [i.e. the creditor banker] has the option to exercise which of two securities it wishes to enforce. It may even enforce both securities, as is done in this case, if it found that one security is insufficient to settle the debt and it was to meet this eventuality that the plaintiff had in its wisdom insisted upon two forms of security, the charge as well as the guarantee”. 20

Such high value of the guarantee has made it significant in the transaction of loans. The importance of the guarantee is apparent when it accords with a commitment to the success of a business. An example of this is when the guarantee is taken from directors of private companies. Jaginder Singh et. al. confirm;

“Banks often like to obtain a personal guarantee from directors of private companies, even though substantial collateral for the indebtedness has been obtained, to commit them to the success of the enterprise”. 21

In this instance the guarantors not only have a direct interest but their advantage of a limited liability has also been reduced through the production of the guarantee. Therefore, under the guarantee, the guarantors will put their full commitment to the success of the business of the companies and thus contributing to the nation’s economic development.

On another point, the guarantee also accords with moral obligation on the part of a guarantor to ‘advise’ the principal debtor to commit to the success of a business. It is the cardinal principle of the law of the guarantee that if the principal debtor fails to perform, the guarantor has to bear the burden of the principal debtor. Thus, it is desirable for the guarantor to commit himself and advise the principal debtor to perform well in the business so that the debt could be recovered from the profit of the business.

In the modern interpretation of the contract of the guarantee the failure of the principal debtor could mean the failure of the guarantor to perform his promise. In the statement of Lord Reid,

"A person might undertake no more than that if the principal debtor fails to pay any installment he will pay it. That will be a conditional agreement. There would be no prestable obligation unless and until the debtor failed to pay ... On the other hand, the guarantor's obligation might of different kind. He might undertake that the principal debtor will carry out his contract. Then if at any time and for any reason the principal debtor acts or fails to act as required by his contract, he not only breaks his own contract but also puts the guarantor in breach of his contract of guarantee. Then the creditor can sue the guarantor, not for the unpaid installment but for damages".

In the context of Lord Reid's statement, it is construed that under the contract of the guarantee a guarantor is held responsible for the conduct of a principal debtor. Therefore, he is bound to observe the conduct of the principal debtor so as to ensure that the principal debtor will perform his promise.

In short, the combination of the above functions of the modern contract of the guarantee reveals that the guarantee has an important role in the economic development. Such an important role of the guarantee has been well recognized in the business of the Islamic banking. Thus, a similar devise has also been adopted to realize its banking businesses.

1.4 Issues and Research Questions

The guarantee is regarded as the most common instrument used in the business of a commercial bank. Being the simplest and least expensive, it is regarded as the most acceptable form of security in the banking lending transactions. Most of the capital users find it very useful in obtaining loans from financial institutions. On the other hand, the creditor bankers also like to accept the guarantee although in most cases substantial collateral has been deposited as security for the loans. In short, being simple in both conclusion and execution the guarantee has been commonly used in the business of a commercial bank.

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22 Moschi v Lep Air Services [1973] AC 331
In the business of the Islamic banks, the practice of a similar device is also not uncommon. A vast amount of funds has been successfully extended to the customers through the strength of the device. Nevertheless, due to its Islamic nature, the banks are not allowed to engage with transactions that are contravened to the cardinal principles of the Islamic Shari'a. Thus, instead of adhering to the modern devices, the banks have to seek other alternatives that conform to the fundamental precepts of Islam.

In this context, the scheme of *al-kafala*\(^{23}\) has been chosen as an alternative instrument to the modern practice of the guarantee. The scheme, which was originated from the principles of the Islamic Shari'a, was constructed through the period of the classical formations.

The main issue that concerns most legal observers about the Islamic guarantee is the divine nature of the scheme. As mentioned above, the guarantee in Islamic banks does not develop in parallel to the modern concept but rather was constructed upon the rules of the Islamic Shari'a, which was developed through the classical formulations. The law that regulates the scheme was divine in nature hence it allows a little room for change. The question that arises is whether the scheme of the guarantee could suit the modern demand of the social and economic changes.

The fact that the demands of modern businesses do change and sometimes do so very quickly, a further question arises as to whether the law could be amended to accommodate those changes. In other words, is the classical law that relates to the guarantee susceptible to changes?

These issues need to be clarified in order to make the law acceptable in modern world. Now, after almost 40 years of the operation of the Islamic banks, the law that regulates the guarantee needs to be re-examined. The weaknesses of the law should be corrected

\(^{23}\) The *kafala* is the closest Islamic term to guarantee. Throughout the thesis the writer will use the term 'Islamic guarantee' instead of *kafala*. See chapter 3 for reasons.
while at the same time the feasible features of the scheme should be maintained and polished for further enhancement of the law. The importance of the institution of the guarantee in the field of the economic growth has made this as a valid plea for the re-examination of the scheme in the Islamic banking.

Indeed, the institution of Islamic guarantee shall be made applicable at the international level. In view of economic perseverance, the application of the scheme shall not be confined to the Muslim alone but must involve the business of the non-Muslim as well.

Thus, a careful study on the Islamic law of the guarantee needs to be engaged. The entire regime of the classical doctrines that relate to the guarantee needs to be studied in order to understand the theoretical basis of the law. The method the classical jurists interpreted the guarantee could provide us with information on how the law was developed and how it reacted to social changes. In modern practice of the guarantee, issues such as the extent to which the classical doctrine is applied in the modern banking and legal practices shall also be made clear. At this point, the study shall not only help us to understand how the classical doctrine was made applicable to the modern practices but also help us to make a further suggestion for the betterment of the law.

Thus, questions that are relevant to my study include;

i. What is the legal concept of the guarantee as understood through the classical formulations;

ii. How far do these classical doctrines influence the modern decisions of Islamic banking and legal practices;

iii. What are the method(s) that have been used in order to make these classical doctrines as a workable legal rule; and

iv. What are the main features of the classical guarantee that can be forwarded as a workable legal rule in the modern legal practice?
1.5 Importance of the Research

The study on the classical Islamic guarantee is not only important for the development of legal studies but also for economic growth in the Islamic banking sector. In the conventional system, the guarantee has been proven to be one of the most important instruments in the economic development of a nation. In relation to this, capital users often find it a very useful method in obtaining loans from the financial institutions. On the other hand, the availability of the guarantee encourages the creditor bankers to make loans; and in this way the economic activities of a nation are stimulated.

Due to the divine nature of the law that governs the guarantee in the Islamic banks, the participation of the non-Muslim in this area is not overwhelming. The presumption that the law is too rigid and intolerant to the modern commands of social changes has dominated the minds of non-Muslims. This misconception about the law should be clarified so as to attract more participants in the business of the Islamic banks. Therefore, a thorough examination needs to be engaged not only to correct the above misconception, but also to attract more participants in the business of the Islamic banks. At this point, the Islamic legal reactions to the instrument of the guarantee should be made clear to the public.

Although there is a substantial literature on the modes of financing in the Islamic banks, there exists little discussion on the law that governs the financial transactions. In the context of the guarantee, to the best of the researcher's knowledge, there exists no practical research that has been conducted with regard to both of its concept and application in modern banking and legal practices. Therefore, the present research is important and useful as a future guide to the development of the law that concerns the guarantee.

In view of the modern revival of classical Islamic law, the present research seeks to investigate the nature of the guarantee as identified in classical Islamic legal thought. The
fact that most of the modern Islamic law was constructed upon the classical doctrines, the investigation of the classical rules seems to be an urgent appeal. In the field of the guarantee, the vast borrowing of the classical doctrines is undisputable.

Thus, the plea of this classical thought in modern world seems compelling and it is not impossible that the law will reshape the modern legislations of the Muslim world. This is foreseeable since the modern movement for the reassertion of the Islamic Shari'a could also mean the call for the reinstatement of the classical Islamic law in the modern Islamic legislations. Hence, for those involved in comparative laws, practitioners or academicians, the values that have been developed during the classical period could be a useful determinant for future development of the Muslim laws.

In a wider global perspective, the research is a significant step towards harmonization of international private law, particularly between the common and Islamic commercial law. In the wake of the growth of Islamic banking, more and more Western bankers and financiers participate in Islamic banking seminars and conferences in order to understand the theory and concept of Islamic banking and finance. The fact that most Arab countries own some of the world's oil reserves has attracted many established Western companies to invest in the Arab world. Although the Arab leaders welcome the foreigners who can contribute in developing their countries, they too are now increasingly leaning towards Islamicisation of their laws. In the banking sector in particular each bank's Shari'a Supervisory Board plays an important role in advising and monitoring the banking activities so as not to cross the boundaries of Islamic Shari'a. Hence, despite being dependant on each other, it is essential for the foreigners to understand the Islamic laws in order to deal with their Islamic partners. The research aims to contribute to the modern Islamic intellectual discourse to give a clearer picture to the foreigners of the jurisprudential objective of the classical Islamic law of guarantee. It is hoped that this work can provide a basis for understanding and developing a better legal framework, which shall harmonize the available laws on the subject leaving only the more just system and abolish the unfair and biased law.
1.6 Scope and Methodology

As the theme of the research suggests, most of the discussions are generally referred to the classical opinions on the law. Classical opinions represent both judicial views and fatwas that embodied in the classical works of the four Sunni schools, i.e. the Hanafis, the Malikis, the Shafi'is and the Hanbalis, who constitute some 90% of the Muslims population. It is worth mentioning at this point that the classical Islamic law was framed within the context of the emergence of these four schools of thought. From 1850, the Islamic law came into modernization through the introduction of some Islamic codifications by the Ottoman authorities.

While examining the classical Islamic law, some modern Islamic legislation will also be discussed. This has been done so as to look into the consistency of the law within the context of modern calculation of Muslim life. These selected modern Islamic legislations will include, inter alia, The Majalla of the Ottoman authorities (introduced in 1869-1876), and The United Arab Emirates Civil Transactions Code 1985.

The common law position will also be discussed at this stage. This is important not only to make the subject more comprehensive but also to describe the legal position of the classical Islamic guarantee. Moreover, a desired result could be obtained through this approach as it could explain the strengths and the weaknesses of the classical Islamic law. In this context, principles that are embodied in the classical Islamic law will be compared with decisions that have been made in other jurisdictions. Thus, the extent to which the classical Islamic law differs from the modern concept of legal theories could be determined. Hence, the weaknesses of the law could be corrected in the light of the modern concept. To quote the words of Lepaulle;

"To see things in their true light we must see them from a certain distance as strangers, which is impossible when we are studying a phenomenon of
our own country. That is why comparative law should be one of the necessary elements in the training of all those who are to shape society". 24

On the common law side, the jurisdictions of the United Kingdom and Malaysia will be the main focus although some other jurisdictions will be occasionally referred to. It should be stressed, however, that it is not the purpose of this thesis to discuss the common law in detail, but it is discussed to compare and make the subject comprehensible.

Towards the end of the study, the researcher will make an attempt to examine the application of the law in modern banking and legal practices. To achieve a desired result, the discussion will be divided into two chapters. The first will discuss the application of the law in modern Islamic banking and financial institutions. Some main issues will be highlighted in this chapter and this will include issues such as the importance of the guarantee in banking transactions and the Islamic Shari'a standpoint on the modern practice of the guarantee. Some selected Fatwas pertaining to the modern practice of guarantees would also be highlighted in this chapter. The second chapter will discuss the application of the law in modern legal practice. Some modern legislation will be selected as the focus of the study. This includes the Majalla, The Egyptian Civil Code 1948, The Kuwaiti Civil Code 1980, The Qatari Civil and Commercial Code 1971, The Bahrain Contract Law Regulation 1961, The Jordanian Civil Code 1976, and the UAE Civil Transactions Code 1985. Malaysia, which follows the common law traditions, will also be selected in the discussion. At this point, issues such as reconciling the religious and Malaysian common law would be highlighted. It is pertinent to state at this point that the laws referred in this thesis are current to 2005.

1.7 Thesis Organization and Sources

The thesis will be divided into two main parts. The first that consists of chapter 2, 3, 4, and 5 intends to provide both theoretical and conceptual basis of the classical Islamic law

24 Lepaulle, 'The Function of Comparative Law', (1922) 35 Harv. L. Rev. 853
of guarantees. The second part that consists of chapter 6 and 7 intends to provide practical application of the classical Islamic law of guarantees in modern legal practice. Chapter 6 however focuses on the application of the law in modern banking transactions while chapter 7 focuses on the application of the law in modern legal practices that concern with Muslim countries. Chapter 1 is the introduction while chapter 8 is the concluding remarks of the thesis; some suggestions will be included.

Chapter 1 is the introduction of the thesis. The chapter attempts to explain the main objective of the research. Issues and problems that have a direct connection to the study will be highlighted. Thus, some important topics, such as theoretical framework, methodology and research background are discussed in the chapter.

Chapter 2 discusses the origin and historical development of guarantees. Being general in nature, the chapter refers the guarantees to the multi-societal developments. This includes early development of human society, medieval England and early days of Islam in the Arabia. The main objective of the chapter is to find the origin of the guarantees; and how it develops within societal progress.

The importance of such historical reflection was due to the fact that experiences of the past could reflect on the contemporary issue. To quote Tim May, 'the study of the past is to understand the sense of our 'past' and with that, the ways in which our 'present' came about'. This means that through historical reflection we will be provided with knowledge about the experiences of the past; the law in context, how it emerged and responded to social changes; which ultimately could enable us to reflect upon our

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25 Tim May, Social Research: Issues, Methods and Process, p. 158 (1997). On the same point, McDowell gives an elaborative statement, "This record of the past can help to enrich our understanding of our own society and that of other cultures [sic]. It is [sic] history, which provides us with the opportunity to understand and appreciate the past, to distinguish myth from reality, and to see which elements of the past had an influence on future events. [sic] History enables us to view ourselves and society in a proper perspective, to focus on human motives and the consequences of them for other individuals or for society, and to enhance our knowledge of the potential, as well as the limitations, of human actions". See W.H. McDowell, Historical Research: A Guide, p. 3 (2002)
contemporary issues. From another perspective, historical discussion could also form a theoretical foundation of the law for further discussion on the subject.

As such, the main data that has been used in the chapter are the legal historical sources. However, due to the remoteness of the data, between the past and the present, most references have been made to the secondary sources. At this point, various major textbooks, journal articles and legal historical bibliographies have been referred to in this chapter. This includes, *inter alia*, W.S. Holdsworth, *A History of English Law*; Theodore F.T. Plucknett, *A Concise History of the Common Law*; Jean Brissaud, *History of French Private Law*; Ibn Khaldun, *The Muqaddima*; S. Mahmassani, *The Philosophy of Jurisprudence in Islam*; T. Hewitson, *Suretyship: Its Origin and History in Outline*; and W.D. Morgan, "The History and Economics of Suretyship", (1927) 12 Corn. L.Q. 154.

Chapter 3 is the beginning of the discussion of the main topic. It discusses the basic characteristics of classical Islamic guarantees. The chapter investigates the meaning, role and function of the guarantee as understood in the classical formulations. At this point, some similar instruments have been discussed, so as to differentiate and appreciate the nature of the Islamic guarantees.

Chapter 4 discusses classical provisions on the creation of the Islamic guarantees. The main objective of the chapter is to understand the classical requirements with regard to the conclusion of a valid contract of guarantee. At this point, issues such as classical theories on contract, formalities and other kind of arrangements will form the main discussion.

Chapter 5 focuses on the effect and enforcement of classical Islamic guarantees. Issues, such as rights and liabilities dominate the discussion.
The main data for chapter 3, 4 and 5 was the classical texts. At this point, rules and principles in the classical texts of the Islamic jurisprudence have been extensively referred to in the discussion.

The reference to the classical texts is important since there was a lack of legislation, as we know in the modern sense. Furthermore, the classical texts could also provide us with rich information about the Islamic legal reaction to the guarantee.

Indeed, classical texts are important not only because of their closer link to the period of the Prophetic, but also to understand the general rules of the Islamic Shari’a. Expositions that have been made in the classical texts could provide us with enormous amount of information about law as intended in the Islamic Shari’a. In other words, to understand the Islamic Shari’a, classical texts could best serve the purpose. In connection to this, Hooker\textsuperscript{26} remarks,

\"[The Islamic Shari’a] was a self-contained universe in law. It depended on the revealed text – Qur’an; the divinely inspired practice of the Prophet Muhammad – Sunnah; and the consensus of the recognized jurists – ijma’. It is through the later, the classical text books, that we ‘know’ the former\".

Thus, the classical texts, which were formulated upon calculated deductions, contain rich information for the understanding of the rules that were intended in the Islamic Shari’a. If the English common law refers to the rules of precedent for the understanding of law, the Islamic legal tradition refers to the precepts of the classical jurists for the same.\textsuperscript{27}

Indeed, the classical texts represent useful data for any research that is concerned with Islamic legal theories. The classical texts contain a great deal of information about legal interpretation on a specific subject of law. In this context, the texts are able to provide us with information on how rules were constructed and the manner in which the classical

\textsuperscript{26} M.B. Hooker, ‘Introduction: Islamic Law in South-East Asia’, [2002] 4 Asian Law 213 at 214

\textsuperscript{27} See Herbert J. Liebesny, ‘Comparative Legal History: Its Role in the Analysis of Islamic and Modern Near Eastern Legal Institutions’, [1972] 20 The American Journal of Comparative Law 35 at 44
reacts to social changes. In short, classical texts are important for those who intend to investigate the legal behavior of Islamic law.

A reference to the jurisdictions of common law has also been made in these chapters to compare with the rules and principles of the classical Islamic law. At this point, statutory provisions and case laws of the England, Wales and Malaysia have been extensively referred to reach at the desired results.

As for the classical Islamic texts the reference includes the works of the four major schools of law. To mention a few this includes, inter alia, Kitab Bada' i al-Sana'i fi al-Tartib al-Shara'i of Kasani (the Hanafis), al-Mudawana li al-Imam Malik of Sahnun (the Malikis), Nihayat al-Muhtaj Sharh al-Minhaj of Ramli (the Shafi'is), and Kashshaf al-Qina' 'An Matn al-Qina' li Ibn Qudama of Buhuti (the Hanbalis).

Modern legislations on the Islamic law have also been considered in this chapter to look into the consistency of the rules that are contained in the classical texts with that of the modern positive laws. The legislations include the Majalla of the Ottoman authorities and the UAE Civil Transactions Code 1985.

Chapter 6 is the beginning chapter for Part 2. The chapter is an attempt to explore the application of the classical Islamic guarantees in modern banking transactions. The main objective of the chapter is to investigate the extent to which the classical Islamic guarantee is applied in modern banking transactions. One method of inquiry is to go through the fatwas.

Since not much legal decision has been made on the issue, or perhaps none, much reliance has been made on fatwas. Thus, the fatwas are regarded as an important source of information in this chapter in evaluating and assessing the development of the classical Islamic guarantee in modern banking transactions. A list of fatwas that relate to the subject has been included in the chapter.
As for the importance of the guarantee in the banking lending transactions, several personal interviews have been conducted to grasp a better knowledge on the issue. At this point, a series of correspondence has been made with Mr. Mohd. Azid Abu Samah a Manager in the credit department of the Bank of Bumiputra-Commerce Berhad Malaysia (BBCB) in order to understand the importance of the guarantee in the banking lending transactions. An interview has also been made with Dr. Aznan Hassan, a member of the Shari’ a Supervisory Board of the Bank of Muamalat Malaysia Berhad, (BMMB) in order to understand the extent to which the classical rules have been applied in the fatwas. However, due to the lack of such fatwas, not much information has been obtained with regard to the inquiries. At this point, it is suggested that the role of the Shari’ a Supervisory Board is mainly to supervise the operation of the bank rather than to deduce a rule from the classical Islamic law.

Chapter 7 discusses the application of the classical Islamic guarantee in the modern legal practices. Unlike chapter 3, 4 and 5, the chapter intends to examine the extent to which the classical Islamic guarantee applies in the modern Islamic legal practice. Thus a discussion has been made in reference to modern Islamic legislations, which include the Majalla and some of the Arab legislations. A special reference has also been made to the Malaysian law of guarantee.


However, due to the vastness of the data, the UAE Civil Transactions Code 1985 has been selected as a model for the purpose of the above test (i.e. the extent the classical Islamic guarantee applies in the modern Islamic legislations). The selection has also been made for the reason that the Code has been suggested to owe much of its rules to the classical doctrines.
In Malaysia a reference has been made to the Malaysian Contract Act 1950 and the judicial decisions.

Chapter 8 is the concluding remarks of the thesis. The chapter represents the outcomes of the research. All of the ideas and findings of the thesis are summed up in this chapter. In addition, suggestions and an agenda for future research on the subject will also be made in the chapter.

Finally, it should be noted that doing a research on classical Islamic law is not an easy task as one can assume. This is because the classical Islamic law contains extraordinarily rich and complex legal principles. The law is seldom stated in its general principles but has always been elaborated in innumerable detailed rules. On another point, the rules and principles that are embodied in the classical manuals are not only legal but also moral, defeating at times any hope of a legalistic precision. Further, the classical Islamic law also involves disparities in opinions, which not only attract to confusions but also difficulties in understanding legal principles that pertain to certain issues.
PART 1

THE HISTORICAL AND THEORETICAL FOUNDATIONS OF CLASSICAL ISLAMIC GUARANTEE
CHAPTER TWO

ORIGINS AND HISTORICAL DEVELOPMENT OF THE GUARANTEE: A GENERAL OVERVIEW

2.1 Introduction

The guarantee has been regarded as the most practical form of security to safeguard peacekeeping and the performance of future obligations. In the primitive ages, this important role of the guarantee was not only applied in social agreements but also in commercial transactions. True to its original meaning, that is to support, the institution of the guarantee developed as humanity grew, and together they will both compliment each other for as long as there are men in this world. Thus, development in the civilization of Mesopotamian, Greek, Roman, and Medieval England has affected the development of the rules that relate to the guarantee. In Islam, whose doctrines emerged between the civilization of the Roman and Medieval England, the important role of the guarantee has been adopted with modest modifications.

This chapter is an attempt to explore the origin and historical development of the guarantee. Issues such as how the guarantee has emerged and used in the primitive races will be the main focus in the study. To this end, considerable legal historical literatures have been consulted to get a real picture of the origin and historical development of guarantee in the past. The study is important not only to understand how the institution of the guarantee existed, developed and reacted to social changes, but also to provide a base for future discussion on the subject.

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1 The word ‘guarantee’ originally comes from the Norman French word ‘garantie’. This word was derived from the Frankish word ‘garant’, which is a derivation of the word ‘warant’. This word carries the meaning of support. See Kevin Patrick McGuinness, The Law of Guarantee, p. 21 (1986)
2.2 The Origin of the Guarantee

In recorded evidence it appears that the origin of guarantee is not recent. In fact, it has been known since ancient times beginning with the development of human civilization. In this context, the guarantee is observed to have emerged in the purview of the theory of causative factors that exist in the human need, which evolved and measured socially.

As societies develop, the relationship between men becomes more complex and multifarious. At this point, the relationship was not only concerned with different communities but also involved diverse characteristics and transactions. As such, there is a strong need to the formation of steadfast rules to facilitate such relationship. As a result of this, as happened in the past, there must be a set of peaceful and productive social orders to govern such relationship between men. The rules that relate to the guarantee are believed to have emerged under this process.

Thus, the need that guarantees were conceived to meet is conditioned by circumstances of time, place, local environment and racial characteristic. However, it is believed that the fact that men are gregarious has been the main factor for the emergence of the institution of the guarantee. With regard to this, there is a platitude of maxims, which suggests that men cannot survive on their own selves but only with the interference of others. It seems, therefore, that the idea of association or cooperation, which forms the fabric of human relationship, was significant. A derivative tendency was therefore to merge their individualities and to cooperate with each other. As a result of this fundamental fact, a

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3 The main factor, which triggered the establishment of the institution of guarantee, was believed to be the savageness of primitive society.
4 See T. Hewitson, Suretyship: Its Origin and History in Outline, p. 1
5 With regard to this, Ibn Khaldun remarked: 'Man cannot survive as an individual in isolation; by his very nature he needs cooperation to get what he requires. This cooperation inevitably involves, first quid pro quo, 'mu'awada' in Arabic term, then sharing, 'musharaka' in Arabic term, and other forms'. See Ibn Khaldun, Muqaddima, p. 439; Aristotle, the great Greek philosopher has also made the same remarked when he described himself as a social animal. See T. Hewitson, Ibid. This means that the very existence of man and his survival in the universe is very much dependent upon association and cooperation.
principle of reciprocity emerged and everybody has a moral duty to help each other for their own benefits. This classical rule of association was established through the process of ‘spontaneous order’, and it is also believed that the emergence of the institution of the guarantee was triggered from this process.

Also, most of the social orders, in the primitive ages, were created through voluntary actions that existed in man. Thus, in the absence of state or legislative body, rules were created through a process of informal reliance on the prevalent customs and traditions that prevail in that particular society. At this point, one could also suggest that the initial enactment of rules that relate to the guarantee have gone through such a process of rule making. In other words, the existence of guarantees was not sanctioned by a state or legislative body but through voluntary actions of men who interact frequently to facilitate their need. Perhaps the writing of P.H.J.H. Gosden, which pertains to the institution of assurance within the British friendly societies of the 18th and 19th centuries, can be a useful reference for such practice of spontaneous creation of social orders. Gosden wrote inter alia:

“They do not owe their origin to parliamentary influence; nor to private benevolence; nor even to the recommendation of men of acknowledge abilities, or professed politician. [They] originated among the person on whom chiefly they were intended to operate; [these men] foresaw how possible, and even probable, it was that they, in their turn, should ere long be overtaken by the general calamity of the times and wisely made provision for it”

In short, in the primitive ages, rules that pertain the guarantee were not sanctioned by a state or legislative body but originated from an informal reliance upon the prevalent practice and customs. It was tradition that shapes the rule of the guarantee rather than the power from a state.

7 P.H.J.H. Gosden, Self-Help: Voluntary Association in the 19th Century, p. 91
Thus, the guarantee was regarded as important in the primitive ages. It was used as a method to secure peacekeeping and the performance of future obligations. In relation to debt transactions, the primary purpose of the institution of guarantee was double-edged. In this context, the guarantee provides both assistance and security for those who are in need. Thus, the guarantee could be seen as a method to reinforce one’s capability, status, as well as credit, by the accession of another. On another hand, the guarantee could also be seen as a personal security that secures the unforeseeable future risks. In short, guarantees are indispensable not only as an auxiliary of credit and good faith but also as security for future uncertainties.

In all respects, the emergence of guarantees was due to human needs that evolved and measured socially. They owe their origin to a spontaneous informal process reliant on custom and traditions that prevail in a community. In a society of people who interact frequently, the principle of reciprocity serves to reinforce the co-operative behavior by which men work together to achieve their motives. As this happens, men are morally bound to help each other where they collectively take upon each other the responsibility of guarantees as occasion arises. At this point, each member of a group assumes some form of responsibility for the others in the group, thereby diffusing among the group the burden of risks, which might otherwise fall on a single individual, for any unpaid debts, defaults on agreements, negligence, and so forth of other members of the group.

2.3 Primitive Practice of the Guarantee

It is observed that the earliest use of the guarantee was connected in warfare. In relation to this, the original establishment of the institution of guarantee was prompted through the idea of securing a peaceful life. At this point, it appeared that there was no proper rule that governed the life of the primitive men and their relationships. Therefore, it seemed that the instinct of the primitive men was to defend themselves from all hazards and if possible to deprive others of their property and even their lives. Hence, retaliations and
vengeances were very common and their safety was dependent upon brute force. However, upon development, a mechanism to put a stop to the savagery was sought and the extermination of enemies and rivals was conceived to be one of the methods. At this point, the guarantee was perceived to be a useful mechanism to safeguard the peacekeeping between societies. Hewitson said;

"When the wholesale capture or slaughter becomes either impossible, inexpedient or abhorrent, the elementary and fundamental need of securing safety by submission, or of securing good faith, or the performance or observance of any act, forbearance, office, or undertaking may, in such circumstances, be satisfied by the capture or voluntary surrender of one or more members of the enemy group. The individual thus taken is held in ostagium, (obsidium) as a pledge or surety [i.e guarantee] for the good behavior of the community he represents".

Indeed, the guarantee was useful not only as a method of putting a stop to such savagery but also as security for a peaceful life. In this context, the guarantee was important to ensure the good behavior of the people through the submission of guarantor(s) as hostages. In the inscription of Tiglath Pileser, it is described that ‘the children, the offspring of his heart and family I took as hostages [to secure the good behavior of the people that they represent]’. The hostages who stood as guarantors were held in the claimants' custody where the claimants were allowed to take vengeance upon the guarantors should the people that they represented fail to observe the requirement of good behavior.

As such, with the march of social progress the important role of the guarantee has been developed and the application of which has been further extended to include cases in future obligations. At this stage, the essential function of guarantee has been developed to include the security for the performance of promises or future obligations. Perhaps, the

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8 See T. Hewitson, Suretyship: Its Origin and History in Outline, p. 3
9 T. Hewitson, Id. at p. 4
10 See A.B. Bell, Commentaries on Scottish Law, Vol. 1, p. 1106; Prof. A. H. Sayce, Records of the Past, p. 97 (1888) as cited in T. Hewitson, Ibid.
earliest recorded practice of such guarantee can be found in Genesis\textsuperscript{11} whereby Simeon, son of Jacob was held in Joseph’s custody until his brethren brought Benjamin before him. In this notable example, Simeon was held as a hostage to secure the performance of the promise made by Joseph’s brethren who have agreed to bring Benjamin before Joseph. It is interesting to note here that although the general application of guarantee has developed the practice of taking hostages as guarantors was still commonplace. Perhaps hostages were regarded as a successful mechanism of oppression through which the claimants could compel the others to observe their good behavior or to perform their future obligations. Therefore this method was used for centuries after it was first established. It was reported that during the reign of King Solomon this practice had been extended to include other matters such as debt transactions.\textsuperscript{12} The code of Hammurabi (circa 2250 B.C.) presupposes that a debtor without friends or credit might well have no choice but to hand over some member of his family or a slave, as hostages, whose services to the creditor would reduce or discharge the debt.\textsuperscript{13} In relation to this ancient practice of the guarantee, Brissaud described;

"The creditor kept him [the hostage] near himself, sometimes sequestrated, or even in irons; he was authorized to take vengeance upon him if the debtor did not pay his debt at maturity; just as he would have taken vengeance upon the person of the debtor (it was death, mutilation; slavery for debts). Such a prospect as this must have led the hostage to neglect no means of getting the debtor to free himself of the obligation".\textsuperscript{14}

The implication of such practice was the subjection of a guarantor into the power of a creditor. At this point, it is observed that the subjection of a guarantor into the power of a creditor is important for at least two points; first is to have an actual possession of the guarantor, second is to establish the creditor’s rights over the hostages and the people to whom the hostages represent. It was suggested that the right of the primitive men over something could only be established through the physical possession of the subject

\textsuperscript{11} The Genesis 42; The reader may also consult the Qur’an, 12:78-83
\textsuperscript{12} See T. Hewitson, Suretyship: Its Origin and History in Outline, p. 12
\textsuperscript{13} See T. Hewitson, Ibid.
\textsuperscript{14} Jean Brissaud, History of French Private Law, (Continental Legal History Series) Vol. 3 p. 574
matter.\textsuperscript{15} Hence, the rudimentary principle of subjection became significant and therefore we find that the practice of taking security in the form of hostages was prevalent in the ancient times.\textsuperscript{16}

In the Middle Ages, the guarantors were held absolutely responsible for the delinquent or wrongdoing of the offender; they assumed the primary liability of the offender in the sense that their positions are in substitution for the offender. This means that the offender was no longer responsible for his own delinquency but it was his family, the guarantors, who assumed the burden of guarantee.\textsuperscript{17}

Other than being forcibly captured, it is also observed that the production of a guarantor was also made on a voluntary basis. This is in fact one of the primitive principles that has been built upon a general principle of 'collective responsibility'. Under the principle of collective responsibility everybody in a clan is responsible to take the burden of guarantee as the occasion arises. In other words, everybody has a reciprocal duty to help each other in whatever course and whenever it is needed. Further, the offence of an individual was regarded as the offence of the clan. Therefore, voluntary guarantee was common and it was perceived to be a characteristic of medieval times. It is not surprising that in the code of Hammurabi (circa 2250 B.C.) the city and its governor will be held responsible for the failure to capture a brigand. With regard to this, section 23 of the code, for instance, stated:

"If the brigand be not captured, the man who has been robbed shall, in the presence of God make an itemized statement of his loss, and the city and

\textsuperscript{15} With regard to this Hewitson said; "In early Teutonic law and probably in most primitive systems, the right is not conceived apart from the physical possession of the subject matter, any more than the juristic effect of a transaction is perceived apart from the visible public manifestation of purpose, which by force of usage becomes essential to the creation of particular individual legal relationship. The right or power of the creditor, like the right or power of the owner, must be physically expressed. As in the latter case it is expressed by actual possession, so in the other case the creditor's power must be shown by the possession of the debtor or a pledge or hostage". See T. Hewitson, Suretyship: Its Origin and History in Outline, p. 36

\textsuperscript{16} When societies are developed, the subjection of guarantors into the power of creditors was not the physical restraint but they were only held in virtual custody whereby the guarantors were taken in parole. In this respect, the guarantors should present themselves when and where the creditors required.

\textsuperscript{17} See T. Hewitson, Id. at pp. 7-9
the governor, in whose province and jurisdiction the robbery was committed, shall compensate him for whatever was lost.  

Under this section, the principle of collective responsibility was applied whereby the city and the governor were placed in the position of a guarantor.

As such, it seems however, as a result of the constant evolutionary and collateral changes in social relationships, the principle of collective responsibility was gradually replaced by individual responsibility. The march of social progress from the rule of force to the rule of law has also witnessed the development of the law of guarantee. The practice of controlling hostages was later developed and replaced through the notion of bilateral agreement. At this point, the guarantee arrangement emerges as a duty or a liability, which inheres by way of accession instead of substitution, and by way of contractual obligation instead of subjection to power.

2.3.1 The Guarantee in Early Contractual Obligations

The practice of the guarantee in contractual obligations has been known since before 2500 B.C. During the reign of King Sargon I (circa 2,750 B.C.), the guarantee was widely used as a method to secure the performance of promises in contractual obligations. Willis D. Morgan describes;

"A farmer, who resided in a suburb of Accad, had been drafted into the military service of the king. He entered into a contract with a second farmer by the terms of which the latter agreed to cultivate the soldier’s farm for the period of his absence. He also agreed to fertilize the land properly and to maintain the property and return it to the owner upon the expiration of the lease, in as good condition generally as when received by him. The lessee, in return, was to receive one-half of the produce from the farm. The owner, of course, would be in no position to personally supervise the performance of the contract by his lessee, and, in order he

18 See Botsford, Source Book of Ancient History, p. 29 as cited in W.D. Morgan, "The History and Economics of Suretyship", (1927) 12 Corn. L.Q. 154
20 W.D. Morgan, "The History and Economic of Suretyship", (1927) 12 Corn. L.Q. 153
might be properly secured, the tablet states that a merchant of the city of Accad, as a surety for the lessee, guaranteed the performance of this contract by him."

The code of Hammurabi also presupposes the important of guarantee in relation to contractual obligations. This code, which has been enacted from about 2,250 B.C., some 500 years after the reign of King Sargon I, provided some guidelines pertaining to the production of hostages as security in debt transactions. During the reign of King Solomon, the Hebrews also used the guarantee to secure the performance of promises in contractual obligations. At this point, provisions that pertain the guarantee in the Book of Proverbs could give us some clues on how the guarantee was practiced. For instance, the Book of Proverbs inter alia mentioned: "He that is surety for a stranger shall smart for it; and he that hateth suretyship is sure;" A man void of understanding striketh hands, and becometh surety in the presence of his friend," and "Be not thou one of them that strike hands, or of them that are sureties for debts."

In the period of the Babylonian, the practical importance of the guarantee has been extended to the contract of marriage. According to the Greek historian, Herodotus no man could take away the woman whom he had purchased without first producing a guarantor that he would make her his wife.

In short, the guarantee has been recognized as a practical method to secure future obligations be that commercial or civil transactions. However, it is observed that most of the guarantee arrangements were never made in a written form until 670 B.C. From 670 B.C. the arrangements were made in a written form and this is evident through a tablet which states, inter alia, 'A loan of silver had been made by one Silim Asur to Pudu-Piati. Minuhdi-ana-ili shall pay the silver to Silim Asur if Pudu-Piati does not pay it'.

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21 See sections 115, 116, 117, 118 and 119.
22 Proverbs 11:15
23 Proverbs 17:18
24 Proverbs 22:26; See also Proverbs 6:1-5; 20:16; Genesis 43:9; 44:32; Job 17:3.
25 A source quoted from W.D. Morgan, 'The History and Economic of Suretyship', (1927) 12 Corn. L.Q. 153 at 155
26 W.D. Morgan, Id. at p. 156.
arrangement shows that Minuhdi-ana-ili has become a guarantor for Pudu-Piati. It was suggested that this arrangement represents the first example of a written guarantee in the Middle Ages.

During the Greek civilization (c. 400-300 B.C.), the importance of the guarantee in debt transactions was also recognized. In the speech of Demosthenes, it is stated that;

"Against Apaturius. Defendant requested plaintiff to lend him thirty minas. Plaintiff, being on good terms with his banker, persuaded him to lend defendant the sum required on plaintiff’s guarantee. While the action was pending, the parties agreed to refer matters to a common arbitrator, and each gave sureties to the other to secure the performance of the terms of submission".27

As such, the guarantee further experienced a massive reformation during the Romans. During this period it was suggested that the law of guarantee had been developed to be a very highly technical apparatus28 and it was regarded as to have taken the shape of purely contractual obligation.29 In fact, the practice of the law, except in certain issues, was suggested to be the same as the modern law of guarantee as practiced nowadays.

Similar to the modern devise, the main objective of the guarantee during the Romans was perceived to be to reinforce the existing liability of a principal debtor who is primarily liable to the creditor. At this point, a guarantor might undertake an equal liability but shall not exceed the existing liability of the principal debtor. Furthermore, the modern doctrines of contribution, reimbursement and subrogation had their counterparts in the Roman law of guarantee.30 The Lex Apuleia (c. 102 B.C.) provides that a sponsor or a fidepromissor who had paid more than his share, was entitled to recover the excess from his co-sponsores or co-fidepromissores.31

27 A source quoted from T. Hewitson, Suretyship: Its Origin and History in Outline, pp. 18-19
29 See T. Hewitson, Suretyship: Its Origin and History in Outline, p. 27
According to the Romans, the adpromissor, the guarantor, has been categorized into three different types; i.e., the sponsor, the fidepromissor, and the fidejussor. The sponsor, who should always be a Roman citizen, and the fidepromissor could act as a guarantor only on verbal contracts, whereas the fidejussor could be a guarantor on any undertaking whether re verbis, litteris or consensus.\textsuperscript{32} Beside these three varieties there were two other types of fidepromissor. This includes the mandatum and the pactum de constituto.\textsuperscript{33}

It seems therefore that the liability of a guarantor would be different according to the different types of the guarantee and the guarantor. The liability of a sponsor, for example, is not the same as the liability of a fidejussor. His liability is co-extensive with that of a principal debtor, different to the liability of a fidejussor where his is not necessarily the same as the liability of a principal debtor; it might be less or same as the principal debtor's liability but shall not exceed the liability of the principal debtor.\textsuperscript{34} In addition, the Lex Furia (c. 95 B.C.) provides that the sponsor and the fidepromissores were discharged after two years from the date when they had become obligated. This law did not apply to the fidejussores. They continued to be liable until the principal obligation had been discharged. In fact, the liability of the fidejussor descended to his heir while that of the sponsor and the fidepromissor, as at common law, terminated at death. As the creditors naturally preferred the complete liability of the fidejussor, it superseded the general use of the contract of the sponsor and the fidepromissor in the Justinian's time.\textsuperscript{35}

By the time of the Justinian, the fidejussor, which bears a striking resemblance to a modern guarantee, was the dominant, if not exclusive form of guarantee.\textsuperscript{36} However, certain feasible features of the Roman law of guarantee died with the Empire, but its core has shown a remarkable durability, surviving even today in modern continental codes.\textsuperscript{37}

\begin{footnotesize}
\begin{itemize}
\item[32] See W.D. Morgan,\textit{ Ibid.}
\item[33] See T. Hewitson,\textit{ Suretyship: Its Origin and History in Outline}, p. 29
\item[34] See T. Hewitson,\textit{ Id.} at p. 28
\item[35] See W.D. Morgan, 'The History and Economics of Suretyship', (1927) 12 Corn.L.Q. 153 at 159-160
\item[36] See J. Phillips and J. O'Donovan,\textit{ The Modern Contract of Guarantee}, p. 4
\end{itemize}
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little to Roman jurisprudence. What is surprising, therefore, about the English law of
guarantee is not its divergence from Roman law but the areas of similarity.

2.4 The Guarantee in Medieval England

It is generally accepted that the origin of the guarantee in medieval England dates back to
early Anglo-Saxon England (c. 449-1066 A.D.). The *borh* system\(^{38}\) is a notable example
of guarantee at this time where it was widely used as a primitive pledging procedure.\(^{39}\)
Similar to the guarantee development in the primitive ages, the *borh* system was observed
to have emerged from the need to secure a peaceful life among the people. In fact, it was
suggested that the *borh* was regarded as the dominant type of a 'peace-surety', in the
medieval England.\(^{40}\) With regard to this, the *borh* was recognized as a practical form to
ensure the peace observance especially among the lower classes in the Anglo-Saxon
period.

The *borh* in this period took in the form of a group of individuals\(^{41}\) who, in most
occasions, voluntarily take the burden of a guarantee as occasion arises. Accordingly, if
an individual in the group committed a crime, disturbed the peace, or was delinquent on a
debt, there would be somebody from the *borh* who would readily guarantee to take the

\(^{38}\) According to Morgan, the origin of this form of guarantee is found in the ancient responsibility of the
*maegth* or clan for injuries inflicted by any of its members upon the members of another clan. But the clan
obligation was inadequate; men in some cases had no kindred or if they had kindred, the latter on occasions
would be unable to meet their responsibility. This situation was remedied by the formation of groups
known as *gegildan* or gild brethren, who are mentioned in the laws of Ine and also in the laws of Alfred. As
sureties, one for each other, they supplemented the responsibility of the clan; the total liability being
divided between the latter and the gild brethren. In this regard, the law of Alfred provides; "If a man,
kinless of paternal relatives, fight and slay a man, and then if he have maternal relatives, let them pay a
third of the *wer*; his gild brethren a third part; for a third let him flee. If he has no maternal relatives, let
his gild brethren pay half, for half let him flee. And further if a man kills a man thus circumstanced, if he
has no relatives let half to be paid to the King; half to his gild brethren". See W.D. Morgan 'The History
and Economics of Suretyship', (1927) 12 Corn.L.Q. 153 at 161

\(^{39}\) Nevertheless, given the fact that there was no doctrine of contract in the Anglo-Saxon laws, it is not
surprising to note that the original use of guarantee was not contractual in nature. See W.S. Holdsworth, *A
History of English Law*, p. 82 (1909)

\(^{40}\) Albert Loan, Albert Loan, 'Institutional Bases of the Spontaneous Order: Surety and Assurance', *Human

\(^{41}\) Normally the *borh* consisted of a group of twelve individuals, often though not always, members of the
same clan or kin-group.

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responsibility of tracking, capturing and bringing the person to justice. Therefore, we find that the application of guarantee as security for peace observance in the Anglo-Saxon period was significant and it is not surprising that everybody was required to have a *borh* or guarantor.

To describe the practice, the laws of Edgar state, "let every man so order that he have a *borh*; and let the *borh* then bring and hold him to every justice; and if any one then do wrong and run away, let the *borh* bear that he ought to bear".\(^42\) This is the first example that is found with regard to the practice of the guarantee during the period of medieval England. In criminal procedure, the importance of *borh* was taken in this form to ensure the appearance of a person in a lawsuit.

Later, the importance of *borh* as security was further developed to include matters that relate to future obligations. At this point, it seems that within the purview of criminal procedure, the *borh* was not only applicable as a means of enforcing criminal laws\(^43\) but also as an alternative recourse for the payment of *bot* or wergild by the offender to the aggrieved party. It is worth mentioning at this point that one of the Anglo-Saxon methods of putting a stop to a blood feud was to persuade the aggrieved party to accept some pecuniary compensation as reparation for the delinquent that has been committed by the offender. Hence, if the party chooses to accept the compensation, then negotiation will take place whereupon an agreement will be concluded between the two opposing parties. Here the offender will provide something as security and name his *borh*, as a guarantor. The peace was then restored by the mutual promises of the parties.

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\(^{43}\) Guarantee was indispensable in enforcing the criminal laws. In a lawsuit, for example, the guarantee was significant as a bail. With regard to this when a party to a legal proceeding promises to the other that he will appear in court, and that he will prepare his proof and satisfy he shall provide guarantor to secure the performance of his promises. See W.S. Holdsworth, *A History of English Law*, p. 83
The production of *borh* was then not regarded as a mere formality but as a method to secure the performance of the offender's promise. At this point, Sir Williams Holdsworth said;

"But it would be a mistake to regard this furnishing of *wed* and *borh* as a mere forms, and the arrangements which they sanctioned as merely formal contracts. The *wed* may have become at a very early date an article of trifling value, and its production therefore a mere form. But the furnishing of the sureties was no mere form; it was a substantial sanction. These sureties were bound primarily to the creditor [aggrieved party]; and it was the sureties that he look for the carrying out of the undertaking". 44

It is observed that sometimes the amount of compensation might be a considerable amount, 45 which the offender might not be able to raise forthwith; therefore he would be allowed to make the payment in installments. As such, the offender will be considered as indebted to the aggrieved party until the rest of the installments are paid. Thus, it seems that the production of the *borh* is important not for the customary requirement but as a form to secure the debts. 46

The strength of the *borh* during medieval England was heavily dependant on the good character and reputation of the members of their community. As kinsmen or neighbours were not under obligation to stand as guarantor for those with bad reputation, everyone tried to be good and avoid causing trouble. Their social relations were bonded and maintained only with people who shared guarantee protection. This further restrained dishonest and criminal behavior, and create a peaceful environment and a strong incentive to engage in the *borh* system.

45 In this regard, in certain circumstances, the offender has not only to pay the wergild according to the rank of the injured person, but sometimes he has also make a necessary payment to the lord of the injured person by way of 'wite' or be fined to the King. According to Holdsworth; "The laws of Aethelbert are almost entirely taken up by a tariff of compensations payable for various offences. The tariff for injuries is very minute; and it varies in all cases with the rank of the injured person. At the latter part of the Anglo-Saxon period we meet with two other payments to which an injury might give rise. The fightwite was due to a lord possessing soc over a place where a wrong was done. The man bote was the payment due to a lord whose man had been slain". See W.S. Holdsworth, *Id.* at p. 45
Having said that, the *borh* in the Anglo-Saxon was not only indispensable in criminal laws but also crucial in commercial transactions. In Anglo-Saxon sale transactions, for example, the arrangements were generally secured by the production of witnesses and the *borh*. The laws of Ethelred state, “Let no man either buy or exchange unless he have a *borh* and witness”. The rationale behind this was that the giving of pledge or *borh* by the seller founded the buyer’s right of action for indemnification should the property proved to be stolen. Hence, if the property were proved to be the stolen the *borh* would have to compensate the buyers on the ground that he is the guarantor for the seller. In addition to this the *borh* was also indispensable in the Anglo-Saxon marriage. In this regard, the *borh* was given by the parties to the contract as security for the performance of the contract.

However, to trace the first use of guarantee or *borh* in contractual loan agreement will not be an easy task. The Anglo-Saxon community barely knew what credit was, and to assume that the early development was similar to the other European counterparts is not safe either. Even in the old Germanic law, the exact transition from a real contract, i.e. sale and exchange (with no credit give on either side) to a formal contract (when loan became available and pledge was given and became an important symbol) was arguable since some believed that there was some kind of intervention of sacral ceremony within that period. In the old Germanic law there could be no rights to movable property without possession. On a sale, failure to deliver or pay the price meant failure of the transaction. In other words there could be no credit and no action for the debt arising on promise. The Anglo-Saxon’s real contract refers to a completed transaction. Thus, to buy and sell goods, the money was paid when the goods were delivered. The parties were not bound to deliver or to pay. Of course, the need for loans existed later, and anything lent must be returned. Although the exact period of the first loan agreement has not been

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47 A source quoted from T. Hewitson, *Suretyship: Its Origin and History in Outline*, p. 66
48 See T. Hewitson, *Id.*, at p. 67
established, it is suffice to say that the existence of gage or wed (or now called pledge) signified the existence of such transactions in the early Middle Ages.

One interesting feature that developed during the Anglo-Saxon period was the right of a guarantor to constrain the offender [principal debtor] to observe the due performance. At this point, Sir Frederic William Maitland has described the right of the guarantor in the light of the payment of wergild. Sir Frederic William Maitland said;

"Originally he must give either gages [pledge] or hostages [guarantors] which fully secure the sum; at a later time he make faith 'with gage [pledge] and pledge [guarantee]'; and among the Franks his gage [pledge] is festuca. He passes the festuca to the creditor who hands it to the pledge [guarantor]. The pledge [guarantor] is bound to the creditor; for a while he is still regarded as a hostage, a hostage who is at large but is bound to surrender himself if called upon to do so. He holds the debtor's wed and this gives him power to constrain the debtor to pay the debt". 53

After the Norman Conquest (1066 A.D.), the borh was replaced by frankpledge. The general features of both are the same, for instance both comprise of a group of men pledging and bonding an individual54 for peace observance55. It is of this sort that all men in every village of the whole realm were by custom under obligation to be in the suretyship of ten, so that if one of the ten commits an offence, the nine have to bring him to justice.56

The frankpledge was used to ensure the good behavior of the people in a community; hence if a member has committed a crime, the frankpledge has to come forward and bring the offender to justice. In other words, one could suggest that one of the objectives of the frankpledge is to ensure that the offender will get his punishment. Because of this, the frankpledge could be equated with the communitas of the 7th and 8th centuries.57 During

55 T. Hewitson, Suretyship: Its Origin and History in Outline, p. 71
56 W.A. Morris, The Frankpledge System, p. 15
the reign of King John, it was reported that the Earl of Salisbury has taken the responsibility of a guarantor to secure the good behavior of Peter De Maulay. Sir Frederick William Maitland stated, 'In John’s reign the Earl of Salisbury, becoming surety [guarantor] for the good behavior of Peter De Maulay, declares that, if Peter offends, all the Earl’s hawks shall belong to the King'. 58 This statement is supported by a reference to the charter roll of King John. 59

The frankpledge represents a final development of the ancient guarantee. The frankpledge has its own characteristic as it was regarded as an institution that has been imposed by the Crown. Thus, unlike the borh, in which a person could decline to stand as a guarantor in another’s borh on the basis of knowledge of that person’s character, a guarantor under the frankpledge had no choice in that matter. 60 Further, it was also suggested that under the Crown system, the frankpledge was indirectly used as a source of income by converting the payment for compensation in the borh system into fines paid to the Crown. The implication of such an imposition was that the frankpledge has drastically reduced the role of reputation that had been at the heart of the Anglo-Saxon.

After the Norman, the guarantee then was gradually accepted and became common in contract arrangements. It was so significant that those who were interested to conclude a contract should produce a guarantor as an external act 61 of the arrangement. The early concept of surrendering or submitting the surety’s body to the power of the creditor has gradually been transformed into a more contractual relationship between the parties in the 14th century. As in the primitive Germanic law, whereby the token of the submission was provided by offering one’s hand, the later Englishmen regard the surrender as purely symbolic. The essence of the relationship was converted from power to consent, and as this crept into guarantee, the transition from body-pledge to contract began. The guarantor’s duty is then confined to answering other person’s debt, which stemmed from

58 S.F. Pollock and F.W. Maitland, The History of English Law, p. 224
59 Re Conley, Ex parte The Trustee v Barclay’s Bank Ltd [1938] 2 All ER 138
61 Theodore F. T. Plucknett, A Concise History of the Common Law, p. 560 (1940)
his own promise either under seal or supported by consideration. The guarantee was no longer seen as the substitution of the guarantor's person for that of the debtor. It came to be regarded as a contractual obligation, which arose by way of accession to the debtor's liability. By the time of Elizabeth I, guarantee was not simply a handmaid of administrative justice; it was also an adjunct of good faith and credit, which played a vital role in trade and commerce. The plot of Shakespeare's *The Merchant of Venice* is regarded to be evidence the widespread use of the contract of guarantee in the Elizabethan England. In this context, *The Merchant of Venice* states, 'Bassanio risked a pound of his flesh to guarantee a loan made to his closest friend by Shylock, the money lender, who insisted, "I crave the law, the penalty and forfeit of my bond."' It is not surprising that Shakespeare has chosen the subject, as it was familiar to his audience.

2.4.1 The Guarantee in Early Credit and Banking Transactions

It is generally accepted that there is an absence of, or an undeveloped state of, credit throughout the Middle Ages. As a matter of fact, buying and selling was mainly done through barter, and the requirement for the transaction to be done before good witnesses is mainly for the protection to an honest buyer against possible claims by a third party alleging that the goods was stolen from him. Despite some evidence of miscellaneous borrowing and lending during that time, they did not testify to the economic importance of credit. As early exchange is for consumption and is based on ready payment, medieval loans were 'always disguised into, or regarded as species of, other transactions with which the Middle Ages were more familiar'. Only at the close of the Middle Ages did English foreign trade become important enough to afford an opportunity for the use of credit. Until then, the volume of trade and the capital employed in it was very small so as to limit the need for credit. If there was any money-lending at all, it 'had nothing to do with commerce; wealthy men borrowed in emergency, or to equip for a war; even in

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64 M.M. Postan *Id.* at p. 2
emergency, merchants did not often have recourse to borrowing, as the guild merchants made arrangement which enabled them to get temporary aid; dealing for credit was little developed, and dealing in credit was unknown.\(^{65}\)

It was the sale credit, or credit in the shape of deferred payments for goods sold or advances for future delivery, rather than loans of money that is used more often during this era. However, short-term loans and investment was later become available. Indeed, as there are more ‘sudden liabilities which could not be met from the regular resources of the business, payments impeding before the corresponding receipts fell due, promptitude of creditors and procrastination of debtors-in short, all the maladjustments of the regular systems of sale credits',\(^{66}\) there was an increase in demands for short loans greater than anyone in that time anticipated. Due to the fact that many mercantile debts remained unrecorded, making a definite conclusion on the amount, the impact and the importance of short loans in medieval trade has never been an easy task. As such, many assume that loans of money between merchants were sometimes disguised in the shape of ordinary sales.

The medieval loan can be categorized into a few groups, for instance, loan by sale and loan on exchange. There have been instances where loans by sale have been practiced in medieval times. This happens when the creditor sells his goods at a higher price but repurchases it at a lower price. Interestingly, this type of medieval loan was given for the concealment of interest,\(^{67}\) and as sometimes goods were more available than money, loan by sale had an independent economic function, which distinguished it from an ordinary monetary loan. On the other hand, the loan on exchange refers to the activity of the London members of the Cely family who, when short of money, took up from London

\(^{65}\) M.M. Postan, *Id.* at pp. 2-3

\(^{66}\) M.M. Postan, *Id.* at p. 11

\(^{67}\) For instance, in *Guildhall Plea and Memoranda Rolls*, A 49 mm. 8-10, it is recorded *inter alia*, 'one John Sadiller, vintner, was attached to answer in several prosecutions for "feigned sale". It was alleged that he had sold on credit Spanish iron for £25 and 4s, to one Richard Trogonold, and then repurchased it for £23 and 10s in ready money; and that to John Lawney, John Bernard, Robert Haxton, and even to Sigismund, the King of the Romans, he had lent money in a similar way', cited from M.M. Postan, *Id.* at pp. 11-12, on 26 June 1421,
merchants certain sums in pounds sterling and undertook to repay them in several months abroad in a foreign currency at an agreed rate of exchange. This type of transaction relied heavily on the Staplers and English importers. Both the loan by sale and loan on exchange have their own economic functions and benefits, which make them acceptable and practicable, but they remain largely unrecorded and misrecorded.

Be that as it may, the growth of trade and commerce had made loan of money common and accelerated the development of guarantee as a means of securing payments of debts owed to merchants. The merchant guild, which was an association, chartered or otherwise for purposes of trade, guaranteed the trading debts of each of its members, and it did so by its members individually, jointly and collectively. One interesting feature about this guild guarantee was that it comparable to the frankpledge that had been use in practice after the Norman Conquest. Both relied upon an association for certain purposes of a number of persons into a group. Although the frankpledge, like borh, was relied upon for many social aspects of life, the guild guarantee served purely commercial purposes. The system did not survive long as there were oppositions to it. It was only in 1283 that the remedies for merchants against his debtor's guarantee were codified in the Statute of Acton Burnell, which rendered his movables executed. In 1285, the remedies were extended to the debtor's land.

There is much information available about medieval credit, but to trace the first loan granted by a bank is rather difficult task. To begin with, it is not easy to identify the first bank, which is analogous to the one that we have today. The early history of banking in England itself is a complex matter and there was no single source of development of a

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68 Guildhall P.M. Rolls, A 74, m. 2 and 4, etc. as cited in M.M. Postan, Id. at p. 13
69 T. Hewitson, Suretyship: Its Origin and History in Outline, pp. 74-5
70 This arrangement, however, was attacked by the first statute of Westminster. It then became the law that in no city, borough, town, market or fair, any foreign person who is of this realm be distrained for any debt wherefore he is not debtor or pledge. This restriction was further strengthened by the statute of Staple which forbade that a merchant stranger be impled or impeached for a debt when he is not either debtor, pledge or mainpernor. See T. Hewitson, Ibid.
banking institution. Although it is believed that it began with the goldsmiths in the mid-seventeenth century, R.H. Tawney stressed that the goldsmiths merely supplied one tributary to a stream, which was fed from a multitude of sources. If the loan of money is at all to be regarded as a vital banking function, one can trace the development of banking function as far back as the Middle Ages, as we have seen above. It so happens that the goldsmiths of London issued notes, used their funds in making loans, and provided transfer-banking services by means of circulating notes and written transfer orders. By the late seventeenth century, and after the creation of Bank of England in 1964, London banking facilities had provided much needed credit facilities for the expanding trade and manufacturing industries. The principal means by which the goldsmiths and the Bank of England made loans was by discounting bills of exchange. However, no further discussion will be made on the bills of exchange or the like, only on the loans, which require guarantee and indemnity as their securities.

2.5 The Guarantee in Early Days of Islam

Islam was born in 610 A.D. in a city, which was considered to be one of the most complex and heterogeneous places in Arabia. The Mecca was a town set amidst a barren rocky valley, where ‘no agriculture at all was possible'. The economic activities of the people therefore were predominantly dependent on stockbreeding and commercial activities. As the city stood at the cross roads of the routes from the Yemen to Syria, and from Abyssinia to Iraq, Mecca became the most important commercial city at the time. Indeed, Mecca was the centre of trade where goods were accumulated from the north and the south, as well as from different parts of the Peninsula, to be dispersed again in opposite directions. This led to the growth of big markets both inside and outside the city of Mecca.

As the city prospered with business and trade, this necessarily led to the need for a financial institution to support the need of traders and merchants. Historically, and before the advent of modern banking, landlords and wealthy merchants assumed the role of financial institutions or moneylenders for the traders and merchants. They were the people who had enough surplus of cash, precious metal, or whatever the monetary instruments might be, to do so. They assumed the role of financing to the commercial societies. The Prophet Muhammad himself is said to have accepted some forms of credit facilities from Khadijah, a wealthy merchant in Mecca, as a capital for his business venture in both Syria and Yemen.

The importance of credit and finance was therefore pivotal. Indeed, the success of either a businessman or a business corporation or even a government is sometimes very much dependent upon the availability of a credit facility. Therefore, credit and finance were widely practiced and indeed it had a great consequence on the prosperity of the city of Mecca.

With the advent of Islam, in 610 A.D., the practice of accepting credit and the provision of finance was adopted with some modifications to the existing principles. In fact, Islam

76 Abdel Fattah suggested that the need of financial institution has at first arisen whenever a barter system was replaced by the monetary economy. As this happens, payments and receipts do not always coincide and as such there will be a need to provide finance in the period between the two transactions. Ahmed Abdel-Fattah El-Ashker, Id. at p. 11.

77 Ahmed Abdel Fattah El-Ashker, Ibid.

78 This shows that Mecca was not only considered as a commercial city but also as a financial center. 'Mecca was more than a mere trading center; it was a financial center. Scholars as a whole may not be quite so certain about details as Lammens appears to be, but it is clear that financial operations of considerable complexity were carried on at Mecca. The leading men of Mecca in Muhammad's time were above all financiers, skilful in manipulation of credit, shrewd in their speculations, and interested in any potentialities of lucrative investment from Aden to Gaza or Damascus. In the financial net that they had woven not merely were all the inhabitants of Mecca caught, but many notables of the surrounding tribes also. The Qur'an appeared not in the atmosphere of the desert, but in that of high finance'. W. M. Watt, Muhammad at Mecca, p. 3.

79 The major modification to the ancient principle of credit was the prohibition of accepting interest, riba. See, for example, the Qur'an, 30:39; 4:161; 3:130-2; 2:275-81; In his last sermon, the Prophet is reported to have said, "Allah has forbidden you to take riba or interest, therefore all riba obligation shall henceforth be waived. Your capital, however, is yours to keep. You will neither inflict nor suffer inequity. Allah has judged that there shall be no riba and that all the riba due to Abbas ibn Abd'al Mutallib shall henceforth be waived."
does recognize credit as important\textsuperscript{80} and the provision of which is exceedingly encouraged. To mention a few, there are several traditions of the Prophet Muhammad, which support the justification. It was reported that the Prophet said: ‘in the night of the journey, I saw on the gate of heaven written, reward for 
\textit{sadaqah}, alms, is ten times and reward for \textit{qard al-hasan}, benevolent credit, is eighteen times’.\textsuperscript{81} Similarly, it was reported that the Prophet said: ‘whoever extends a loan to a Muslim twice, its reward is similar to that of a single alms’. In another hadith, Abu Hurairah is said to have reported that the Prophet said: ‘whoever relieves a believer from a difficulty in this world, Allah will relieve him from his difficulty and Allah will facilitate him in this world and the world hereafter’.\textsuperscript{82} Clearly, the hadiths acknowledge the importance of credit and Muslims are thoroughly encouraged to help\textsuperscript{83} each other through the means of providing a credit facility if it might relieve the difficulty of another.

There is also evidence to indicate that the bayt-al-mal or state treasury has extended loans to certain individual for business purposes. In Muwatta Imam Malik, Caliph Umar’s sons Abdullah and ‘Ubaidullah received loans from the bayt-al-mal, which they used on their way back to Medina, for trading and consequently earned profits.\textsuperscript{84}

Having accepted credit facilities as important, Islam also emphasizes the importance of the necessary provision of a proper means of security for the credit facility advanced to a debtor. With regard to this, the Qur’an reads: ‘And if you are on a journey and cannot find a scribe, then let there be a pledge taken (mortgaging); then if one of you entrust the other, let the one who is entrusted discharge his trust (faithfully)’.\textsuperscript{85} Similarly the Prophet was reported to have bought some foodstuffs on credit for a limited period and to have

\textsuperscript{80} Ahmad Hidayat Buang, “Credit in Islamic Law”, Monograf Syariah 4, p. 49
\textsuperscript{81} Hadith Ibn Hisham and Ibn Majah as quoted in \url{http://www.online.org/vil/Default.htm} (20th March 2002)
\textsuperscript{82} Hadith Muslim as quoted in \url{http://www.online.org/vil/Default.htm} (20th March 2002)
\textsuperscript{83} In the Qur’an, \[5:2\] Allah enjoins Muslim to help each other towards good deeds and fear Allah. This is a general statement from the Qur’an that Muslim should always be ready to offer any assistance to his fellow believers who are in need. One of these needs is credit.
\textsuperscript{84} Malik’s Muwatta, Book 32 Chapter I (Loan Transaction) No. I as quoted in \url{http://www.jannah.com/cgi-bin/library/hadeeth.pl?coll=4&book=32&chap=1} (16\textsuperscript{th} April 2002)
\textsuperscript{85} The Qur’an, 2:283
given his armor as a security for it.86 One of the simplest and easiest means of credit security is a personal guarantee.

In Islam the word guarantee is derived from the Arabic word of al-kafalah, which is originated from the Qur'an.87 The word can be found in many occasions in the Qur'an, for instance, 'He made her grow in a good manner and put her under the care of Zachariah';88 'You were not with them, when they cast lots with their pens as to which of them should be charged with the care of Mary'89 and '[A]nd break not the oaths after you have confirmed them, and indeed you have appointed Allah your Surety'.90 According to scholars, the word however does not strictly bear the meaning of guarantee in commercial transactions for it is more applicable to the notion of guardianship.91 However, the general connotation of the word still bears the meaning of responsibility i.e. to take the responsibility of another. The true meaning of guarantee, as security, however can be found in other occasions where the word 'zaim' is mentioned for several times in the Qur'an.92 In Sura (Chapter) Yusuf, for example, the Qur'an reads; 'They said: "We have missed the (golden) bowl of the king and for him who produces it is (the reward of) a camel load; I will be bound [zaim] for it'.93 According to al-Tabari, the word 'zaim' implies the meaning of a guarantor, which is kafil in the Arabic term.94 There is another occasion in the Qur'an, which signifies the notion of the guarantee as security. In the same Sura, the Qur'an reads; 'He (Jacob) said: I will not send him with you until you

86 According to al-Bukhari, the armour stands for a guarantor to the creditor. See Muhammad Muhsin Khan, The Translation of The Meaning of Sahih al-Bukhari, Arabic-English, Vol. 3 p. 247
87 The word is mentioned for several times in the Qur'an. See, for example, the Qur'an, 3: 44; 20: 40; 28: 12; 38: 23; 16: 91.
88 The Qur'an, 3: 37. The English translation for this verse has been referred to Muhammad Taqi-ud Din al-Hilali and Muhammad Muhsin Khan, Interpretation of the Meanings of the Noble Qur'an in the English Language (1994). The reader may find different wordings from different version of English translations for the Qur'an. In A. Yusuf Ali, The Holy Qur'an: Text, Translation and Commentary (n.d.) Beirut: Dar al-'Arabia, for example, the verse has been translated as 'To the care of Zakariya Was she assigned'. To maintain consistency, a full attempt has been made to refer all Quranic citations in this thesis to the former English translation.
89 The Qur'an, 3: 44
90 The Qur'an, 16:91
92 See, for example, The Qur'an, 68: 40
93 The Qur'an, 12:72
swear a solemn oath to me in Allah’s Name, that you will bring him back to me unless you are yourselves surrounded (by enemies, etc.)'. 95 Al-Qurtubi suggested that although the verse neither mentions the word kafalah nor zaim, but it brings the connotation of guarantee 96 in the sense of the security for the performance of promise made by Joseph’s brethren to bring back Benjamin to Jacob.

It is worth noting here that even the verse correlates with the occasion of guarantee before the advent of Islam, the Muslim scholars agreed that the concept of guarantee is still applicable to the Muslim society. The rationale behind this is that the Islamic jurisprudence allows the Muslim society to follow suit the ancient laws since there is a saying that ‘the laws of our predecessors are laws unto us except those parts that have been preserved by the textual provision’. 97

During the time of the Prophet Muhammad, this general connotation of a personal guarantee was extensively used by the Muslim society either as a security for the performance of a promise or for the appearance of a person in a lawsuit. In one hadith, the Prophet was reported to have ruled that: ‘a guarantor, zaim, holds the liability, gharim, [of a third person].’ 98 This hadith of the Prophet clearly shows that the concept of guarantee, as known in other legal systems, has been thoroughly accepted and practiced in the period of the Prophet. Moreover, there are numerous hadiths, which indicate the applicable of guarantee in the early days of Islam and one of which is the hadith that has been reported by al-Shafi’i. In the hadith, the Prophet is reported to have said to one of his companions, Qubaysah ibn al-Mukhariq: ‘O Qubaysah requesting things is forbidden except in three things [first] when man has a suretyship [or guarantee], then request for it

95 The Qur’an, 12:66
96 See Abi Abdullah bin Muhammad bin Ahmad al-Qurtubi, al-Jami‘ li Ahkam al-Qur’an, vol. 9, p. 231 (n.d.)
98 The hadith cited in Sunan Ibn Majah, Kitab al-Sadaqat. This hadith shows that the rudimentary notion of a guarantee arrangement is ‘gratuitous’ in nature since the surety has become liable to the creditor without any pecuniary consideration. This is clear from the word ‘gharim’ which bears the meaning of absolutely responsible rather than profitable advantage or ‘ghunm’ in the Arabic term. See Ali Ahmad al-Salus, al-Kafalah wa Tatbiqatuha al-Muasirah, p. 31
is permissible'. The hadith does not only indicate the permissibility of the guarantee to Muslims but also declares the legality of such a form as a valid security arrangement.

One of the intriguing features of the guarantee in the early days of Islam is that it was regarded as a gratuitous contract. The arrangement of guarantee contract is preliminarily concluded by a unilateral action of a guarantor who assumes the liability of a principal debtor by his own motion without recourse to any request of either from the principal debtor or from the creditor.

On another occasion, the Prophet was reported not to offer his special funeral prayer for a dead man who left behind an unpaid debt. When the body of the man was brought in, the Prophet asked: 'Has he any debt?' The people replied, 'Yes, two Dinars'. The Prophet said, 'Therefore say the special funeral prayer [among yourselves] for your friend'. Abu Qatadah then remarked: 'O Messenger of God, I take the responsibility [of the guarantee] for the payment of the two Dinars'. Then, the Prophet offered his special prayer for the dead man.

This hadith shows the significance of the guarantee in Islam. It was Abu Qatadah, the Prophet's companion, who voluntarily came forward to take the burden of guarantee for the repayment of the unpaid debt. The assumption of the liability by Abu Qatadah was purely made by himself without recourse to any request of either from the principal debtor or the creditor. This assumption of Abu Qatadah had been accepted by the Prophet, which later embryonic the legal principle of guarantee under the Islamic law. In another report, Ali ibn Abi Talib, also was the guarantor of a dead man who left behind him an unpaid debt. As Abu Qatadah, the assumption of the principal debtor's liability by Ali was also prompted through his own thinking. Similarly, the Prophet himself is also reported to have assumed the burden of a guarantor in the same manner. It was reported

99 The hadith cited in Sahih Muslim, Kitab al-Zakat. See Ali Ahmad al-Salus, al-Kafalah wa Tatbiqatuha al-Mu'asirah, p. 44
101 See Abi Bakr Muhammad bin al-Hussayn al-Bayhaqi, al-Sunan al-Kubra, vol. 6, p. 73 (n.d.)
by Abu Hurairah that the Prophet said: ‘I am closer to the believers than their own selves, so if a true believer dies and leaves behind some debt unpaid, I am responsible [as a guarantor] for him and if he leaves behind some property, it will be for his heirs’.\(^{102}\)

It is interesting to note here that although most of the hadiths illustrate the undertaking of guarantee in relation to dead people they show that the importance of guarantees as security was extensively practiced in that period. Also, the hadiths also indicate that the early practice of guarantee was purely gratuitous in nature. The above declaration of the Prophet testified this justification. In this regard, the arrangement of guarantees was completed unilaterally and not dependent on bilateral transaction. It is therefore true that most of the Muslim scholars are of the opinion that the arrangement of guarantees is valid even though it is made without the knowledge of either the principal debtor or the creditor.\(^{103}\)

This legal principle of guarantee was later diametrically adopted by the companions (623 A.D.), who neither made further comment nor alteration to the law. They accepted the law as it was. During this period, Abu Bakr al-Siddiq is reported to have assumed the burden of guarantee for the Prophet Muhammad who had promised to pay a certain amount of money to Jabir bin Abdullah. However, before the payment was made the Prophet had passed away and thereby Abu Bakr stood as a guarantor for him. As such, Abu Bakr made the necessary payment to Jabir bin Abdullah.\(^{104}\)

\(^{102}\) According to Ibn Hajar al-Asqalani, Ibn Battal said: ‘The Prophetic saying, “I will be the guarantor for his debt” has abrogated his decision not to perform the funeral prayers. Repayment of the debt is drawn from the state treasury (bayt al-mal), which had a special allocation for al-gharimin, those who are in debt and genuine difficulty and have satisfied the condition to receive assistance from the state. This is because the state treasury was in the custody of the Prophet and therefore he said ‘my responsibility’. This responsibility later had been shifted to the head of the state as it is clear from another hadith’. See Ibn Hajar al-Asqalani, Fath al-Bari, vol. 4, p. 478 (1407 H); Muhammad bin ‘Ali al-Shawkani, Nayl al-Awtor Min Ahadith Sayyid al-Akhyar, vol. 5, p. 357 (n.d.); Muhammad Isma’il al-San’ani, al-Musannaf, vol. 8, p. 290 (n.d.); ‘Ala’udin Abi Bakr al-Kasani, Kitab Bada’i al-Sana, fi Tartib al-Shara’i, vol. 6, p. 206 (1968)

\(^{103}\) This includes the opinions of the Malikis, Shafi’is and Hanbalis. See, for example, Shamsuddin Muhammad bin Abu al-‘Abbas Ahmad al-Ramli, Nihayat al-Muhtaj ila Sharh al-Minhaj, vol. 4, p. 438 (1967); Muhammad ‘Abdullah bin Ahmad Ibn Qudama, al-Mugni, vol. 5, p. 103 (n.d.); and Abi al-Farraj Abdul Rahman al-Maqdisi, al-Sharh al-Kabir ‘ala al-Mugni’, vol. 5, p. 102 (n.d.)

The position however changed in the period of the successors (656 A.D.) where a further thorough development of the law was made. In this period, the principal concept of guarantee was not constrained to cases of unpaid debt by a dead man, but was further extended to include cases in commercial transactions\textsuperscript{105}. Such development of the law has been attested by the successors, 'Ata' Ibn Abi Rabah, Shurayh, Qatadah and 'Amr Ibn Dinar, who claimed that the rudimentary notion of guarantee should be extended to include sale transactions. According to them, it is recommended to employ the guarantee arrangement in future obligations such as future trades, bay' al-salam, since it involves loans and credits. With regard to this, Muhammad Ibn Sirin has further suggested that a condition should be stipulated in the arrangement to include the contract of guarantee on debt either in total or sundry and manifold. In addition, the successors had also pronounced that the arrangement of a guarantee is better made in a written form to protect the interests of the parties involved if there was nobody to come forward to be a witness. In another occasion, Shurayh has further allowed a man to seek a guarantor from anyone who is able to take on this role voluntarily, especially the wealthy people. This suggestion of Shurayh is necessarily a move from the earlier concept of the guarantee, which was based upon a gratuitous contract. As regard to corporate business, there is also evidence, which shows the practice of guarantee in partnership.\textsuperscript{106}

As regards the security for the appearance of a person in a lawsuit, there is one tradition, which attests that the notion of guarantee as security is applicable. It was narrated by Muhammad Ibn ‘Amr al-Aslami that his father, Hamzah, said; 'Umar sent him, Hamzah, as a sadaqah collector. A man had committed illegal sexual intercourse with the slave girl of his wife. Hamzah took personal sureties for the adulterer till they came to Umar'.\textsuperscript{107} This principle of guarantee was later thoroughly adopted by Muslims in the subsequent period.

\textsuperscript{105} This is due to the expansion of the Islamic state. As trade and commerce developed the volume of commercial transaction has become greater. There were varieties of commercial transactions involved in the epoch including the future trades.

\textsuperscript{106} Abdullah Alwi Haji Hassan, Sales and Contracts in Early Islamic Commercial Law, p. 145-6 (n.d.)

\textsuperscript{107} Muhammad Muhsin Khan, The Translation of The Meaning of Sahih al-Bukhari, Arabic-English, Vol. 3, pp. 271-4
In other instances, guarantee was also used as the security for the good behavior of the community that the surety represents. In one tradition, it was reported that Jarir and al-Ash’ath, the Prophet’s companions, said to Ibn Mas’ud regarding renegades, those who became infidels after embracing Islam; ‘Let them repent and take personal sureties for them. They repented and their relatives stood as sureties for them’. 108

Briefly, the concept of guarantee was accepted in the early days of Islam. The important characteristics of guarantee were extensively practiced in that period, be that in debt transactions or criminal procedures. As such, the guarantee has been regarded as the most important method of securing the performance of promises and the observance of good behavior. In addition, the arrangement of guarantees was regarded as gratuitous in nature since it was motivated unilaterally. However with the development of social relationship this concept of guarantee arrangement has been assumed to one of bilateral contractual obligations.

2.6 Conclusion

The guarantee exists in almost every society in the world. In the primitive ages, the main objective of the guarantee was perceived to be the safeguard of a peaceful life. Thus, in the inscription of Tilgath Pileser, for example, the guarantee was described as a practical method to secure peacekeeping among societies. In the course of development, the principal notion of the guarantee, i.e., to safeguard, has been developed to include future obligations. Thus, during the Middle Ages, the guarantee was common in civil transactions including debt agreements.

The first institution of the guarantee was established upon the concept of causative factors that exist in parallel to human needs. It was environment that triggered the establishment of the institution of the guarantee. The rules that governed the guarantee were initially enacted through voluntary actions that existed in societies. There was no

known legislative body that instructed on how the law of the guarantee should be in the primitive ages. Therefore, an informal reliance on the prevalent customs and traditions that prevail on that time was pivotal to construct the ancient law of the guarantee.

As such, the law of the guarantee was developed with the development of human civilization. It has been demonstrated that the Romans were the first who developed the law in a highly legal apparatus. The English, however, have taken a distinct approach where it witnessed the transition from *plegiatio*, or the submission of hostages, to consent. In other words, under the English law the liability of a guarantor was no longer referred to the body-pledge but upon the promise of the guarantor.

In Islam, whose civilization was established between the Romans and the English, the guarantee was also recognized as an important method to secure peacekeeping and future obligations. At this point, the ancient guarantee has been accepted with modest modifications. The guarantee in Islam was constructed upon the principle of *ta'awun* or helping each other. It is not surprising therefore that the guarantee in Islam is regarded as a gratuitous contract; or a contract that requires no consideration.
3.1 Introduction

The guarantee in Islam is not a new devise of law. In fact, it has been practiced among the Arabs even before the advent of the new religion. However, when Islam was established in Arabia, the ancient concept of the guarantee was refashioned to suit the will of the Islamic Shari'a. In relation to this, rules that regulate the guarantee were also modified and developed to accommodate the basic requirements of the Islamic Shari'a.

This chapter is an attempt to investigate the meaning of the guarantee as understood in Islam. The focus however will be made on interpretations that have been made during the classical period. This is because most of the Islamic legal principles, including the rules that govern the guarantee, were developed during this period.

To this end, considerable Islamic sources have been consulted. This includes both primary and secondary sources. At this point, the primary source will be the Qur'an and the Sunnah of the Prophet, while secondary source will include the classical texts. It is noted however that the reference to the classical texts will be confined to the four Sunni schools, i.e., the Hanafis, Malikis, Shafi'is and Hanbalis, as this represents the majority of the Muslim population. On the other hand, a comparison will be made to modern interpretations; and this will include the English common law. The investigation is important not only to understand the basic characteristics of the Islamic guarantee but also to form a theoretical foundation for further discussion.
3.2 General Terminology of the Guarantee

The Islamic term of the guarantee is far from consistent. With regard to this, the term of the guarantee could be translated as kafala, daman, hamala, za'ama, qabala and sabara. However, the two most common words that used in the classical texts are kafala and daman. In this context, the Hanafis refer the notion of guarantee as a kafala while the Hanbalis, Malikis and Shafi'is refer to the same as a daman. Since there are differences in names and to avoid complexities, we shall use the 'Islamic Guarantee' phrase to signify the Islamic concept of the guarantee rather than any specific Arabic word.

3.3 Sources of Islamic Guarantee

It appears from the previous discussion that the Islamic guarantee was originally derived from the pre-Islamic practices. As such, it was also submitted that when Islam was established in Arabia, these pre-Islamic practices were refashioned and developed to suit the will of the Islamic Shari’ah. This new form of the Islamic guarantee was interpreted upon the general precept of the Islamic Shari’ah that in contained in the Qur’an.

With regard to this, the Prophet, who was the first Muslim jurist – in the context of Islamic legal development – has been responsible for explaining the concept of the guarantee that conforms to the will of the Islamic Shari’a. Thus, at least at this point, one could suggest that beside the Qur’an, the Sunnah also forms the main source for the legal development of the Islamic guarantee. Hence, the sources for the legality of the guarantee in the Muslim milieu, for instance, could be referred to both the Qur’an and the Sunnah.

In the Qur’an, apart from the texts that have been mentioned in the previous chapter, there are some other sources that indicate the legality of the guarantee in the Muslim

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1 See Mahmud Abdul Hamid al-Sayyid al-Dayib, Kafala al-Dayn fi al-Shari’a al-Islamiyya: Bahth Fiqhi Muqaran, pp. 5-6 (n.d.)
milieu. An example of this can be found in verse 72 of Sura (Chapter) Yusuf of the Qur'an. In this particular verse the Qur'an reads, 'They said: "We have missed the (golden) bowl of the king and for him who produces it is (the reward of) a camel load; I will be bound [za'im] by it".\(^2\) In the Arabic, the closest translation for the word 'za'im' could be the word 'answerable'. At this point, as al-Qurtubi suggests, the word za'im has in turn had the connotation of guarantor or kafil.\(^3\) Thus, the text refers the issue to the guarantee and it is approvable in the Islamic milieu. On another occasion the Qur'an also reads, 'He (Jacob) said: I will not send him with you until you swear a solemn oath to me in Allah's Name, that you will bring him back to me unless you are yourselves surrounded (by enemies, etc.)'.\(^4\) Again, the text signifies the legality of the guarantee within the Islamic legal context. In fact, the text also describes the importance of the guarantee as a method to secure the performance of future obligations; and in the context of the text, future obligation is referred to the promise of Jacob's children to bring back Benjamin in a safe condition. In connection to this, al-Qurtubi remarked that the words 'a solemn oath to me, in Allah's name' signify the meaning of personal guarantee.

Apart from these Qur'anic texts, there are also several hadiths that illustrate the significant of the guarantee in Islam. In Sahih al-Bukhari, for example, Salamah Bin al-Akwa' reported that the Prophet has been brought with dead man to be offered a funeral prayer. When the body of the man was brought in, the Prophet said;

"Has he any debt?" The people replied, "Yes two Dinars". The Prophet said, "Therefore say the special funeral prayer [among yourselves] for your friend". Abu Qatada then remarked, "O Messenger of God, I take the

\(^2\) The Qur'an; 12:72

\(^4\) The Qur'an; 12:66
responsible [of suretyship] for the payment of the two Dinars". Then the Prophet offered his special funeral prayer for the dead man.\(^5\)

Besides, there are also several hadiths demonstrate the legal principles that pertain to the guarantee. At this point, in Sunan al-Kubra, Ibn 'Abbas has reported that the Prophet said, 'A debt must be paid and a guarantor must be liable'.\(^6\) This hadith does not only signify the legality of the guarantee but also prescribe kernel legal principle that pertains the Islamic guarantee. In this context, it seems that, as far as the Islamic law is concerned, the guarantor shall be liable for his promise and his obligation shall be co-extensive with that of the principal debtor.

In another occasion Abu Hurairah has reported that the Prophet said, 'I am closer to the believers than their own selves, so if a true believer dies and leaves behind some unpaid debt, I am responsible [as a guarantor] for him and if he leaves behind some property, it will be for his heirs'.\(^7\) This hadiths shows that the guarantee was common during the period of the Prophet.

In short, all these legal texts demonstrate that the guarantee has been accepted as a useful method to secure future obligations. As such, in the course of development, the rules that pertain to the guarantee have been developed to accommodate the demand of current situations. Such significant development of the law could be referred to the classical period. At this point, similar to other sorts of laws, the rules that pertain to the guarantee have been developed to be a sophisticated law particularly during the period of the 'Abbasid. Thus, it seems that the sources for the Islamic guarantee were not restricted to the Qur'an and the Sunnah as such, but include *ijtihad* or interpretation and *ijma* or the consensus of opinion from among the Muslim scholars. In the context of our modern life, the sources could be extended to include the works of the classical jurists, i.e., the legal rules that contain in the classical manuals, fatwa and court decisions.

\(^6\) The hadith cited in Abi Bakr Ahmad bin al-Hussayn al-Bayhaqi, *al-Sunan al-Kubra*, vol. 6, p. 72 (n.d.)
\(^7\) The hadith cited in Ahmad bin 'Ali Ibn Hajar al-Asqalani, *Fath al-Bari*, vol. 4, p. 478 (1407H)
3.4 The Objective of the Islamic Guarantee

It is generally accepted that the main purpose of the guarantee is to safeguard obligations that have been tendered to others. In other words, under the guarantee, the person who stands as a guarantor will make sure that these obligations will be duly performed. Thus, the guarantee has a significant role in securing the performance of future obligations.

In Islam the essence of the guarantee has been diametrically recognized. However, true to its original meaning, i.e., to support, and based upon morality, the classical Islamic guarantee has been perceived as a useful method not only in securing future obligations but also to help each other particularly in the context of loan transactions.

Thus, in addition to security, the classical Islamic guarantee also aims at providing assistance to the people who are in need. In the context of creditor-debtor relationship, the Islamic guarantee will provide assistance to a prospect debtor in obtaining a loan from the creditor. The presence of a guarantor is important, and his willingness to help others is absolutely encouraged in Islam.8

In connection to this the Prophet said:

"Whoever relieves a believer from a difficulty in this world, Allah will relieve him from his difficulty and Allah will facilitate him in this world and the world hereafter".9

According to al-Zuhaili, the assistance that has been extended by the guarantor is regarded as a good deed and subservience to God and therefore he shall be rewarded in the hereafter.10 It is upon this notion that the classical Islamic guarantee was interpreted to be one of the devices for helping others. Similar to gift inter-vivos, the aim of the

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8 In the Qur'an, [5:2] Allah enjoins the Muslims to help each other for good things. This has been regarded a general order (rule of the Islamic Shari'a) that has been put upon the Muslims to extend their assistance to others.
9 Hadith Muslim as quoted in http://www.online.org/vil/Default.htm (20th March 2002)
classical Islamic guarantee was to provide assistance to the people who are in need. At this point, the Islamic guarantee is one of the Islamic devices that have been interpreted upon the concept of *ta’awun*, i.e., mutual assistance.

The legal consequence of such an interpretation would be that the Islamic guarantee will be regarded as a gratuitous contract; a contract that requires no consideration. In the modern context, this interpretation of the classical Islamic guarantee could somehow create a legal problem especially in some Muslim countries like Malaysia. At this point, being gratuitous in nature, it seems that the Islamic guarantee neither requires consideration nor acceptance to conclude a valid contract. Moreover, it also seems that the Islamic guarantee does not require consent on the part of a creditor to create a valid contract of the guarantee.

### 3.5 Scopes and Definition of Islamic Guarantee

Literally, the Islamic guarantee means to take the responsibility of others. In relation to this, one could also suggest that the meaning of the Islamic guarantee includes the taking care of others and to be a guardian for others. In the Qur'an, the word *kafala* — literally, the guarantee — has been used to signify the above meaning of the Islamic guarantee. Thus, in verse 37 of *Sura Ali `Imran*, when the Qur'an reads, 'He made her grow in a good manner and put her [*kaffalaha*] under the care of Zachariah', Ibn Mandhur (d. 711 H) remarked that the above text was intended to explain that Prophet Zachariah has the responsibility to look after Mary. In this context, the word *‘kaffalaha’* — a derivation from the word *‘kafala’* — has been translated as to take the responsibility, to take care and to be the guardian for Mary.

In another occasion the Qur'an reads; "You were not with them, when they cast lots with their pens as to which of them should be charged with the care of Mary". In *Sura Sad*,

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11. *The Qur’an;* 3:37
the Qur'an reads, 'Verily, this my brother (in religion) has ninety nine ewes, while I have (only) one ewe, and he says: “Hand it over to me, and he overpowered me in speech”.

All these legal texts indicate the literal meaning of the Islamic guarantee.

In its legal sense, the Islamic guarantee could be defined as a promise to perform the obligations of another when that other person fails to fulfill his promise. Hence, in the context of loan agreements, the Islamic guarantee is a promise to answer for the debts of a principal debtor in case he defaults or fails to make the payment. This is a generally accepted definition of the Islamic guarantee that has been recognized by all the Muslim jurists.

However, there are some differences with regard to detailed explanations on the concept of the classical Islamic guarantee. With regard to this, the Hanafis - as recorded in the classical texts - suggest that the Islamic guarantee is essentially the amalgamation of one obligation or dhimma into another in respect of demand. As such, the Malikis, Shafi'is and Hanbalis suggest that the Islamic guarantee is essentially the amalgamation of one obligation or dhimma into another in respect of debt.

If closer examination is being made, one could suggest that there is a big difference, at least in concept, between the two groups. This could be explained through issues that relate to the effect of the Islamic guarantee, i.e., the right of a creditor to call upon the guarantor. In the above context, it seems that, as far as the Hanafis is concerned, the right of a creditor to sue the guarantor does not arise unless and until a proper demand has

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14 The Qur'an; 38:23
16 Abi al-Farraj Abdul Rahman Ibn Qudamah, al-Mughni, vol. 4, p. 534 (n.d.); see also Muhammad al-Shirbini al-Khatib, Mughni al-Muhtaj ila Ma‘rifat Alfadh al-Minhaj, vol. 2, p. 192 (1958). Note that the only difference between these schools of thought and the Hanafis is the objective of the arrangement. In this regard, the three schools of thought held that the objective of the arrangement is the debt itself while the Hanafis held that the objective of the arrangement is the accommodation of necessary protective measurement i.e. be ready for the creditor. This different doctrine of the Islamic guarantee arrangement has given rise to a great implication in respect of right to claim on the part of the creditor as well as the commencement of the guarantor’s liability.
been made upon the guarantor. This is because, according to the Hanafis, 'demand' is the essence of the Islamic guarantee. Therefore, a proper demand has to be made in order to claim his right over the guarantor. The position however is different if a reference is being made to the other three schools of thought. At this point, it seems that demand is not the essence of the Islamic guarantee. Thus, in cases of defaults the creditor could have the right to claim over the guarantor even though a notice of demand has not been served to the guarantor. According to the other three schools when default occurs the question of the right to call upon the guarantor does not arise since the object of the guarantee is not the demand but the debt.

Thus, the legal consequence of this could be that while the notice of demand is essential in the Hanafis, the other three schools of law could suggest that the right of a creditor arises as there is a default, regardless of the notice. All groups however agreed that in cases of defaults the right to claim should remain in the creditor. It is submitted that the pivotal point for the differences of the opinion rests upon the exact time the creditor could have the right to claim, but not the issue as to whether the right arises or not.

Indeed, the process of amalgamation has created a right upon the creditor to claim his debts from the guarantor. This however does not mean that the obligation of the principal debtor will be relinquished but rather to reinforce the right of the creditor in respect of his credit. At this point, it is submitted that under the Islamic guarantee the principal debtor has not been freed; his obligation is not being relinquished and he is still rendered liable to his own debts.

The position however is different if a reference is being made to the Zahiris and some of the Shi'as. Thus, according to the Zahiris, the guarantor will be primarily liable for the debts; and therefore the creditor will have the right to call upon the guarantor regardless of the above issue of demand. This view has been made upon the fact that according to

the Zahiris the Islamic guarantee is essentially the 'transfer' of the principal debtor's
obligation to the guarantor's obligation.\(^{18}\) Thus, once the guarantor undertakes the
guarantee, he is supposed to be liable primarily, as the liability of the principal debtor
will be relinquished. With regard to this, Ibn Hazm said;

> "This view has been held by all of our companions including Ibn Abi Layla, Ibn Shibrimah, Abu Thawr and Abu Sulayman. All of us agreed
> that the obligation of the principal debtor would be totally relinquished
> and that the creditor has no right to claim from the principal debtor.
> Instead, the guarantor would be liable for what he has undertaken".\(^{19}\)

Note however that this principle applies only in cases where the guarantor voluntarily
assumes the obligation of the principal debtor. Thus, if the guarantor were required to
assume such obligation either from the principal debtor or the creditor, a different
principle applies.\(^{20}\) At this point, the principles that govern the Islamic guarantee might
be the same as the four Sunni schools.

In short, the Islamic guarantee, as generally accepted, is a contract to perform the
obligations of another in case that other person defaults or fails to perform those
obligations. This definition of the Islamic guarantee could be compared with that of the
modern law of the guarantee. The English common law, for example, defines the
guarantee as a promise to answer the debt, default or miscarriage of another.\(^{21}\) In relation
to this, Jordan C.J. said;


\(^{19}\) Abi Muhammad 'Ali bin Ahmad Ibn Hazm, *Id. at p. 527*


\(^{21}\) s. 4 of the Statute of Frauds 1677; In Fell's Treaties on the Law of Mercantile Guaranties and of Principal
and Surety in General, a 'contract of guarantee' is defined as a promise to answer for the payment of some
debt, or the performance of some duty, in case of the failure of another person, who is, in first instance,
liable to such payment or performance; In De Colyar on Guarantees, a 'contract of guarantee' is defined as
a collateral engagement to answer for the debt, default or miscarriage of another person; In Smith's
Mercantile Law, a 'contract of guarantee' is defined as a promise to answer for the payment of some debt,
or the performance of some duty, in case of the failure of another person, who is, in first instance,
liable to such payment or performance. See *Re Conley [1938] All ER 127* at pp. 130-1. These
common law definitions on the guarantee have been adapted to be the law of Malaysia. In the Malaysian
Contract Act 1950 (Act 136) section 79 provides, a 'contract of guarantee' is a contract to perform the
promise, or discharge the liability, of a third person in case of his default. The person who gives the
"The contract of guarantee or suretyship is a contract between two persons which is intended by them to secure the performance of the obligation of a third person to one of them. The existence, present or future, of the obligation of a third person, and an intention in the parties to the contract to secure the performance of that obligation, are essential features of a contract of guarantee. If these elements are present, the contract is one of guarantee whether the promise be collateral to the promise of a principal obligor and in the nature of a distinct and separate promise to perform the principal obligation if it does not: Inland Revenue Commissioners v Holder [1931] 2 KB 81 at 101-102; Elder v Northcott [1930] 2 Ch 422 at 430; or whether it be a joint promise with the principal obligor by virtue of which an immediate obligation is assumed to the obligee which is joint with that of the principal obligor: Permanent Trustee Co. of New South Wales Ltd. v Hinks (1934) 34 SR (NSW) 130".22

In a similar vein, the guarantee has also been described as a contractual obligation undertaken by one person (known variously as the ‘guarantor’ or the ‘surety’) in which he promises that a second person (known as the ‘principal’) shall perform a contract or fulfill some other obligations and that if the principal does not, the surety will do it for the principal.23

From the above, one could suggest that under the English common law, the guarantee is a promise to ensure the creditor that obligations owe to him will be satisfied. At this point, if the principal does not perform, the guarantor will do it for the principal. Thus, the guarantee presupposes a valid principal obligation in which case if the promise is not collateral to this principal obligation, the arrangement shall not be regarded as a guarantee.

guarantee is called the ‘surety’; the person in respect of which default the guarantee is given is called the ‘principal debtor’, and the person to whom the guarantee is given is called the ‘creditor’. 22 Jowitt v Callaghan (1938) 38 SR (NSW) 512
23 Kevin Patrick Mc Guinness, The Law of Guarantee, p. 25-6 (1986); see also the judgment of Lord Reid in Moschi v Lep Air Services Ltd. [1972] 2 All ER 393 at 398. It is submitted that this approach to the guarantee needs an in-depth analysis since it is almost impossible for the guarantor to compel the principal debtor to perform, unless the guarantor has an actual control over the conduct of the principal debtor.
This follows that in practice, the question as to whether a particular promise is a guarantee or otherwise is left to the court to determine. At this point, the court will construe the promise in the light of the words and circumstances of the agreement.\textsuperscript{24}

### 3.5.1 The Concept of Dhimma under Islamic Jurisprudence

It appears that obligation or \textit{dhimma} is the central issue for the subject of the Islamic guarantee. At least for one point, the issue of obligation has somehow affected the whole concept of the Islamic guarantee. This can clearly be seen with reference to the concept of the Islamic guarantee in the Zahiris and some of the Shi’as. At this point, it seems pertinent to explain the concept of \textit{dhimma}, which forms the fabric of the Islamic guarantee contract.

#### a. Definition of Dhimma

The \textit{dhimma} literally means a contract, or an ‘\textit{ahd}, or a guarantee, or a \textit{daman}, or a peace treaty, or an \textit{aman}.\textsuperscript{25} In relation to this, one could suggest that the \textit{dhimma} has a close meaning to that of the \textit{dhimmis}. In one hadith the Prophet said, ‘Muslims among themselves have the same rights. The principle also applies to the \textit{dhimmis}’. The hadith demonstrates that Muslims among themselves are responsible for each other; to respect each other and to honour their obligations; and this applies to the \textit{dhimmis}. It is submitted that since between the Muslims and the \textit{dhimmis} there is a social contract, which binds themselves to respect each other, they both have rights and duties among each other. Thus, this social contract of the Muslims and the \textit{dhimmis} is regarded as the basis for commitment (responsibility) as well as deservingness (rights of claim).

\textsuperscript{24} See Hollier \textit{v} Eyre (1840) 9 CI. & Fin. 1, 8 ER 313 at 331 (H.L.), per Lord Cottenham; as for Malaysian cases, see, for example, Carlsberg Brewery Malaysia Bhd. \textit{v} Soon Heng Aw & Sons Sdn. Bhd. \textit{& Ors} [1989] 1 MLJ 104. In this case, it has been held that the true construction of the nature of the agreement largely dependents upon the intention of the parties which is to be collected from the language and the words of the guarantee.

In its legal sense, the dhimma could be defined as a legal attribute upon which a person is made a proper subject of the law, which provides him with rights or charges him with obligations. Hence the dhimma may be referred to as an expression of the sum total of a person's legal rights and duties. It is the basis upon which a person is entitled to his or her personal rights and responsibilities. With regard to this, Professor Mustafa Zarqa' writes; “It is well established principle in law that a person is duty bound to perform his duties and obligations. As far as the dhimma is concerned, it is the basis for the entitlement of the sum total of legal rights as well as the basis for the fulfillment of the sum total of duties and obligations”. 26

Under Islamic jurisprudence, the concept of dhimma is not confined to commercial transactions alone. In fact, it embraces all kinds of proprietary and extra-proprietary rights. 27 Thus, in addition to commercial transactions a person is also being endowed with dhimma in relation to religious duties such as prayers, fasting, alms giving, and pilgrimage. Indeed, the concept of dhimma is very wide and it covers all human transactions. In this context, some writers have been able to suggest that dhimma is not a mere expression of legal rights and duties but it is a real persona, which exists in a human body. 28

The dhimma is very much correlated with the notion of legal capacity or ahliyya. 29 At this point, it seems that, as far as obligation is concerned, the dhimma is subsumed under the principle of legal capacity. In this regard, Schacth said;

“The concept of responsibility is subsumed under that of legal capacity (ahliyya), within which are distinguished the ahliyyat al-wujub and the

26 Mustafa Ahmad al-Zarqa', Nadhara 'Amma fi Fikra al-Haqiq wa al-Ilizam, p. 122 (1948)
27 See Abdul Latiff Muhammad 'Amer, al-Duyun wa Tawthiqhafa fi al-Fiqh al-Islami, p. 37; see also Chafik Chehata, 'Dhimma', in The Encyclopedia of Islam, p. 231
28 See, for example, 'Abdul 'Aziz al-Bukhari, Kasif al-Asrar 'Ala Usul Fakh al-Islam al-Bazdawi, vol. 4, p. 1358 (n.d.). At this point, al-Taftazani in al-Talwih, suggested that this notion of the dhimma is useless that devoid of any real meaning, Sa'aduddin al-Taftazani, al-Talwih, vol. 2, p. 726 (1310 H)
ahliyyat al-ada’. The ahliyyat al-wujub, ‘capacity of obligation’, is the capacity to acquire rights and duties; the ahliyyat al-ada’, ‘capacity of execution’, is the capacity to contract, to dispose, and therefore also validly to fulfill one’s obligation; it can be either full or restricted, and is harmonized with the ahliyyat al-wujub by considering the ‘qualification’ (hukm), the essential character of the obligation”.  

b. The Classical Approach

The classical jurists held the opinion that the dhimma exists in man so long as he is alive. However, they were not unanimous as the exact point of time at which the dhimma is endowed upon man. The general opinion among the Hanafis, Hanbalis and Shafi’is is that the dhimma exists in man from the moment of birth and ends with death. During this period a man is made a proper subject of the law, which provides him with rights or charges him with obligations. The Malikis however have a different opinion about this matter. In this respect, al-Qarafi (d. 684H)31 one of the Malikis was of the opinion that dhimma only exists in man when he reaches the stage of full competence or mukallaf. 32 To put in another words the dhimma does not exist in man unless he has reached at the age of majority or bulugh and he is in the state of sound mind or rushd and aqil.33

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30 Joseph Schacht, An Introduction to Islamic Law, p. 124 (1964)
31 al-Makashift Taha al-Kabashi, al-Dhimma wa al-Haqq wa al-Iltizam wa Ta’thuruha bi al-Mawt fi al-Fiqh al-Islami, p. 20
32 The mukallaf are those who have reached at the age of majority, baligh and in the state of sound mind, rushd or ‘aqil. These people enjoy the capacity to contract, ‘aqd and to dispose, tasarruf.
33 The majority of classical jurists agree that the dhimma ends with death. As such, they are not unanimous if the dead person has left behind unperformed obligations such as debt. In this respect, the Hanbali school of thought was of the view that the dhimma ceases to exist as soon as the person is dead. The obligation of the debt will be transferred to his immediate relatives with the condition that the dead person has left something for the payment of the debt. The Malik and the Shafi’i schools of thought on the other hand held the opinion that the dhimma has not disappeared but it still exists in the dead person so long as the debt is still outstanding. Therefore they were of the view that so long as there is a person who undertakes the obligation of the debt the dhimma will cease to exist in the dead person. The Hanafi school of thought has a special treatment to this particular issue. According to the Hanafis the dhimma is neither absolutely disappears as propounded by the Hanbalis nor absolutely exists as propounded by the Malikis and the Shafi’is. It further suggests that if the dead person has left something for the repayment of the debt or there is somebody who undertakes the obligation of the debt then the dhimma of the dead person is there until such obligation has been performed. On the other hand if it appears that the dead person has left nothing for the repayment of the debt or there is nobody undertakes the obligation of the debt then the dhimma will cease to be existed. At this point the inability or the non-existence of a person to take over such obligation should be clearly proved.
These differences of opinion were basically founded upon their different interpretations about the notion of dhimma. The Malikis perceive the dhimma as the basis for obligations alone. In other words, the entitlement for rights is not included in the definition of dhimma. Hence a man is only endowed with dhimma if he is capable to perform the obligation i.e. mukallaf. In this regard, al-Qarafi said;

“This means that the lawgiver has made dhimma as a consequence of puberty and sound mind. Therefore a person who has not reached at the age of puberty or has reached so but in the state of unsound mind has no dhimma for him. The same principle is applied to those who have been declared for bankruptcy. On the other hand, a person who satisfies those conditions will certainly be accorded with dhimma; that is to say he will be entitled for rights that arise from either criminal offences or commercial transactions and obligations. In short, those conditions are very important in determining as to whether a person is endowed with dhimma or not.”

The Hanafis, Hanbalis and Shafi’is on the other hand view the dhimma as the basis upon which a person is both charged with obligations and provided with rights. These schools of thought contended that the dhimma should not be strictly constrained to obligations. Indeed it embraces both rights and obligations. Therefore it exists in man even though he has no competence. Thus, to some writers the dhimma exists in man even though he is of unsound mind or majnun. In the al-Mudawana al-Kubra, Imam Malik (d.179H) said;

“If there is a case that has been claimed that a minor or an insane man has willfully injured the others this [offence] would be regarded as an unintentional offence. The punishment of which is that their guild, ‘aqila, should pay the blood money shall the amount is more than one third. Otherwise they have to pay from their own property. In case if they don’t have any property then the blood money will be regarded as their debts to the victim”

On another occasion, again Imam Malik said that in case if a minor has destroyed a property that has been deposited to a person then the minor shall bear the responsibility,

34 al-Makashifi Taha al-Kabashi, al-Dhimma wa al-Haqq wa al-Iltizam wa Ta’hiruhu bi al-Mawt fi al-Fiqh al-Islami, p. 23
35 The quotation cited in al-Makashifi Taha al-Kabashi, Id. at p. 20
that is to say he has to pay back the price of that property. 37 In short, the \textit{dhimma} is a legal attribute that confers upon man rights and charges him with duties.

c. The Modern Approach

In modern legal practice the term however has been used to connote the meaning of obligations. Professor Mustafa Zarqa' writes; "\textit{Dhimma} is a legal quality, upon which the creditor is enable to recover his debts from the principal debtor. In this regard, the \textit{dhimma} has a close relationship with the notion of Islamic legal capacity i.e. the fitness of a person to accept liability, i.e., \textit{ahliyat al-wujub}. To this end, the \textit{dhimma} is always construed as obligations but not rights" 38

On another occasion Professor Mustafa Zarqa' said that the \textit{dhimma} is the basis for claim, therefore once the \textit{dhimma} is established the legal consequence is that there would be an obligation on the part of the obligor i.e., the principal debtor. 39 Similarly, Professor Muhammad Salam Madkur was also of the same view, that the concept of \textit{dhimma} is relatively referred to the notion of obligations. 40 In this context, apart from \textit{mukallaf}, the existence of \textit{dhimma} can be seen as the result of a valid contract concluded by the obligor with the other party. 41 This approach of modern legal practitioners is similar to that of the Malikis. In \textit{The Encyclopedia of Islam}, Chafik Chehata wrote; "In its second sense, that of the legal practitioners, the term goes to the root of the notion of obligation. It is the fides, which binds the debtor to the creditor. The bond of the obligation requires the debtor to perform a given act (\textit{fi’l}), and this act will be obtained at the demand of the creditor, \textit{mutalaba"}. 42


37 Imam Malik Bin Anas Bin Malik, \textit{Id.} at p.154
38 Mustafa Ahmad al-Zarqa', \textit{al-Madkhal al-Fighi al-‘Amm,} vol. 3, p. 187
39 Mustafa Ahmad al-Zarqa', \textit{Id.} at p. 24
41 This connotation of the \textit{dhimma} may well be referred to its literal meaning i.e. contract, \textit{‘ahd.}
As regards to its relationship with others, the *dhimma* means the amalgamation of obligations in respect of performance or the fulfillment of certain obligations owed to some other parties. In our case, this notion is specifically referred to the amalgamation of a guarantor's liability with that of the principal debtor's in respect of the performance of promises in favour of the creditor. This means that the guarantor together with the principal debtor hold the responsibility in favour of the creditor, although it does not create any extra rights on the part of the creditor.

**3.5.2 The Theory of Amalgamation the *Dhimma***

The explanation of the theory of the amalgamation of the *dhimma* is important since it reflects the whole concept and legal consequences of the Islamic guarantee. In this context, we will see the extent to which the guarantor merges his obligation with that of the principal debtor. It is well accepted, under the Islamic guarantee that the guarantor will be liable the same as the principal debtor. The question is however whether this obligation arises upon the completion of the arrangement or it is dependent upon certain conditions. A further question arises as to whether the obligation of the guarantor is regarded as collateral or primary obligation. In response to these questions, the theory of the amalgamation of the *dhimma* in the contract of the Islamic guarantee needs to be explained.

The extent of the amalgamation of the *dhimma* can be explained in two dimensions. First is from the etymological perspectives and second from the classical definitions of the Islamic guarantee. Etymologically, the classical linguists were not unanimous as to the derivation of the word *daman* — another name for the Islamic guarantee.\(^{43}\) In relation to this, al-Qadi (d. 458H), for instance, proposed that the word *daman* was originally derived from the word *damm* which literally means the amalgamation or addition.\(^{44}\) On the other hand, Ibn 'Uqail suggested that the word *daman* was originally derived from the

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43 See detailed discussion on different names of the Islamic guarantee in the previous chapter
44 See 'Ala'uddin Abi al-Hasan 'Ali bin Sulayman al-Mardawi, *al-Insaf*, vol. 5, pp. 188-9; also Abi Muhammad Abdullah bin Ahmad Ibn Qudama, *al-Mughni*, vol. 4, p. 590
word *damina* which literally means the inclusion or subsume. This different approach of the linguistic debate has led at least to two different conceptual interpretations of the Islamic guarantee. In the first the Islamic guarantee has been interpreted as a mere amalgamation of the guarantor’s obligation with that of the principal debtor’s. In other words, this interpretation implies that the guarantor’s obligation will not arise unless the creditor has served a proper demand to him. In the second the Islamic guarantee has been interpreted as the inclusion of the guarantor’s obligation into the obligation of the principal debtor. This interpretation leads to the assumption that the guarantor will be rendered liable together with the principal debtor. In this regard, the creditor has the right to insist the guarantor to make necessary payment; and the guarantor has no legal right to challenge such insistence. This is because the obligation of the guarantor arises as soon as the arrangement has been completed.

The second dimension can be discussed in the light of the classical definition of the Islamic guarantee. As mentioned earlier, the classical jurists were not in agreement with regard to a specific definition that concerns the Islamic guarantee. Thus, it seems that, in the context of the above, the Hanafis has adopted the first while Hanbalis, Malikis and the Shafi’is have adopted the second linguistic approach to the Islamic guarantee. Again, the implication of such adoption is that the jurists were not in agreement with regard to the exact time the creditor can sue the guarantor for his credit. Thus, as mentioned earlier, for the Hanafis, the right will only arise when a proper demand has been made, while for the other three schools the right arises as soon as there is a default. The jurists however agreed that the nature of the guarantor’s liability should not be primary but secondary.

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The position is different if a comparison is being made to the Zahiris\textsuperscript{46} and some of the Shi‘as.\textsuperscript{47} According to these schools of thought the actual meaning of the Islamic guarantee is the shifting of the principal debtor’s obligation to the guarantor’s. Hence, the creditor will have an immediate right to recourse his credit from the guarantor. Under this approach, there will be no question at all with regard to the theory of the amalgamation as Islamic guarantee has been regarded as the transfer of one obligation to another. This interpretation of the Islamic guarantee has no different if compared to the contract of assignment or hawala; and under the English principle, the contract of indemnity.

In short, the process of amalgamation has given the right to the creditor to call upon the guarantor for the settlement of his debts.\textsuperscript{48} Indeed, the process reinforces the right of the creditor though it never creates a double right for him; the right of the creditor is one, i.e., the original sum total of his debts. It is also worth noting at this point that, as far as the four Sunni schools are concerned, the process of amalgamation has never meant to relinquish the obligation of a principal debtor; he is still liable and the creditor has the right to call upon him whenever he wishes.

3.6 The Guarantor’s Obligation

The purpose of the Islamic guarantee is to create an obligation on the part of a guarantor. This obligation has in turn arisen from the promise that has been made in favor of the

\textsuperscript{46} An example of this can be found in Abi Muhammad ‘Ali Ibn Hazm, \textit{al-Mahalla} vol. 8, p. 111. The Zahiris are those who follow the ideology of the Imam Dawud Bin Ali Bin Khalaf al-Asbahani (d.270H). They are called the Zahiris because they interpret the Islamic legal texts according to its literal meanings. In fact, the Zahiris is a derivation from the Arabic word Zahir, which means apparent. In this context, the Zahiris were always like to interpret the Qur’anic according to its apparent meaning but not to construct upon \textit{ijtihad} or circumstantial interpretation. See detail discussion in Ali Abdul Qadir, \textit{Nadhrah ‘Ammahfi Tarikh al-Fiqh}, p. 299

\textsuperscript{47} An example of this can be found in al-Sayyid Muhsin al-Tabata’i al-Hakim, \textit{Mutamassik al-‘Urwah al-Wuthqa}, vol. 11, p. 209 (1383 H)

\textsuperscript{48} Cf. The English common law however envisages that the right of a creditor does not arise from such a process of amalgamation. In fact, the right of a creditor under the guarantee arises from a promise that has been concluded between the creditor and the guarantor. See Kevin Patrick Mc Guinness, \textit{The Law of Guarantee}, p. 30
creditor. Thus, when the guarantor agrees to take the burden of the principal debtor, he ought to accept the burden when there is a default or miscarriage from the part of the principal debtor.

Under the Islamic guarantee, the obligation of a guarantor arises only when there is a default from the part of the principal debtor. In other words, the obligation arises from the non-performance from the part of the principal debtor. In relation to the non-performance Schacht comments;

"Questions of liability form one of the most intricate subject-matters in the Islamic law of obligations. Liability may arise from the non-performance of a contract (especially if the performance would have consisted in handing over an object, in cases where the object has perished so that the performance has become impossible), or from tort (ta'addi, literally 'transgression'), or from a combination of both".

Thus, so long as there is no default, the guarantor will not be liable to perform the obligation of the principal debtor. This principle of the law is comparable to that of the Malaysian common law. Thus, in Universiti Kebangsaan Malaysia v Zainal Abidin bin Ahmad & Anor, Lee Hun Hoe C.J. (Borneo) held that a guarantor could not be rendered liable under a guarantee unless the principal debtor was in default under his contract with

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49 It seems that the promise under the Islamic guarantee is confined to the performance of obligations in case there is a default. This however is different if a comparison is being made to the English common law. In Moschi v Lep Air Services Ltd [1972] 2 All ER 393 the House of Lords classified the promise into two categories.

i. The guarantor promises that he will perform if the principal debtor fails to do so,
ii. The guarantor promises to ensure that the principal debtor will perform.

Thus, as far as the English common law is concerned, the promise could also include ensuring that the principal debtor will perform. This is an imperative interpretation, as the object of the modern guarantee shall be not seen as a method to secure the performance alone but also as a method to develop a nation economic. At this point, with the ensuring, it is hoped that the principal debtor will use the loan in the right way so that the debts could be settled when the time is due. The issue will be clearer if a reference is being to cases that involve loans that have been advanced to entrepreneurs.

50 Joseph Schacht, An Introduction to Islamic Law, p. 147
51 [1988] 2 MLJ 303
the creditor. The basis for this principle is perceived to be upon the fact that the
obligation of a guarantor is 'dependant' upon the obligation of the principal debtor.

As such, the obligation of the guarantor shall also be the same as the obligation of the
principal debtor. In other words, the guarantor shall not be liable for what the principal
debtor has not undertaken. In addition, the guarantor shall also not be liable for more than
the principal obligation that has been made between the principal debtor and the creditor;
the guarantor shall also not be liable for what he has not undertaken. Thus, in the context
of loan agreements, the guarantor shall not be liable to perform obligation other than the
principal obligation that has been made between the principal debtor and the creditor.
This follows that interest or riba or any other charges outside the principal debt shall not
be included as obligation that the guarantor needs to perform. A detailed explanation on
the nature of the guarantor's obligation can be referred to the principle of co-
extensiveness infra.

In short, the obligation of the guarantor is made based upon the principal obligation of the
principal debtor. At this point, one could suggest that the obligation of a guarantor is co-
extensive with that of the principal debtor. This is due to the fact that the obligation of the
guarantor is collateral or secondary to that of the principal debtor's.

3.6.1 The Secondary Nature of the Obligation

It appears that the obligation of a guarantor, except in certain cases, is secondary in
nature. This means that the obligation of a guarantor will not arise unless there is a valid
principal obligation in the first instance. This follows that to make the guarantor
responsible there should be; first the existence of a principal obligation, second that the
first contract is valid. This has been made so due to the fact that the obligation of the
guarantor is 'dependant' upon the existence of a valid principal obligation. Thus, unless

52 This is further discussed in The Secondary Nature of the Obligation infra.
53 This includes the Islamic guarantee as understood in the jurisprudence of the Zahiris and some of the
Shi'as. See in the previous section for a detailed discussion on the subject.
the above two key elements have been satisfied, a contract of the Islamic guarantee would have been invalidated and as a consequence the guarantor could not be held liable to the creditor.

Thus, the guarantor will only be liable if the principal debtor is held liable in the first instance. This follows that if the principal obligation is for some reason unenforceable or null and void in law, the guarantor shall not be held liable, as there is no obligation on the part of the principal debtor. Similarly, if the principal debtor were discharged from his principal obligation, the guarantor would also be discharged and he would not be rendered liable for the debts. The logic of this is that the guarantor cannot be rendered liable, as there is no debt due under the contract between the principal debtor and the creditor. At this point, al-Musili the Hanafis jurist said;

"In the event if the principal obligation is discharged the guarantor shall also be discharged since the intrinsic nature of the Islamic guarantee is to secure the performance of the principal obligation. In this instance the principal obligation is extinct, therefore the guarantor should not be liable". 54

Similarly, Ibn Qudama (d. 630 H), the Hanbalis jurists also suggested that in the event of the principal debtor being discharged the guarantor would also be discharged since the guarantor's obligation is secondary to that of the principal debtor. Therefore it would appear that if the principal debtor's obligation is extinguished the guarantor's liability would also become extinct. This principle however should not be applied in cases where the guarantor is discharged. In this respect the principal debtor would not be discharged simply because its obligation is not collateral but primary. 55

In modern writings, Professor Mustafa Zarqa' said; “One of the significant features of the Islamic guarantee is that the guarantor assumes to perform the principal debtor' obligation. Therefore the arrangement is essentially collateral in nature. In other words, the obligation of the guarantor is dependent upon the existence of the principal obligation. This necessarily means that in the event if the principal obligation is extinguished the guarantor would not be liable. Similarly if the principal debtor is discharged the guarantor should also be discharged”.

This secondary nature of a guarantor's obligation is comparable to that of the English common law. Thus, in *Lakeman v Mountstephen*, one will find where Lord Selborn held that;

“There can be no suretyship unless there is a principal debtor, who of course may be constituted in the course of the transaction by matters of *ex post facto* and need not be so at the time, but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed”

In *Swan v Bank of Scotland* it was suggested that a guarantor could not be rendered liable under a guarantee if the contract between the creditor and the principal debtor was null and void in law. This approach would suggest that the existence of a valid contract between the principal debtor and the creditor was necessary precondition for the liability of a guarantor to arise. Similarly, if a principal debtor discharges his liability the liability of a guarantor is similarly discharged. In *Western Credit Ltd. v Alberry*, it was also suggested that a guarantor could not be rendered liable under a guarantee once the principal debtor had discharged his obligations towards the creditor. In a similar vein, R Else Mitchell wrote, ‘with certain exceptions, English law recognizes the rule of civil law

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56 Mustafa Ahmad al-Zarqa', *al-Madkhal al-Fiqhi al-'Am*, vol. 1, p. 326
57 In Malaysia, the principle of secondary liability is uttered in a way of the principle of co-extensiveness. Under section 81 of the Malaysian Contract Act 1950 it is stated that the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.
58 (1874) 7 HL 17
59 (1836) 10 Bligh NS 627; For the Malaysian position see *Government of Malaysia v Gurcharan Singh* [1971] 1 MLJ 211; the reader can also see *Kelappan Nambiar v Kunchi Raman* (1957) AIR Mad. 164 at 167
60 [1964] 1 WLR 945
that a contract of suretyship is dependent upon the existence and continued existence of a principal obligation and that there has been no wholesale attempt to treat a surety as a principal or his obligation as one of indemnity. 61

It should be noted at this point that the fact the guarantor’s liability is secondary it does not prevent the creditor from proceeding against him before he sues the principal debtor. It appears therefore that the principal debtor’s primary liability merely connotes that he will ultimately be liable to indemnify the guarantor in respect to the amounts paid by the guarantor in reduction of the principal debt. 62

3.6.2 The Principle of Co-extensiveness

The secondary nature of the obligation further suggests that the obligation of the guarantor is co-extensive with that of the principal obligation. 63 This means that the extent to which the guarantor is liable must be the same as the principal debtor. It follows that there must be no liability imposed upon the guarantor apart from his promise to perform the obligation of the principal debtor. In other words, the guarantor should not be held liable for the obligation, which the principal debtor did not. In this context, al-Salus remarked;

"With regard to the guarantee for the payment the guarantor would not be liable for what the principal debtor did not liable since the intrinsic nature of the guarantor’s obligation is secondary or collateral". 64

61 R Else Mitchell, 'Is a Surety's Liability Co-extensive with that of the Principal Debtor?', [1947] 63 The Law Quarterly Review 355 at 370
Thus future debts cannot be guaranteed since they are not determined and did not exist at the time when the arrangement was concluded. As far as the principle of co-extensiveness is concerned, the obligation of the principal debtor should be ascertained beforehand. Therefore, the guarantor shall not liable for any payment made after the arrangement has been concluded.

A further implication of the principle of co-extensiveness is that the guarantor cannot be imposed with greater obligation than that of the principal obligation. However, it may be less onerous: for example, it is validly possible to guarantee part of the principal obligation. The English common law also has the same legal principle. The law however has further imposed that a strict construction of the contract should be applied to determine the extent to which the guarantor is liable. In this context the guarantor should not be made liable for more than he has undertaken. Further, in Malaysia the courts have also not used the co-extensiveness principle to assume that the quantum or scope of a guarantor’s liability is equal to that of the principal debtor but have proceeded on the basis of construction of contract. Hence, the true scope of the guarantor’s liability is dependent on the true construction of the contract of guarantee i.e. from the language and words of the guarantee.

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67 Cf. Under the Roman law concept of fidejussio, the liability of a guarantor must not be greater than that of the principal obligation otherwise the contract will be regarded as null and void. See R. Else Mitchell, ‘Is A Surety’s Liability Co-extensive with that of the Principal Debtor?’, [1947] 63 *The Law Quarterly Review* 355 at 357
69 *Re Sherry* (1884) 25 Ch D 692 at 703; *Nicholson v Paget* (1832) 1 C&M at p. 52
70 Despite section 81 of the Malaysian Contract Act 1950 states that the liability of a surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract, the provision does not directly mean to define the scope of the guarantor’s obligation. Instead, it is rather used to interpret the obligation as collateral in nature. See, for example, *Government of Malaysia v Gurcharan Singh* [1971] 1 MLJ 211; see also Low Kee Yang, *The Law of Guarantees in Singapore and Malaysia*, pp. 25-6 (1992)
72 *Carlsberg Brewery Malaysia Bhd v Soon Heng Aw & Sons Sdn Bhd & Ors* (1989) 1 MLJ 104
3.7 The Gratuitous Nature of Islamic Guarantee

As mentioned earlier, one of the distinct natures of the Islamic guarantee is that it is regarded as a gratuitous contract. A legal explanation for this is that the mechanism has been constructed upon the concept of ta'awun, i.e., mutual assistance. Thus, in Islam a person is encouraged to give his guarantee to others, helping those who are in need to obtaining loans from financial institutions. In fact, at this point, the giving of the guarantee has been regarded as an act of charity in Islam. The Prophet said, `whoever relieves a believer from his difficulties in this world, Allah will relieve him in this world and the world of hereafter'. Therefore, it seems that the asking for remuneration is inappropriate since it will deny the purpose of the guarantee.

The gratuitousness of the Islamic guarantee could be compared with other similar contracts in Islam. This includes gift *inter-vivos*, loan, deposit or bailment, alms, endowment and bequest. Under these contracts, a person unilaterally makes an offer to others hence he is bound to the promise. The acceptor, being the beneficiary of the contract, is not obliged to accept the offer nor will he be bound in case if he accepts the offer.

Following the principle of gratuitousness, the classical jurists have stipulated that a guarantor should be able to dispose of his liberality freely; that is he must be in full enjoyment of his capacities, i.e., *ahlīyya al-tabarru‘*, and must not be a minor, madman nor ‘prohibited’ to enter any transaction including the contract of the Islamic guarantee. At this point, al-Kasani (d. 587H), the Hanafis, has suggested that the arrangement of the

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73 A gratuitous contract is a contract whereby one person enters into an arrangement unilaterally for no rewards. The basic characteristic of such arrangement is that only the person who undertakes the obligation will be bound. As such the Islamic law has stipulated that the person should be capable enough (*ahlīyya al-tabarru‘*) to fulfill his obligation as the whole transaction is relied on him. A further consequence of the gratuitous contract is that the element of consideration is not a motive. In other words, as far as the Islamic law is concerned the contract would be valid even though there is lack of consideration on the part of the acceptor.

74 Hadith Muslim as quoted in http://www.online.org/vil/Default.htm (20th March 2002)
Islamic guarantee will be invalidated if it involves a person who has no capacity to convene the arrangement. Similarly, al-Buhuti (d. 1051H) has also remarked that capacity is of paramount important since it involves his obligation to perform the principal debtor’s duties.

As mentioned earlier, the main effect of the gratuitousness of the Islamic guarantee is that a guarantor is not allowed to ask for, neither from the creditor nor from the principal debtor, any pecuniary payment in return for his undertakings. al-Hattab (d. 954H), one of the Malikis jurists pointed that it is not permissible for the guarantor to accept any reward neither from the creditor nor the principal debtor and even any other third party.

Besides, it was also suggested that asking for the fees could be tantamount to the acceptance of *riba* or interest, since the guarantor has no locus standi to do so. In *Sura al-Baqara*, the Qur’an reads, ‘And do not eat up your property among yourselves for vanities nor use it as bait for the judges with intent that ye may eat up wrongfully and knowingly a little of (other) people’s property’. In connection to this Dayyib a scholar from the University of al-Azhar argued that in cases where the principal debtor has performed the obligation of the debts, the asking for pecuniary consideration by the guarantor would necessarily be tantamount to the improper acquisition of another’s property, which is implicitly prohibited by the Qur’an. Similarly, if the guarantor has paid the debts, and the guarantor has recovered the sum total of the debts from the principal debtor, the asking for pecuniary consideration would necessarily be tantamount to asking for extra payment, which is regarded as *riba* and therefore is not allowed in Islam. In this regard the prophet Muhammad s.a.w said, ‘The debts which are based on an extra payment is

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75 ‘Ala’uddin Abi Bakr Mas’ud bin Ahmad al-Kasani, *Bada’i al-Sana’i Fi Tartib al-Shara’i*, vol. 4, p. 3411
78 The Qur’an; 2: 188
one of the prohibited features of *riba* [and therefore it is prohibited]. In respect to this Schacht\(^\text{80}\) said;

"It is a general principle of Islamic law, based on a number of passages in the Koran, that unjustified enrichment [*fadl mal bila iwad*], or ‘receiving a monetary advantage without giving a countervalue [*‘iwad*]’ is forbidden, and that he who receives it must give it to the poor as a charitable gift. This applies, for instance, to reletting a hired object for a greater sum, or to reselling a bought object, before payment has been made for it, for a higher price. Special cases are the giving and taking of interest, and other kinds of *riba*, literally ‘increase’, ‘excess’.

In short, following the principle of gratuitousness, a guarantor under the Islamic guarantee is not allowed to ask for any fees with regard to his undertaking. In other words, under the arrangement the law will not allow the guarantor be paid for his undertaking. This however would be different if the undertaking of the guarantor was motivated through the request of either the principal debtor or the creditor. In this case the guarantor will be allowed to accept the reward given either from the principal debtor or the creditor.

The gratuitous nature of the Islamic guarantee has led to some profound differences in attitude between the classical Islamic law and the modern law of the guarantee. At this point, as Foster suggested – though not entirely correct – the classical Islamic law tends to lack of the protective measures towards the guarantor. Thus, while the modern law attempts to protect the guarantor, the classical Islamic law seems to have no practical technique for the purpose.\(^\text{81}\)

The classical Islamic law also differs from the modern law of the guarantee in respect to the creation of a valid contract of the guarantee. This could be summarized in the areas that concern acceptance, consent, and consideration. The issues will be dealt with later in the subsequent chapters.

\(^{80}\) Joseph Schacht, *An Introduction To Islamic Law*, p. 145

\(^{81}\) See Nicholas H.D. Foster, ‘The Islamic Law of Guarantee’, (2001) *Arab Law Quarterly* 133 at 142
3.8 The Unilateral Engagement of Islamic Guarantee

Following the principle of gratuitousness, classical Islamic law acknowledged the Islamic guarantee even though it has been concluded through a unilateral engagement. This has been demonstrated in the hadith of the Qatada. At this point, the Prophet was reported to have refused to offer a funeral prayer over a dead man who has left behind an unpaid debt. When the body of the man was brought in, the Prophet asked: ‘Has he any debt?’ The people replied, ‘Yes, two Dinars’. The Prophet said, ‘Therefore say the special funeral prayer [among yourselves] for your friend’. Abu Qatadah then remarked: ‘O Messenger of God, I take the responsibility [of suretyship] for paying the two Dinars’. Then, the Prophet offered his special prayer for the dead man. 82

This hadith shows that the Prophet has accepted the undertaking of Abu Qatadah even though there was no acceptance on the part of the creditor. Indeed, the creditor might not even have the knowledge about such undertaking. This suggests that the arrangement is valid even though it was concluded through a unilateral engagement.

This general principle of the Islamic guarantee has been well accepted in the classical Islamic legal tradition. The issue arises however as to whether the contract binds the guarantor alone or both of them.

At this point, al-Ramli (d. 1004H) suggested that the contract binds the guarantor alone. 83 This is because the creditor was not aware of the arrangement nor did he give his consent to the contract; therefore he should not be bound upon the unilateral promise of the guarantor. In line to this view Ibn Qudama added;

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83 Shamsuddin Muhammad al-Ramli, Nihayat al-Muhtaj Ila Sharh al-Minhaj, vol. 4, p. 438
"In order to create a valid contract of guarantee, a free consent should be obtained from the guarantor but not the creditor. This is because the guarantor will assume obligations but not the creditor. In this context, the creditor is the party who would benefit from the contract. Further, an Islamic guarantee is a personal guarantee, which is created in favor of the creditor. At this point, a free consent from the creditor is not required as he will be regarded as the beneficiary just like the nadzar (a sacred vow) and witnesses undertakings." 84

Thus, the contract binds the guarantor alone.85 The position however is different if a comparison is being made to the Hanafis. According to the Hanafis, the contract of the Islamic guarantee essentially binds both the guarantor and the creditor.86 This is not surprising as the Hanafis suggest that both consent and acceptance are essential to create a valid contract of the Islamic guarantee.

3.9 Instruments Similar to Islamic Guarantee

There are some instruments which are similar to the Islamic guarantee. These include some classical devices such as the hawala and haml as well as some modern instruments such as letters of credit and performance bonds.

a. Hawala

The Arabic term of hawala literally means the transfer. In its legal sense, the Hanafis define the hawala as the transfer of debt obligation from one obligation into another.87 In the Lane's Lexicon, the hawala has been described as the transfer of a claim or of a debt by shifting the responsibility from one person to another.88

84 Abi Muhammad ʿAbdullah Ibn Qudama, al-Mughni, vol. 5, p. 103
85 See Mansur bin Yunus al-Buhuti, Kashqaf al-Qina' Min Matn al-Iqna', vol. 3, 336; also Abi Muhammad ʿAli bin Ahmad Ibn Hazm, al-Mahalla, vol. 8, p. 523
86 See ʿAlaʿuddin Abi Bakr Masʿud bin Ahmad al-Kasani, Badaʿi al-Sanaʾi fi Tartib al-Sharaʿi, vol. 4, p. 3404
88 The Lane's Lexicon definition on the hawala is cited in Nicholas H.D. Foster, 'The Islamic Law of Guarantees', (2001) Arab Law Quarterly 133 at 150
The *hawala* should be distinguished from the modern contract of assignment\(^89\) since in the former the arrangement involves the transfer of obligation whilst in the latter the arrangement involves the transfer of right. The *hawala* should also be distinguished from *suftadja*\(^90\) since in the former the arrangement involves the transfer of all kinds of obligation whereas in the latter the arrangement involves only the transfer of debts. In short, the *hawala* is an arrangement in which one party agrees to accept that the obligation of another to be put into his *dhimma* or obligation.

The contract of *hawala* involves at least three parties i.e. the creditor, the principal debtor and the indemnifier. The creditor is regarded as the beneficiary of the contract whilst the principal debtor and the indemnifier are regarded as the original parties to the contract. With regard to this, the principal debtor will be the transferor whereas the indemnifier will be the transferee. The principal debtor and the indemnifier must be of full age and not mentally unstable as they are the direct parties to the contract. However, the creditor is excluded from such legal requirement. The obligation indemnified must be a debt i.e. an obligation to pay, not a specific object. The contract is concluded with the offer from the principal debtor and the acceptance from both the creditor and the indemnifier. In this regard the principal debtor will make an offer to transfer his debt obligation to the indemnifier. It is important that all parties concerned should give their consent in the arrangement.\(^91\)

From the above, it seems that the basic characteristic of the *hawala* contract is that the obligation of the principal debtor will be shifted to the *dhimma* of the indemnifier. This means that the principal debtor will be acquitted from the obligation whilst the

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89 Under the assignment arrangement such as assignment of debts a third party has not voluntarily undertaken the obligation of the principal debtor. In fact, the obligation is created on purpose by the principal debtor, who originally has the right over the third party.

90 See M.Y. Izzi Dien, 'Suftadja', in *The Encyclopedia of Islam*, p. 770; see also Joseph Schacht, *An Introduction to Islamic Law*, p. 149

91 This last stipulation has been adopted by the Hanafis. See Abdul Latiff Muhammad 'Amer, *al-Duyun wa Tawthiqa fi al-Fiqh al-Islami*, p. 153
indemnifier will be held liable to the creditor. In such a case a claim could possibly be made from the indemnifier.

The *hawala* arrangement is of two types; first is the conditional *hawala* and second is the unconditional *hawala*. In the former, the arrangement includes transaction, which is similar to the arrangement of the bill of exchange in modern banking transactions. A common practice of such arrangement is that A owes B 10 GBP (i.e. principal debtor’s obligation). At the same time C owes A the same amount (i.e. indemnifier’s obligation). A and C agrees that the principal debtor’s obligation is transferred to C. The effect is that A is released from any obligation whilst C is also released from obligation as against A but has a new obligation as against B. This is referred to as the conditional *hawala* by the Hanafis. In the latter, the arrangement includes transaction, which is similar to the English contract of indemnity. A common situation for this arrangement is that A owes B 10 GBP (i.e. principal debtor’s obligation). A and C then agree that the obligation is to be transferred to C. A is released from the obligation whilst C will be responsible to B. Note that under this second arrangement C does not have prior obligation as against the principal debtor. The effect of this arrangement is that A is released from obligation. On the part of C he has the right of indemnity after a proper payment has been made.

From the above, it is apparent that a contract of *hawala* is different from that of a contract of Islamic guarantee. In the former the obligation of the principal debtor is relinquished whilst in the latter the obligation of the principal debtor is not acquitted. In fact the principal debtor is still held liable together with a guarantor. Under the *hawala* arrangement the obligation of the principal debtor is transferred to the *dhimma* of the guarantor while under the Islamic guarantee arrangement the obligation of the principal debtor is not transferred but stands together with the obligation of the guarantor.

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92 See Abdul Latiff Muhammad Amer, *al-Duyun wa Tawthiquha fi al-Fiqh al-Islami*, p. 159
As such it was argued however that some creditors actually prefer the hawala, as if the principal debtor were released the creditor still can rely on the indemnifier. The situation would be different if the arrangement fell under the Islamic guarantee. In this respect the creditor might get nothing since the release of the principal debtor would necessarily bring about the release of the guarantor. Furthermore there is also the possibility that defenses, which are available to the principal debtor, are not available to the indemnifier.

Be that as it may, the two-security devices share the same important function in economic development in that they provide secured obligation, especially in debt transactions. To quote the words of Muhammad Ahmad Sarraj:

"It is well accepted that the security device is very important in debt transactions. This is due to the fact that this security device not only provides legal remedies and protections but also avoids disputes. In addition it also provides security for repayment and as far as the secured creditor is concerned he will have the priority over the asset of the principal debtor. In this regard, security devices include the written contract of the debt transaction, kitaba, the witnesses, shahada, the pledge, rahn, the transference of the principal debtor's obligation to the indemnifier dhimma, hawala, and the guarantee, kafala".  

b. Haml

Another similar device created to secure obligations is the haml arrangement. The haml is usually translated as indemnity, which literally means transporting. Under this device the indemnifier undertakes to perform the obligation of the principal debtor. Thus the illustration would be A owes B 10 GBP. C undertakes to make the repayment of the 10 GBP to B. C is the indemnifier whereas A is the principal debtor. This device is relatively similar to that of the English contract of indemnity except the obligation of the principal debtor is totally released under the haml arrangement.
One consequence of this arrangement is that the creditor does not have an option in claiming his right. The possible claim that the creditor entitled to is against the indemnifier alone. In this respect once the performance has been accomplished the indemnifier has no right of indemnity as against the principal debtor. The assumption being that the indemnifier intended to commit an act of pure liberality.

The general rule of the *haml* arrangement is that it must be created by express words. In some exceptional cases such as where a father guarantees a nuptial gift promised by his son or where a high-ranking person guarantees the debt of one of his dependents what would otherwise be considered an Islamic guarantee might be considered a *haml*. This arrangement of personal security has been regarded as not particularly important mechanism. It would seem that the reason for this insignificance is the existence of the *hawala*, which could perform the same function.

c. Letters of Credit

Instead of a guarantee, a letter of credit is also used to secure the performance of future obligations. At this point, a letter of credit is defined as an instrument whereby an issuing bank (the issuer) assumes an independent obligation to pay the beneficiary. The letter of credit is widely used in international commercial transactions. It is a written document where a bank issues a guarantee statement to the sellers in favour of his customers.

The arrangement involves three parties i.e. the customer, the issuing bank and the beneficiary. One of the distinct natures of the letter of credit is that the obligation under the arrangement is independent of the underlying transaction, i.e., principal obligation. Thus, while the guarantee depends upon the principal obligation, the letter of credit assumes an independent obligation. In other words, the obligation under the letter of credit does not contingent upon default as under the guarantee but has arisen when there is a demand or upon the receipt of a certificate of default or when certain event occurs. To borrow the words of Roskill LJ;
"[T]he obligation of the bank is to perform that which is required to perform by that particular contract, and that obligation does not in the ordinary way depend on the correct resolution of a dispute as to the sufficiency of performance by the seller to the buyer or by the buyer to the seller as the case may be under the sale and purchase contract." 

Thus, the letter of credit is different from that of the guarantee. The letter of credit does not create an accessory obligation, which is contingent upon the borrower's default and dependent upon the continued existence of the borrower's principal obligation.

d. Performance Bonds

Similar to the letter of credit, the performance bond is a new security device available in Islamic banking transactions. It is defined as an undertaking issued by a bank, upon the request of its customer (the applicant), for the payment to a third party (the beneficiary) of a determined or determinable amount, without any restriction or condition, if a demand is presented during the period set out in the letter of the performance bond. Such a bond or guarantee should, in addition, stipulate the reason for which it is issued. Thus, the performance bond is an instrument issued by a bank to a third party on demand of the customer. In general, the function of the performance bond is similar to the true Islamic guarantee arrangement in that both guarantee the performance of the principal obligations.

The performance bond is different from that of the true Islamic guarantee. Under the true Islamic guarantee, the guarantor assumes a secondary liability to answer for the principal debtor who remains primarily liable for the debt owing to the creditor. Before the guarantor is called upon to pay under the true Islamic guarantee, the principal debtor must have defaulted on his obligations; and in certain cases the creditor must notify the guarantor about the default of the principal debtor before calling upon the guarantor to pay. In short, the true Islamic guarantee is conditional upon an event or default on the

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97 Howe Richardson Scale Co. Ltd. v Polimex-Cekop and National Westminster Bank Ltd. [1978] 1 Lloyd's Rep. 161 at 165
98 Article 382 of The Kuwaiti Commercial Code 1980
part of the principal debtor to bring about liability. On the other hand, under the performance bond, it is not necessary for the principal debtor to default before the guarantor (the issuing bank) can be called upon to pay. It is not necessary for the beneficiary to notify the issuing bank that the principal debtor has defaulted on his obligations. All the beneficiary needs to do to bring about liability of the guarantor is to make a simple demand on the issuing bank.

In short, the obligation under the performance bond is separate and independent and it arises on demand. The bank is protected from the underlying contract and is concerned only to make payment according to the terms of the performance of the contract itself. To borrow the words of Lord Denning:

“A bank which gives a performance guarantee must honour the guarantee according to its terms. It is not concerned in the least with the relation between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand, if so stipulated, without proof or condition ...”\(^99\)

In the Egyptian Supreme Court, it was held that notwithstanding the fact that the guarantee was issued in pursuant to the application that has been made by a customer, the relationship between the issuing bank and the beneficiary is separated from that of the issuing bank and the customer (the applicant). Under the performance bond or letter of guarantee, the bank agrees to pay the amount claimed by the beneficiary to the extent that has been stipulated in the letter of guarantee.\(^100\)

Most of the Islamic banks in the world issue different kinds of performance bonds. Some are based of the principle of wakala, some are based on mudharaba whilst others are


based on *kafala*. All these kinds of performance bonds that have been issued either related to domestic or international transactions will be charged accordingly.

### 3.10 Conclusion

The guarantee in Islam is not a new devise of law. In fact, it has been practiced among the Arabs even before the advent of the new religion. However, when Islam was established in Arabia, the pre-Islamic guarantee was accepted with some modifications. At this point, the rules that governed the 'Islamic guarantee' have developed upon the principles of the Islamic Shari'ah.

In the classical Islamic law, the guarantee was constructed upon the concept of *al-ta'awun*, i.e. mutual assistance. The effect of this was that the guarantee was regarded as a gratuitous contract; a contract that requires no consideration. At this point, the contract of the guarantee could be equated with other similar devises, like the gift inter-vivos, endowment, bequest, and etc. The main character of these contracts is that they will be regarded as valid contracts even though they have been concluded upon a unilateral engagement. In other words, the contract will be considered as valid even though there is no acceptance or consent or even consideration that moves from the 'recipient'. These particular issues have made the classical Islamic guarantee different from that of the modern practice of the law of guarantee. The English common law, for example, stipulates that to conclude a valid contract of the guarantee, there must be an acceptance, consent and consideration that move from the acceptor. In the absence of these elements the contract will be considered null and void *ab initio*. The reason for this is that the guarantee has been regarded as part of contract, which should always comply with the general rules of the contract law.

Be that as it may, the aim of the classical Islamic guarantee is similar to that of the modern practice of the guarantee, i.e., to give proper protection to the recipient. Thus, in
the context of loan agreements, the purpose of the classical Islamic guarantee is to secure
the payment of debts that owed by others.

Indeed, the classical Islamic guarantee imposes an obligation upon the guarantor to settle
the debts in cases where the principal debtor defaults. That is, having agreed to be a
guarantor, the classical Islamic law imposes that the guarantor shall be liable together
with the principal debtor to the creditor. At this point, the creditor will have the right to
recover his debts from the guarantor even though exhaustive remedies have not been
made upon the principal debtor. In this context, the guarantor has no special right to
demand that the creditor should first call upon the principal debtor to pay off the debts
before asking the guarantor to pay.

The rationale behind the law is that, under the classical Islamic guarantee, the guarantor
has merged his obligation or dhimma with that of the principal debtor. Thus, the
guarantor has been regarded as part of the parties, subject to the general rule of the
guarantee, in the loan contract. Indeed, the process of the merger or amalgam itself
indicates that the guarantor is prepared to be bound together with the principal debtor in
the contract of the loan. This is how the classical Islamic law constructs the promises that
relate to the arrangement of the Islamic guarantee. Further, the undertaking of the
guarantor will also be enforceable based upon the Qur'anic injunction, i.e., 'O you who
believe! Fulfill (your) obligations',\textsuperscript{101} and the saying of the Prophet, 'The Muslims should
fulfill his promise(s)'.

The process of the amalgamation under the classical Islamic guarantee was not meant to
make the guarantor be primarily liable to the creditor. Previously, it has been
demonstrated that the principal debtor will still be liable; and his obligation is not
relinquished. In fact, this has made the classical Islamic guarantee different from that of
the hawala or, in modern practice, the contract of assignment or indemnity under the
English common law.

\textsuperscript{101} The Qur'an; 5:1
In short, the classical Islamic guarantee is a distinct devise of law, which created as a practical protection measure for the recipient. Beside its objectives, i.e., to secure and to help, the classical Islamic guarantee is also referred to as the principle of gratuitous contract. Hence, for the purpose of modern practice, a discussion on the classical Islamic ought to be made, at least, upon four main points, i.e., the process of the creation of the guarantee, which involves three parties, the principle of gratuitous contract that forms the fabric of the classical Islamic guarantee, the protective measures in the classical Islamic guarantee – this refers to the guarantor where there is a normal reference being made to the knowledge gap between the astute creditor and the naïve guarantor, and the objectives of the guarantee or the maqasid shar'iya of the devise – this shall include the economic contribution of the mechanism to the nation.
4.1 Introduction

It appears that the Islamic guarantee is essentially gratuitous in nature. This means that the Islamic guarantee could be concluded even though a creditor is not present in the session. Indeed, knowledge and consent of the creditor is not necessary to conclude the arrangement. As has been demonstrated in the previous chapter an acceptance and consideration are also not important in the conclusion of the Islamic guarantee.

Question arises as to whether the Islamic guarantee can be regarded as a valid contract. In other words, in view of the modern common law tradition, could the Islamic guarantee be considered as enforceable in law? The issue needs a thorough examination.

This chapter is an attempt to further investigate the nature of the Islamic guarantee engagement. Legal principles that relate to the creation of the Islamic guarantee will be the focus of the investigation. At this point, issues like the classical definitions on contract; formalities and other related questions will be dealt with in this chapter. This is important in order to understand the classical attitude towards the creation of the Islamic guarantee. At this point, it is hoped that legal foundations could be formed for further development of the law.

4.2 The Islamic Guarantee: Is It a Contract or Merely a Personal Declaration?

In the previous chapter, it appears that the Islamic guarantee is essentially a gratuitous engagement. The distinctive character of the Islamic guarantee has given rise to some important questions; the most crucial one is whether the engagement should be regarded
as a contract or a mere declaration of a guarantor. The fact that the Islamic guarantee is made upon promises it seems pertinent to examine the theories of contracts as understood in the classical interpretation.

4.2.1 The Classical Theories on Contract

It is suggested that until the 19th century no general theory of contract had been developed in the Islamic legal tradition. In fact, there was no specific definition on contract to be found in the classical manuals of the Islamic law. There was however variant specific mode of engagements known as nominate contracts.

At this point, it seems that during the classical period, the jurists were more comfortable to discuss the law in the light of a specific issue of transaction instead of developing general rules that pertain to contract. This was so, as Salleh suggested, because the Islamic *fiqh* (jurisprudence) was developed upon a casuistic approach rather than dogmatic rules.\(^1\) The rules were developed exclusively according to a specific issue of transaction that had arisen at that time.

Hamid, who was a law teacher in the University of Khartoum, however has another reason. According to Hamid, this distinctive dimension of the classical law of contract was reflected to its historical development. At this point, Hamid suggested that the tendency of the classical jurists was to ‘Islamise’ the various institutions and activities of the pre-Islamic transactions. Therefore, various engagements, known as nominate contracts, were developed rather than a general theory of contract.\(^2\)

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Thus, numbers of nominate contracts have been discussed in the classical manuals of the Islamic law. At this point, the nominate contract is defined as a contract where special rules and regulations are applied to govern that particular contractual relationship.³

In the classical period, nominate contracts included sale, which represents a variety of exchange transactions, and hire, which represents various types of transfer of usufruct arrangements. In fact, sales and hire, which are commutative in nature, are regarded as the most important foundations for the development of the classical Islamic commercial law. The other nominate contracts that are found in the classical law are the gift inter-vivos and the benevolent loan. The gift inter-vivos and the benevolent loan arrangements are regarded as gratuitous contracts, since they do not require consideration from the part of the beneficiary. Apart from this, there are also other types of nominate contracts that fall outside the scope of sales, hire, gift inter-vivos and benevolent loan. These types of contract include the arrangement of security; and the Islamic guarantee falls under this classification.⁴

The Islamic guarantee is considered as one of the classical nominated contracts and being gratuitous in nature, it contains different rules and regulations that need to be observed. At all times the parties to contract should adhere to the rules and regulations of the Islamic guarantee to conclude an enforceable guarantee. Similarly, in cases of litigation, the court is also bound to apply these rules and regulations when cases are brought up.

a. The Classical Definition on Contract

In the classical Islamic law, contract means no more and no less than 'a legal undertaking', the essentials of which are very different from 'the binding promise' that

constitutes a contract in the Western law. It is a well established under English common law, for example, that the two basic essentials of contract are agreement and consideration; factors upon which classical Islamic law does not insist. In this context, the classical Islamic contract may neither necessarily involve agreement nor consideration to constitute a valid arrangement and the arrangement will be regarded as contract so far as there is a ‘legally recognized undertaking’. This includes both bilateral and unilateral engagements. In order to clarify the issues relating to the classical doctrine of contract, some forms of the classical promise are outlined below.

In the classical Islamic law, promises can be classified into three main categories. The first comprises of a promise that has been made between two parties, whereby each makes a solemn pledge with the view that the other party will perform what he has undertaken. This kind of promise involves offer and acceptance and therefore constitutes a bilateral contract. Clear examples of this are manifest in a variety of exchange transactions that involve consideration, such as sale and hire.

The second category comprises a promise that requires an action as an acceptance. Examples of this include the classical nominate contract of al-ju’ala, (contract of employment) contained in which is a promise to reward whoever undertakes and completes a particular work. It is worth mentioning at this point that the difference between this type of promise and the previous one is that in the latter an acceptance ought to be made through a clear declaration in one session, while in the former such clear declaration is not necessary. It suffices that the acceptance be manifested through an action. This second type of promise could be compared with that of the unilateral contracts that are understood under the English common law.

The third category comprises a promise that involves unilateral declarations. In this case, a mere offer is sufficient to render an arrangement as valid. There are three important facets that differentiate this form of promise from the preceding ones. Primarily, it is

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5 See Noel J. Coulson, Commercial Law in Gulf States; the Islamic Legal Tradition, p. 18 (1984)
gratuitous in character while the first two are commutative. Secondly, while the first two categories require strict compliance with agreement, i.e. the occurrence of acceptance and consent on the part of the recipient, this type of promise does not insist on such a requirement. Finally, this type of promise does not require a valid consideration to constitute a valid engagement. In short, unilateral declaration comprises transactions that favour the recipient, such as gratuitous loan, gift and the Islamic guarantee.

In view of the above it would appear that the scope of the classical definition of contract is wide enough to encompass 'every legal undertaking', including bilateral, unilateral and gratuitous engagements. In the similar vein Coulson remarks that while ‘uqud may be translated as ‘contract’, because the term normally refers to legal transactions which are concluded by an offer from one party and acceptance from the other, it must be emphasized that an ‘aqd or contract in Islamic jurisprudence means no more and no less than a legal undertaking, the essentials of which are very different from ‘the binding promise’ which constitutes a contract in Western law. At this point it would seem that the classical term of contract is in no sense a precise equivalent of the technical term contract in Western jurisprudence; and this includes the English common law. Classical Islamic law defines contract in a broad sense, while the English common law confines the application of contract to bilateral and unilateral engagements only. In this regard, gratuitous engagements are not regarded as binding contracts.

b. The Modern Definition on Contract

As mentioned at the above, until the 19th century no general theory of contract has been developed. This, however, has changed when the classical Islamic law was revolutionized through the process of modernization. At this point, classical definition of contract has been revised in order to adopt the Western approach. The tendency of the modernists was

6 Noel J. Coulson, Commercial Law in Gulf States: the Islamic Legal Tradition, p. 18
7 It should be pointed out here that although the classical term of contract is in no sense a precise equivalent of the technical term of contract in Western jurisprudence, the classical contract also recognizes the primary function of contract, that is, to ensure that the expectations created by a promise of future performance are fulfilled; or that compensation will be paid for its breach.
to narrow down the broad scope of the classical contract, to limit its application to the scope of bilateral and unilateral engagements only.

"The modernists are more inclined to apply 'Aqd only to bilateral contracts as it appears to western laws, and this is how it is defined in most modern civil codes of the Islamic nation states".  

Thus, the UAE Civil Transactions Code 1985, for example, defines a contract as a combination of a proposal and an acceptance that arise from two different parties and they both conform with each other in the sense of its legal effect in respect of the subject matter of the arrangement and this arrangement will create both right and obligation on the parties involved. In the surface of the definition it seems that gratuitous engagement has been excluded from contract. A similar approach could also be seen under the Egyptian Civil Code 1948. Thus, under article 122 of the Code, a contract has been defined as an agreement between two or more parties to create a legal relationship or to substitute or to terminate such a legal relationship.

Commenting on the above Egyptian provision, Professor Abu al-Su'ud suggests that a contract should possess the element of 'conformity between two or more desires'. In other words, there should be a common objective between the offeror and the acceptor; there should be, at least, an offer and an acceptance to conclude a valid contract. This means that a transaction that has been motivated through a unilateral engagement such as the disposition of property by will, mortis causa, will not be considered as contract. Indeed, it is referred to as a legal disposition, tasarruf that binds only the offeror.

This modern definition of contract has had significant implications for the position of the Islamic guarantee arrangement in modern Islamic legislation. It is therefore unsurprising that some scholars have been able to suggest that the Islamic guarantee is not a contract

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9 Article 125 of the UAE Civil Transactions Code 1985  
10 Article 122 of the Egyptian Civil Code 1948  
but a mere legal disposition. This dilemma becomes more complex in the light of the fact that the Islamic guarantee is defined by various legislative bodies as a unilateral declaration, *al-tasarruf al-infiradi*, while at the same time its provisions have been located under the heading of contract, *'aqd*, in the same legislations.

### 4.2.2 Islamic Guarantee as an Enforceable Contract

Being a unilateral engagement one might argue that the Islamic guarantee is not a contract but a mere personal declaration of a guarantor. This might be true if we accept that the legal definition of a contract is limited to an agreement that is concluded between two or more parties. In other words, such contention may be valid if it is accepted that the term 'contract' is limited only to bilateral engagement, but not unilateral declaration.

In view of the previous points, so far as classical Islamic law is concerned, the term contract includes those unilateral declarations. This means that the Islamic guarantee could be considered as a contract. It is worth mentioning at this juncture that classical jurists have divided the term 'contract' into two main classifications: i.e. the 'general', *amm* and 'specific', *khass*. The general contract includes all undertakings that have been recognized by the law and specific contract is confined to those bilateral engagements. Therefore, if a reference is being made to the classical works of the Malikis, Shafi'is, Hanbalis and most importantly the Hanafis, it reveals that the majority of classical jurists considered gratuitous arrangements as valid contracts.

As previously stated, there is an abundance of evidence under Islamic commercial law, which refers to what are termed 'nominate' contracts. The Islamic guarantee is

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13 See for example Article 1057 of the UAE Civil Transaction Code 1985. This provision has been put under the heading of 'contract', *'aqd* rather than a 'unilateral disposition', *al-tasarruf al-infiradi*.


considered one of those nominate contracts, hence, as far as classical Islamic law is concerned there is no question regarding the position of the Islamic guarantee within the law. It is clearly stated in the *Kitab al-Fiqh 'ala Madhahib al-Arba'a*, that the Shafi'is define the Islamic guarantee as a 'contract' in which one person undertakes the obligation of another.\(^\text{16}\) This suggests that although the Islamic guarantee is unilateral in nature, it remains a valid contract.

Thus the Islamic guarantee is an enforceable contract. On various occasions, both the Qur'an and the hadiths require a person who enters into a valid contract to fulfill his promise. In this context, in *Sura al-Ma'idah*, the Qur'an states, 'O you who believe! Fulfill (your) obligations'.\(^\text{17}\) Similarly, in *Sura al-Isra’*, the Qur'an reads, 'And fulfill (every) covenant. Verily! The covenant, will be questioned about'.\(^\text{18}\) The hadith also contains similar injunctions, condemning the breaking of a promise as one of the behaviours of a hypocrite. In this context, the Prophet declares a hypocrite as 'if he makes a promise (wa'd) he breaks it, and if he makes a compact ('ahd) he acts treacherously'.\(^\text{19}\) On another occasion, the Prophet said, 'The Muslims are bound by their stipulations (shurutihim)'.\(^\text{20}\) These legal texts signify that once a guarantor enters into a contract of Islamic guarantee, then he must fulfill his promise. In cases of default the creditor will have the right to recover his 'debt' from the guarantor.

### 4.3 The Formation of Islamic Guarantee

The Islamic guarantee is similar to English common law in that it does not specify any particular wording in order for a contract of guarantee to be created. It suffices that the intention of the guarantor is clearly manifest and this is enough to bind the guarantor


\(^\text{17}\) The Qur'an; 5:1; see also The Qur'an; 17:34 "And fulfill (every) covenant. Verily! The covenant, will be questioned about"; The Qur'an; 16:91 "And fulfill the Covenant of Allah (Bai'a: Pledge for Islam) when you have covenanted, and break not the oaths after you have confirmed them, and indeed you have appointed Allah your Surety. Verily! Allah knows what you do"; and The Qur'an; 4:58 "Verily! Allah commands that you should render back the trust to those, to whom they are due"

\(^\text{18}\) The Qur'an; 17:34

\(^\text{19}\) A hadith reported by Bukhari, Muslim, Abu Dawud, Tirmidhi and Nasai

\(^\text{20}\) A hadith reported by Abu Dawud, Hakim, Ibn Hanbal, Tirmidhi and Nasai
under a contract of guarantee. In common practice, the Islamic guarantee is furnished through the pronouncement of an understandable expression. In this context, the Hanafis and the Shafi‘is have further indicated that this expression may be either expressed or implied. Therefore it suffices if someone says, ‘I will be responsible for the debt that has been advanced to Mr. X’ or ‘In cases of default, I will be responsible for the debt’. It is most preferable to employ an expression that bears a definite meaning such as, ‘I am the guarantor for Mr. X’.

It is interesting to note at this point that the guarantor should be able to express his purpose clearly and his actual words should not reflect anything other than his desire to be a guarantor.\(^\text{21}\) In addition, the expression of the guarantor should reflect the intention to create a legal relationship between him and the creditor; an important factor as it marks the differentiation between social and legal promises.

4.3.1 The Issue of Offer and Acceptance

The Islamic guarantee differs from that of English common law in that it does not necessitate acceptance as a pre-requisite element for the constitution of a valid contract of guarantee. The Malikis, Hanbalis and Shafi‘is suggested that a mere offer on the part of a guarantor suffices to render the Islamic guarantee valid and enforceable.\(^\text{2}\) The jurists maintained that due to the gratuitous nature of the Islamic guarantee, ‘\(\text{aqd al-tabarru}’\), an acceptance is not essential. In this context, jurists suggest that the main purpose of the Islamic guarantee is to help others, but not to gain benefits as in the commutative transactions, ‘\(\text{aqd al-mu’awadat}\)’, therefore consent and acceptance are not essential. In

\(^{21}\) This condition is of paramount importance in the process of creating a valid contract of the Islamic guarantee. In relation to this, it has been stated in the classical manuals that the use of khiyar or ‘option’ is not allowed in the Islamic guarantee. This is because the purpose of khiyar is to give the guarantor the chance to retract his offer if he finds that the arrangement is not beneficial. Under the Islamic guarantee however the arrangement always accords with detrimental result to the guarantor.

Nihayat al-Muhtaj, al-Ramli (d. 1004H) raises this point when he says that due to the gratuitous nature of the Islamic guarantee, which is not commutative [contract] the elements of consent and acceptance are not essential. A similar statement is also found in the works of the Hanbalis; Ibn Qudama (d. 630H) states, ‘although it is generally accepted that the guarantor should give his prior consent in order to conclude a valid contract of guarantee the jurists maintained that such requirement is not applicable to the creditor’. Thus it can be said that both the consent and the acceptance of the creditor is not essential in the Islamic guarantee. The main reason for this is that the Islamic guarantee is not a commutative contract but a contract to help others.

A further justification for not necessitating acceptance in the Islamic guarantee is that the arrangement does not involve the notion of ‘ownership’. The jurists maintained that the sense of ‘transfer’ does not arise in the arrangement of the Islamic guarantee. In this respect, Ibn Qudama (d. 630H) states, ‘under the Islamic guarantee the guarantor does not give the creditor something that can be ‘possessed’, only a mere ‘right to claim’, which obviously cannot be owned’. Therefore the principle of acceptance is immaterial. Thus, it will follow that neither consent nor acceptance is essential to conclude a valid contract of the Islamic guarantee.

Jurists also maintained that based upon the hadith of Abu Qatada, a mere offer suffices to constitute a valid contract of the Islamic guarantee. It has been reported that he narrated the following; ‘the obligation of the principal debtor will fall on me’ and this was

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25 Cf. The civil laws, such as in France and most of continental countries, provide that so long as the promise is absolute, unequivocal and is acted upon by the creditor, the mutual assent of the parties is apparent and no formal acceptance is necessary. But where a person merely offers to become a guarantor, there being no preliminary negotiations between the guarantor and the creditor, then formal acceptance, and notice thereof to the guarantor, is required for the reason that knowledge that he is bound will enable the guarantor to adequately regulate his own affairs and exercise proper vigilance over the debtor. See Leon D. Hubert, JR., ‘The Nature and Essentials of Conventional Suretyship’, [1939] xiii Tul. L. Rev. 519 at 528
sufficient to render Abu Qatada liable for the debt of the dead person. In fact, no record of acceptance has been found in this case, but the Prophet still noted it as valid.

The Hanafis disagree with this argument, contending that in order to constitute a valid contract of guarantee there should be an acceptance from the part of the creditor.\textsuperscript{26} Abu Hanifah and one of his disciples, Muhammad bin al-Hassan justified that the Islamic guarantee is not a mere gratuitous engagement but a commutative contract. At this point, the jurists argued that the Islamic guarantee involves the previous notion of ‘ownership’; hence both consent and acceptance are essential prerequisites. In \textit{al-Bada’i al-Sana’i}, al-Kasani (d. 587H) maintains; ‘In our view the Islamic guarantee is not a mere undertaking (iltizam mahdan) but a commutative contract that connotes the legal sense of ‘possession’. It is well established under the law that possession is not complete unless there are offer and acceptance like the contract of sale’.\textsuperscript{27} Al-Mirghinani (d. 593H)\textsuperscript{28} and al-Babirti (d. 786H)\textsuperscript{29} have further developed this idea of possession by stating that under the Islamic guarantee arrangement there is a sense of ‘transfer of right’, i.e. the transfer of the right to demand (talab) to the creditor. In other words, the guarantor gives the creditor the right of demand and this transference is not complete unless there is an acceptance on the part of the creditor.

Despite the Hanafi viewpoint on the issue of consent and acceptance, the prevailing opinion remains, that the Islamic guarantee is valid even though no acceptance has occurred on the part of the creditor. This has been adopted in modern Islamic legislation and Article 621 of the Majalla\textsuperscript{30} provides, ‘by the offer of the surety alone, a suretyship

\setlength\bibitem{27} ‘Ala’uddin Abi Bakr bin Mas’ud bin Ahmad al-Kasani, \textit{al-Bada’i al-Sana’i}, vol. 7, p. 3404 (1986)
\setlength\bibitem{29} Muhammad Mahmud al-Babirti, \textit{al-Inayah Sharh al-Hidayah}, vol. 6, p. 314 (n.d.)
\setlength\bibitem{30} The full name for the Majalla is The Majalla al-Ahkam al-‘Adliyya. It is the first example for the Islamic law codification. It was introduced in 1869-1876 in the Ottoman Empire. See S.S. Onar, ‘The Majella’, in \textit{Law in the Middle East}, (Eds. Khadduri and Liebesny) pp. 292-308

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becomes a concluded agreement and enforceable or nafiz. But if the claimant [i.e. the creditor] wishes he can reject it. But so far as the claimant has not rejected it, it remains. The legal consequence of such provision is that in the absence of the creditor or if the creditor dies without receiving notice of the guarantor’s undertaking, the Islamic guarantee is valid, and accordingly the guarantor will be rendered liable for his undertaking. However as a matter of compromise it is provided that the creditor is given the chance to repudiate such an undertaking if he believes that the guarantor would not be able to perform his obligation. In such a case, if the creditor repudiates such undertaking, the Islamic guarantee will be considered null and void. In more modern practice the same principle has been included in some of Muslim civil codes. In the UAE Civil Transaction Code 1985, for instance, it is stated that ‘a mere offer on the part of the guarantor suffices to conclude a valid and enforceable contract of the Islamic guarantee so far as the creditor does not repudiate such undertaking’. In relation to this, Ahmad, a professor at the Dubai Police Academy, states that this provision clearly illustrates that the Islamic guarantee is unilateral in nature. Therefore the acceptance of the creditor is not essential to render the arrangement valid. As such, the creditor is given the right to repudiate the guarantee if he believes that the guarantor will not perform his promise thus makes the guarantee null and void.

A comparison between this aspect of the Islamic guarantee and English common law reveals a clear difference between the two legal systems. English common law states that ‘the law of guarantee is regarded as part of the law of contract’. It thus follows that all necessary elements to conclude a valid contract should be duly observed, including the requirement of acceptance. It is well accepted in English common law of contract that one method of proving the existence of an agreement lies in the analysis of ‘the meeting of the minds’ between the contracting parties. This objective cannot be achieved without the presence of acceptance. This suggests that acceptance is of significant importance in

31 Article 621 of the Majalla  
32 Article 1057 of the UAE Civil Transaction Code 1985  
34 Moshi v Lep Air Services Ltd [1972] 2 All ER, per Lord Diplock.
the English common law of contract, including the contract of guarantee. Hence, in the absence of acceptance the contract will be considered null and void ab initio. A similar principle has been adopted in Malaysia where under section 10 (1) of the Malaysian Contract Act it is stated that, ‘All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void’. The ‘free consent’ of the parties could only be realized through the mechanism of offer and acceptance.

a. Legal Effects on the Unilateral Nature of Islamic Guarantee

It appears from the aforementioned that the Islamic guarantee could be concluded through a unilateral declaration rather than a bilateral one. A mere offer suffices to bind the guarantor to ensure that the creditor is safeguarded from suffering loss. In this context, neither consent nor acceptance is essential to render the contract valid. As such, the most significant feature of the Islamic guarantee is that the contract binds the guarantor only. 35

Thus, once a declaration has been manifested the guarantor is not allowed in law to rescind the contract without prior consent from the creditor. 36 This general principle with regard to the rescission of the contract is based upon the intrinsic nature of the Islamic guarantee. It is not clear, however, where the case appears to be the guarantor does not have adequate knowledge about the effect of the guarantee. Under the Malaysian law, it seems that the guarantor must have a sufficient knowledge about the effect of the guarantee otherwise it could be set aside by the court. See Malayan Banking Bhd. v Kim Produce Pte. Ltd. & Ors [1991] 2 MLJ 448

35 The Islamic guarantee does not necessitate acceptance to conclude a valid contract. This means that the Islamic guarantee could be concluded even though a creditor is not present in the session. Indeed, knowledge and consent of the creditor is not necessary to conclude a valid contract of the Islamic guarantee. It is not clear, however, where the case appears to be the guarantor does not have adequate knowledge about the effect of the guarantee. Under the Malaysian law, it seems that the guarantor must have a sufficient knowledge about the effect of the guarantee otherwise it could be set aside by the court. See Malayan Banking Bhd. v Kim Produce Pte. Ltd. & Ors [1991] 2 MLJ 448

36 See Muhammad bin Ibrahim bin Abdullah al-Musi, Nazariyyat al-Daman al-Shakhsi, p. 474; see also Mahmud Abdul Hamid al-Sayyid al-Dayyib, Kafalat al-Dayn fi al-Shari‘a al-Islamiyya, p. 123. It is worth mentioning at this point that while the guarantor is not allowed to rescind the contract, the creditor is given by the law the right to rescind such contract even though there is no prior consent obtained from the guarantor. In respect to this the contract of the Islamic guarantee could be classified as a contract that binds one party but not the other (ja‘iz min ahadi-hima). Therefore in the Islamic guarantee, the creditor who is considered as the recipient has the right at his will to revoke the contract without first referring it to the guarantor. In this context, the creditor may terminate the contract prospectively at any time, even if the contract declares itself irrevocable or of fixed duration. See Wahbah al-Zuhaili, Fiqh al-Islami wa Adillatuhu, vol. 4, p. 242
guarantee, i.e., gratuitous contract. The legal reason for not allowing the guarantor to rescind the contract without prior consent from the creditor is due to the fact that the contract involves the interest of the creditor. It is important to recall here that the main purpose of the Islamic guarantee is to secure the creditor from suffering loss. Therefore, once a declaration has been made the creditor has a reasonable thrust as well as a legal claim over the guarantor and it is inappropriate in the eyes of law for the guarantor to rescind the contract without prior consent from the creditor.

Although the guarantor, as a general principle, is not allowed to revoke his offer, there are certain circumstances in which the law allows the guarantor to do so. These circumstances include:

i. a case in which the principal obligation/debt has not been actually established in the dhimma of the principal debtor, but has the potential of being so.

ii. a situation where the guarantee involves staggered payment of debt

At this point, al-Musi remarks that a guarantor is allowed to revoke his offer before the debt is established in the dhimma of the principal debtor.\(^{37}\) In a similar vein al-Suyuti also maintains, ‘the guarantor has the right to revoke his offer before the debt is established in the dhimma of the principal debtor but not after that’.\(^{38}\) It seems that the right is given because the main object of the Islamic guarantee is the debt. In this case the debt has not been established in the dhimma of the principal debtor and therefore the guarantor has the right to revoke.

An example of this could be a situation wherein some goods have been deposited in the possession of a person for the purpose of selling. In this case, an offer of a guarantor can be revoked before the person has made a decision to buy such goods, but not afterwards. This is because after the decision has been made, the obligation to pay the price becomes

\(^{37}\) Muhammad bin Ibrahim bin Abdullah al-Musi, *Id.* at p. 477

established in the dhimma of the buyer and hence involves the interest of the seller or the creditor. In this context, the appropriate test is the 'completion of the principal transaction', that being the reason for the establishment of the principal obligation.

Another example includes the guarantee given in the contract of ju’ala and the guarantee given in cases of a property acquired through unlawful arbitration, i.e. seizure. In these two examples the principal obligation has not been established but has the potential to become so in the future.

In the case of a guarantee given in respect of a ‘staggered payment’ the jurists maintained that a guarantor could revoke his offer before the ‘next payment becomes due’. In the Fatawa al-Hindiah it is stated, ‘if a person gives a guarantee for the payment of wages, he has the right to revoke such guarantee before the completion of the next month’.39 This situation of the guarantee might be comparable to English common law, under which this kind of guarantee is called a ‘continuing guarantee’.40 A continuing guarantee is based upon a standing offer, which could be accepted through a unilateral act of the creditor. In this example, the creditor normally provides a divisible portion of payment (or consideration) that constitutes the acceptance on the part of the creditor. It is well established under English common law that after the acceptance is completed as against the offeror, he, i.e. the offeror is not allowed to revoke his offer.41 In Coulthart v Clementson,42 Bowen J. held that the guarantee, it has been said, is divisible as to each advance; and ripens as to each advance into an irrevocable promise or guarantee only

40 In section 83 of the Malaysian Contract Act 1950 it is provided, 'a continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor'. The Act has further illustrated (a) A, in consideration of B’s discounting, at A’s request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of RM 5,000. B discounts bills for C to the extent of RM 2,000. Afterwards, at the end of three months, A revokes the guarantee. This revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for the RM 2,000 on default of C' (b) A guarantees to B, to the extent of RM10,000, that C shall pay all the bills that B shall draw upon C. C accepts the bill. A gives notice of revocation. C dishonours the bill at maturity. A is liable upon his guarantee.
41 In section 5(1) of the Malaysian Contract Act 1950 it is provided, 'a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards'; see also Payne v Cave (1789) 3 Term Rep 148
42 (1879) 5 QBD 42 at 46
when the advance is made. This means that the guarantor is only allowed to revoke his offer before the creditor provides the divisible portion of consideration.\footnote{See Low Kee Yang, The Law of Guarantees in Singapore and Malaysia, pp. 50-2 (1992)}

From the above it is clear that in the Islamic guarantee, revocation is allowed based upon the ‘pending’ establishment of the debt in the dhimma of the principal debtor. In English common law, revocation is allowed based upon the ‘pending’ acceptance on the part of the creditor. This difference is due to the reason that acceptance has been regarded as important in English common law of contract, whilst the Islamic guarantee contains no such specification.

The principle of the revocation of offer has been included in Article 640 of the Majalla where it is stated that ‘after entering into a contract of suretyship, the surety cannot withdraw himself from the suretyship. But when the suretyship is conditional or for a future time, the surety can withdraw himself from the suretyship, before there has come into existence any debt due from the debtor’. In view of this provision, most conditional guarantees are susceptible to the principle of the revocation of offer. Thus if a person gives a guarantee for the payment of sale’s price to the seller he will become liable, but until the actual sale has taken place the person still has the right to revoke his offer. For example, a person might say, ‘If you sell your house to Mr. X, I will be the guarantor for the payment of the sale’s price’. This is a conditional guarantee in which the guarantor will be rendered liable but dependent upon the actual sale of the house to Mr. X. In modern practice, the UAE Civil Transaction Code 1985 has adopted the same principle. In Article 1066 the Code provides, ‘in respect of the suspended or appended guarantee, the guarantor shall have the right to revoke his offer so long as the debt has not become due’. The provision in the Article signifies that in conditional guarantees, especially those that adhere to certain stipulations, the guarantor will have the right to revoke his offer before the principal obligation is established in the dhimma of the principal debtor. In the provision the words ‘so long as the debt has not become due’ are used to denote this.
The law however requires that the guarantor should inform the creditor of his retraction from the guarantee. Thus, if the guarantor fails to do so he will be held liable for the principal obligation. Ahmad states that the knowledge of such revocation is important in the modern law of guarantee. Hence, it is suggested that the burden of proof lies upon the guarantor. In this context, if the guarantor proves that the creditor has the knowledge upon such retraction, the revocation is valid. On the other hand, if the guarantor fails to prove that the creditor has the knowledge upon such retraction, he will be liable for the principal obligation.  

4.3.2 The Issue of Consideration

Being unilateral in nature, the Islamic guarantee does not also require a valid consideration. It suffices that the guarantor has initiated a mere unilateral declaration. In this context, consideration is to be supplied by the guarantor alone but not the creditor. At this point, if a comparison is being made to the English common law, it seems that consideration is crucial to the conclusion of an enforceable contract. It thus follows that ‘gratuitous promises’ are not regarded as contract, and hence they are unenforceable. In Re Hudson a promise was made to give 20,000l. in five equal annual installments for liquidation of chapel debts. The promisor paid 12,000l. within three years and then died. The Congregational Union claimed the remaining 8,000l. from the executors but the court held that there was no enforceable contract as there was no consideration.

However, the English common law will render the ‘gratuitous promises’ valid if they have been made ‘in writing and registered’ with the appropriate body. In relation to this, section 26 (a) of the Malaysian Contract Act 1950 provides that an agreement made without consideration is void, unless (a) it is in writing and registered; it is expressed in

45 Cf. The civil laws, particularly the French, state that the guarantee is essentially gratuitous, i.e., in the nature of a donation, and therefore does not need a consideration to conclude a valid contract. See Leon D. Hubert JR., ‘The Nature and Essentials of Conventional Suretyship’, [1939] xiii Tul. L. Rev. 519 at 527
46 (1885) 54 LJ Ch 811
47 Section 4 of The Statute of Frauds 1677
writing and registered under the law (if any) for the rime being in force for the registration of such documents, and is made on account of natural love and affection between parties standing in a near relation to each other. The section has further illustrated, 'A, for natural love and affection, promises to give his son, B, RM 1,000. A puts his promise to B in writing and registers the document appropriately. This is a contract'. Accordingly, as far as Malaysian law (a direct reflection of English common law) is concerned, a guarantee without consideration is valid if it has been made on account of natural love and affection between parties who are in a close relationship, put in writing and registered according to the enforceable law.

4.4 The Requirement of Written Evidence

As stated above, under classical Islamic law, there was no special requirement for the formation of a valid Islamic guarantee. The Islamic guarantee could be constituted informally, indeed either verbally, in writing, through gestures or circumstantial evidences. With regard to this, al-Dirdir (d. 1201H) states that the Islamic guarantee could be constituted through an understandable gesture or the written word; the effect of which would carry the same weight in law as a verbal expression. Similarly al-Buhuti (d. 1051H) adds that the Islamic guarantee that has been constituted through an understandable gesture of a dumb person, is just as valid as any other of his engagements. This is because intention can be clearly indicated by an understandable gesture and it is thus accepted as a mode to communicate such intention. Thus, in classical Islamic law, the Islamic guarantee is valid and enforceable through verbal communication, in writing, with gestures and through circumstantial evidences.

From the perspective of classical jurists, the existence of the written word was not essential to the Islamic guarantee, which could be valid and enforceable via other means

\[\text{\textsuperscript{48}}\text{See Mahmud Abd al-Hamid al-Sayyid al-Dayyib, Kafalat al-Dayn fi al-Shari'ah al-Islamiyyah, pp. 99-119}\]
\[\text{\textsuperscript{49}}\text{See Muhammad bin Ibrahim bin Abdullah al-Musi, Nazariyyat al-Daman al-Shahksi, p. 335}\]
\[\text{\textsuperscript{50}}\text{Abi al-Barakat Sidi Ahmad al-Dirdir, Sharh al-Kabir li Mukhtasar al-Khalil, vol., 4, p. 431 (n.d.)}\]
\[\text{\textsuperscript{51}}\text{Mansur bin Yunus al-Buhuti, Kasshaf al-Qina' Min Matn al-Iqna', vol., 3, p. 363 (n.d.)}\]

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of communication. In fact, some jurists maintained that a verbal guarantee was preferable, given the fact that it was generally perceived to be more accurate and easy to understand than a written guarantee. At this point, Al-Qarafi (d. 684H) remarks that it is recommended that manifestations be communicated through verbal phrases rather than written documents. This is simply because verbal phrases can be more easily understood than written documents. Indeed, written documents are static whilst verbal phrases are more expressive.\textsuperscript{52} Therefore the written agreement is not a prerequisite in the establishment of the rights of the creditor as against the guarantor.

This classical law on the creation of a contract of guarantee is comparable to that of the Malaysian law of guarantee.\textsuperscript{53} With regard to this, section 79 of the Malaysian Contract Act 1950\textsuperscript{54} provides that a contract of guarantee could either be oral or written. The provision in the Act signifies that writing is not essential and the contract of guarantee is valid and enforceable even though it has been constituted through understandable verbal phrases.\textsuperscript{55}

The English common law however requires that a contract of guarantee should be evidenced in writing. The Statute of Frauds 1677 provides that no action is to be brought by which to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which the action is brought,


\textsuperscript{53} The position is also the same in some of the continental Europe. See generally, Ernst J. Cohn, ‘The Form of Contract of Guarantee in Comparative Law’, [1938] ccxiv \textit{The Law Quarterly review} 220

\textsuperscript{54} In respect of guarantees for loans advanced by moneylenders, section 16 of the Malaysian Moneylenders Ordinance 1951 provides that the guarantees are not enforceable unless (i) a written note of the loan contract was signed by the lender and the borrower before the guarantee was given, and (ii) a copy of it authenticated by the lender was delivered to the borrower before money was lent under the contract. A further formality has been put in respect of hire purchase agreement. Under section 5 of the Hire Purchase Act 1967 it is provided that a guarantee relating to hire purchase agreement is unenforceable unless the hire purchase agreement complies with certain requirements as to form and content and as to service of certain documents on the hirer. As such section 21 of the Act further provides that the guarantee is void unless the guarantor pay to the owner an aggregate sum which is larger than the balance originally payable under the hire purchase agreement or perform an obligation in respect of goods other than those comprised in the hire purchase agreement.

\textsuperscript{55} It is interesting to note here that although the Act provides that the guarantee can either be oral or written, in practice the financiers always require written guarantee. In fact, most if not all, financiers or creditors require guarantors to execute their own standardized guarantees.
or some memorandum or note of it, is in writing, signed by the party to be charged with it or by some other person thereunto lawfully authorized by him. Through a careful examination however, it seems that this provision is not intended to be the measurement for the validation of the contract but rather to protect the rights of the parties involved. As John Phillips and James O'Donovan observe that the principal object of the Statute was to prevent fraud and perjury by withdrawing the right to sue on certain agreements if they could only be established by oral evidence. By requiring a guarantee to be proved by objective written evidence the Statue reduced the risk that false claims would be accepted. Guarantees are usually continuing contracts and evidence of their formation may be difficult to find after the lapse of time. Similarly Low Kee Yang also remarks that a creditor who finds his debtor unable to pay the debt may be tempted to make a false claim that a third party had guaranteed the debt, and support his claim by perjured testimony. Hence, one could suggest that as far as the Statute of Frauds is concerned the guarantee is valid even though it was not in writing. The legal consequence, however, it is not enforceable against the guarantor. The words 'no action shall be brought' in the Statute have been construed to mean that a contract that does not comply with the provision is not void but unenforceable. The Statute does not go into merits; it merely deals with evidence. Therefore it is clear that the importance of writing is not for validating the contract but to protect the rights of the parties involved.

If this deduction is correct, then this approach of the English common law seems to be attractive and sensible. It is suggested that as commercial transactions are becoming more complicated and the credibility of the parties involved is always questioned, a total reliance on a verbal guarantee is insufficient. The readiness of the Muslim authorities to put such a condition in modern Islamic law is compelling to ensure that the guarantee arrangement is protected from fraud and perjury. In this regard a written guarantee should

56 Section 4
59 See Maddison v Alderson (1883) 8 App Cas 467, HL.
60 See Fraser v Pape (1904) 91 LT 340, CA; Re Hoyle, Hoyle v Hoyle [1893] 1 Ch 84 at 97, CA per Lindley LJ; Gibson v Holland (1865) LR 1 CP 1; Lucas v Dixon (1889) 22 QBD 357, CA.
not be intended for the purpose of validating the contract but rather to caution people, particularly those who are inexperienced or unsophisticated, against entering into contracts without proper thought. In addition, written evidence could also stand as useful support for a verbal guarantee in that it helps the parties involved to keep to the terms and conditions that have been agreed. Hence the rights of the parties involved could be effectively protected.

In Sura al-Baqara, the Qur’an reads;

“O you who believes, when you deal with each other, in transactions involving future obligations, in a fixed period of time, reduce them to writing. Let a scribe write down faithfully as between parties. Let not the scribe refuses to write as God has taught him, so let him write. Let him who incurs the liability dictate, but let him fear his Lord God and not diminish aught of what he owes ... Disdain not to reduce to writing [your contract] for a future period, whether [the amount] be small or big. It is just in the eye of God, more suitable as evidence, and more convenient to prevent doubts among your selves. But if it be a transaction, which you carry out on spot (direct cash sale) among your selves, there is no blame on you, if you did not write it down. But take witnesses whenever you make a commercial transaction, let neither scribe nor witness suffers harm”.

In fact, in Islam, the importance of such written evidence has been recognized since the early date of the Islamic period. At this point, Ebied confirms that the use of written instruments in establishing contractual obligations and legal entitlements also became a feature of Islamic practice at an early date, and the consequent need for creating such documents gives rise to a distinct branch of legal literature from the eighth century. In that period such written documents were certified through a professional witness who often exercised his capacity as a notary.

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61 The Qur’an; 2:282
62 R.Y. Ebied and M.J.L. Young, Some Arabic Legal Documents of The Ottoman Period, p. 1 (1975)
63 See The Muqaddima, vol. 1, p. 462. In describing such practice Ibn Khaldun said that in every city [the witnesses] have their own shops and benches where they always sit, so that people who have transactions to make can engage them as witnesses and register the (testimony) in writing.
The importance of documents as written evidence has been realized in modern Islamic legislation. The Egyptian, Libyan, Syrian and Lebanese Civil Codes, for example provide that a contract of Islamic guarantee should be evidenced in writing despite the principal obligation being evidenced through witness. According to al-Sanhuri, this provision is not intended for the purpose of validating the contract but rather as a means of proof. The learned scholar has further suggested that due to the gratuitous nature of the contract, methods of proof other than written documents are not sufficient. It is compelling that an objective written document be produced to prove the intention of the guarantor.

4.5 Legal Capacity in Islamic Guarantee

It is established within the law of contract that the issue of legal capacity is also a crucial consideration while concluding a valid legal transaction. This is because contract accords with some rights and obligations on the part of the parties who are involved in such a transaction. As for the offeror once his offer has been accepted he will be deemed responsible for his promise, and the same principle would also apply to the offeree. At this point both the offeror and the offeree are expected to fulfill their promises in favour of the opposite party.

It follows that full competence is of prime importance in the creation of a valid legal transaction. In respect to this, Islamic law stipulates that no person can validly conclude a legal transaction without first having attained physical and intellectual maturity, that being the equivalent of majority. As such, it has been suggested that to attain majority, that being equivalent to full competence i.e. ahliyyat al-wujub and ahliyyat al-ada', a

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64 Article 773 of the Egyptian Civil Code 1948
65 Article 782 of the Libyan Civil Code 1953
66 Article 779 of the Syrian Civil Code 1949
67 Article 1059 of the Lebanon Code of Obligations; in respect to this we find that the Iraqi Civil Code 1951 does not so provide the same provision.
person, whether male or female, should attain physical puberty, *bulugh* and enjoy sound judgment known also as prudence, *rushd* in his or her judgment. With puberty and prudence, that person is deemed a person of age, a person who has attained majority. The Shafi’is however add a third requirement for ‘majority’; and that is a sound judgment with regard to matters that relate to the issue of religion.

The prerequisite of full competence is also found in the English common law of contract, wherein the law requires that parties to a contract shall have attained the age of majority, be of sound mind and not disqualified from contracting with others by any law to which they are subject. Therefore, as a general rule, a minor is not competent to contract with others, unless the transaction involves the notion of ‘necessaries’ that being generally translated as a transaction that gives benefits to the minor.

4.5.1 General Notion of the Islamic Legal Capacity

The general notion of Islamic legal capacity, *ahliyya*, is fairly complicated and different from that of the English common law. This is because Islamic legal capacity covers both the ability of a person to acquire rights and bear obligations i.e. *ahliyyat al-wujub*, which exists from birth, and the ability of a person to initiate actions, the consideration of which depends on sound mind i.e. *ahliyyat al-ada’*. Thus the Islamic concept of legal capacity is fairly wide in comparison to English common law, which considers only the ability of a person to initiate actions. It is not surprising that some of the classical jurists have been

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70 See for example section 11 of the Malaysian Contract Act 1950
71 The age of majority in Malaysia following the Age of Majority Act 1971 is 18
72 For the general principle of the term ‘necessaries’ the reader can refer *Chappel v Cooper* (1844) 13 M & W 252; *Nash v Inman* [1908] KB 1
73 In section 69 of the Malaysian Contract Act 1950 it is provided that, ‘If a person, incapable of entering into a contract, or anyone whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person’.
74 Legal capacity, *ahliyya* is a legal attribute in which a person is qualified to acquire rights and duties and to execute deeds and actions in parallel to the Shari’a principle. See Subhi Mahmassani, *al-Nadhariyyat al-Ammah li al-Mujabat wa al-‘Uqud fi al-Shari’at al-Islamiyyat*, p. 354 (1983)
able to suggest that this notion of Islamic legal capacity is identical and inter-connected with the notion of *dhimma*\(^{75}\) that exists in man from birth and ends with death.

Generally speaking the Islamic legal capacity can appear in several forms depending on the age and mental ability of a person. With regard to this, the classical jurists have therefore defined two major aspects of the Islamic legal capacity and identified five different levels. The two major aspects are the *ahliyyat al-wujub* and the *ahliyyat al-ada’* whilst the five different levels are (i) the embryo/foetus; (ii) childhood; (iii) discernment; (iv) puberty; and (v) prudence.\(^ {76}\) Persons who are entitled to full competence include the free man who is in a state of sound mind and has attained physical puberty and prudence.

**4.5.2 Legal Capacity in Islamic Guarantee**

It has been previously suggested that the main purpose of the Islamic guarantee is to ensure that a creditor will not suffer loss from the principal contract that has been made between him and the principal debtor. Hence, in cases of default, the law entails that the guarantor shall be rendered liable to the creditor to the same extent that the principal debtor is liable. Thus, the responsibility of the guarantor is relatively heavy as he not only takes on the same role of the principal debtor but also pledges to ensure that the creditor will not suffer loss.

It is necessary therefore that to be a guarantor, the law requires that the person should be capable not only of concluding a contract but also of performing his promise. In the context of the Islamic guarantee, the classical jurists stipulated that a guarantor should be a person of full competence. In the classical works of the Hanafis, al-Kasani (d. 587H) states, ‘to conclude a valid contract of the Islamic guarantee a guarantor should be a person of full competence, *ahliyyat al-tabarru’*. The same connotation has also been

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\(^{75}\) Note however this proposition of the classical jurists is referred to the capacity to acquire rights and duties, *ahliyyat al-wujub* only. See al-Makashifi Taha al-Kabashi, *al-Dhimma wa al-Haqq wa al-Ilizam wa Ta’thiruhu bi al-Mawt fi al-Fiqh al-Islami*, p. 28-31 (1989)

\(^{76}\) See Mahdi Zahraa, 'The Legal Capacity of Women in Islamic Law', (1996) 11(3) *Arab Law Quarterly* 245 at 246-51
found in *al-Mukhtasar fi al-Fiqh*, where Ibn Ishaq suggests that to form a valid contract of the Islamic guarantee the guarantor should be a person who is capable of performing liberality. Hence, the capability of performing liberality, which is a literal translation for the *ahliyyat al-tabarru*, is important since the Islamic guarantee is a gratuitous contract; a contract that involves a full detrimental loss on the part of the guarantor.

In modern Islamic legislation this stipulation of the classical jurists has been adopted literally. Article 628 of the Majalla, for example, states that at the making of the contract of the Islamic guarantee it is a legal pre-condition that the guarantor be of full competence, i.e. 'aqil and *baligh*. Similarly Article 1058 of the UAE Civil Transaction Code 1985 stipulates that to conclude a valid contract of the Islamic guarantee, it is a pre-condition that the guarantor should be of full competence.

Here, 'full competence' means that to enter a contract, a person should have attained physical puberty and prudence. As far as physical puberty is concerned, its presence can be either factual, when the natural signs of puberty, such as nocturnal emission for a boy and the start of menstruation for a girl appear, or presumed, when the natural signs are delayed for one reason or another. In this context, the identification of natural signs, as Mahdi suggests, are usually referred to the local custom and expertise, because the age of puberty differs from one person to another, from one place to another and from one time to another. In practice, however, the presence and absence of physical puberty is determined through legal presumptions. Through this method a minimum and maximum age of physical puberty will be presumed accordingly.

"There is an irrebuttable presumption of law that a female below the age of nine and a male below the age of twelve has not reached physical puberty. These ages accordingly represent the minimum age of legal majority. There is an equally conclusive presumption of law that a male or

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77 As cited in Nicholas H.D. Foster, 'The Islamic Law of Guarantees', (2001) 16(2) Arab Law Quarterly 133 at 144
female who has reached the age of fifteen is physically mature, and therefore the age of fifteen is the maximum age of legal majority. Any claim that a person between these age limits has legal majority will succeed only if the proper evidence of sexual maturity is produced."  

Beside attaining physical puberty, the law requires that the prospective guarantor be a person of prudent judgment. In this context, prudence means that a person should show 'protective safe guarding of his property and soundness in the ordering of his livelihood'. According to al-Zarqa' prudence is the ability to see and foresee risks and accordingly makes reasonably good decisions regarding one's own actions and transactions. Therefore, prudence is, in the eyes of the law, a term whose meaning is self-evident, a quality, which people in general and the court in particular will certainly recognize when they see it. Nonetheless the classical jurists have identified certain criteria as a mechanism by which to assess the presence of prudence in a person. Thus, according to the Shafi'is and the Zahiris, the said criteria include the assessment of the physical and mental maturity at which the person attains a good character in both religious and transactional matters. As such, modern Islamic legislations are more specific regarding the presence of prudence in a person and some have fixed a minimum age for the attaining of this attribute. Article 43 of the Jordanian Civil Code, for instance, provides that the age of prudence is reached by 18 Solar years, (another term for the Christian calendar). The UAE Civil Transaction Code, which is repeatedly labeled as the replica of the Jordanian Civil Code, however provides that the age of prudence is 21 Lunar years. The UAE Civil Transaction Code adds the elements of mental strength and not interdicted by any law as further criteria by which to assess the presence of prudence in man.

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80 Noel J. Coulson, Commercial Law in Gulf States; the Islamic Legal Tradition, p. 33  
81 Noel J. Coulson, Ibid.  
83 Noel J. Coulson, Commercial Law in Gulf States; the Islamic Legal Tradition, p. 33  
85 Article 85 of the UAE Civil Transaction Code 1985
The presence of prudence in a guarantor is of significant importance in the Islamic guarantee. Being gratuitous in nature, the Islamic guarantee does not only accord with some obligations but also involves detrimental actions that entail definite loss to the guarantor. Therefore it is prudent for the prospective guarantor to think carefully before embarking on such an undertaking. The ability to consider carefully and the presence of deliberate intention are the two important elements with reference to a person who is about to undertake the obligation of a principal debtor. It is unsurprising therefore that some classical jurists have placed a fairly strict condition thereon. The Ja'fariah Shi'ah, for example, stipulates that to conclude a valid contract, the guarantor should be a person of credibility and creditworthiness.\(^{86}\) This suggestion appears significant, since in practice most of the guarantors appear to be unable to perform their promises. Perhaps this phenomenon has been motivated for some other reasons, but it is undeniable that the absence of credibility and creditworthiness could be the reason for the inability of the guarantors to perform their promises.

The requirement of ‘full competence’ accepts that the guarantees given by minors, lunatics, imbeciles and prodigal spendthrifts are not effective. To quote the words of al-Sawi (d. 1241H), ‘The Islamic guarantee is unenforceable if it involves a prodigal spendthrift, a minor, a lunatic and a person who is under duress’.\(^{87}\) These categories of people are said to be under legal interdiction, hajr; that is to say they are prevented from transacting in a legally effective way. These people are interdicted from transacting because it is the intention of the law to protect their interests as well as the interests of others. Hence, minors who are allowed to conclude contracts that are fully beneficial are not eligible to constitute a valid contract of the Islamic guarantee. In other words, the guarantee that has been given by a minor is deemed to be null and void ab initio. Therefore, the guarantee is ineffective even though the contract has been ratified at the age of full competence.\(^{88}\) Similar to the above principle is the guarantee given by a

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86 See Abdul Latiff Muhammad Amer, al-Dayun wa Tawthiqatuha fi al-Fiqh al-Islami, p. 192; see also Mahmud Abd al-Hamid al-Sayyid al-Dayyib, Kafalat al-Dayn fi al-Shari'ah al-Islamiah, p. 192
88 Article 628 of the Majalla
prodigal spendthrift, *safih*, which is also considered as ineffective. There are also those who are denied the competence to deal with all or some of their property because the rights of others are attached to it. These people are said to be under interdiction not to protect their own interests but to protect the interests of others. This category of people includes a married woman, (under the Malikis school of thought), and a person who is suffering from a terminal illness. A guarantee that has been given for more than one-third of the total assets of the married woman or of the terminally ill person, is not *ipsa facto* null and void; it is said to be 'suspended', *mawquf*, upon the consent or otherwise of the party or parties in whose interest the interdiction is imposed.

**4.5.3 Woman as a Guarantor**

The status of a woman as a guarantor assumes the prime consideration in the contract of the Islamic guarantee. The classical jurists were not in agreement with regard to this matter. Most of the classical jurists, with the exception of the Malikis, held the opinion that there is no difference between man and woman and as far as the Islamic guarantee is concerned a woman is capable of becoming a guarantor.

This divergence of opinion was triggered by the general principle regarding the status of women within Islamic commercial transactions. Some jurists, for certain transactions, considered women as minors, who consequently possessed no contractual capacity to deal with other people; whilst others drew no distinction between the genders. The only difference between man and woman with regard to capacity within an Islamic commercial transaction is the presence or absence of physical puberty and prudence. Thus, provided that the woman attains physical puberty and prudence she is competent enough to contract with others.

In view of this, the discussion of the status of a woman as guarantor is not complete without mention of the status of women in Islamic commercial law. The classical jurists spent much time examining the status of women with regard to commercial transactions.
Perhaps this was a reflection of the attitude of certain ancient laws pertaining to the status of woman, or maybe it was a response to the general ruling of certain Qur’anic texts as well as the Prophetic injunctions. In *Sura al-Nisa’,* for example the Qur’an reads, ‘Men are the protectors and maintainers of women, because Allah has made the one of them to excel the other, and because they spend (to support them) from their means’. Some commentators have argued that according to this Qur’anic text, men should be given priority in family matters since they are considered as the protectors and maintainers of women. Due to this, most of women’s affairs and outdoor activities were entrusted and credited to men. On another occasion, the Qur’an states, ‘And give not unto the foolish your property which Allah has made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice’. Al-Hassan, al-Duhak, Mujahid and Sa’id bin Jabir were of the view that women in general were interdicted because of prodigality. Therefore it is suggested that women are incompetent and therefore they are prevented from contracting with others. In addition to these Qur’anic texts, the Prophet is also reported to have said that, ‘It is not permissible for a woman to dispose of property at her liberty without the permission of her husband’. According to some jurists this hadith indicates that women in any case lack legal capacity i.e. full competence. Therefore their status in commercial transactions is different from that of men.

89 Historically most of the ancient legal systems, such as the Roman and Greek, suggested that a woman had no capacity at all in dealing with commercial transactions. In this regard, most of the ancient European legal systems including the English legal system have also stipulated certain restrictions over a married woman to deal in commercial transactions. It was suggested that women naturally have a lack of understanding therefore most of their affairs have been entrusted to men to deal with on their behalf. In the case of married women, they were allowed in certain circumstances to deal with their own affairs but subject to the permission of their husbands. See Subhi Mahmassani, *al-Nadhariyyat al-‘Ammah li al-Mujabat wa al-‘Uqud fi al-Shari’at al-Islamiyya*, pp. 382-5 (1983). It is also worth mentioning that according to Cohn some modern countries including the South Africa, married women are excluded from intercession in commercial transactions. Thus, it seems that by virtue of the rule in the *Authentica si qua mulier* an intercession of a married woman on behalf of the husband was absolutely void. See Ernst J. Cohn, ‘The Form of Contracts of Guarantee in Comparative Law’, [1938] ccxiv *The Law Quarterly Review* 220 at 226

90 The Qur’an; 4:34
91 The Qur’an; 4:5
Based upon the above Islamic Shari’a injunctions, some of the classical jurists argued that women have no full competence to contract with others in commercial transactions. It is apparent that some of the classical jurists like al-Hassan, al-Duhak, Mujahid and Sa’id bin Jabir contended that women are in general interdicted from transacting with others. According to these jurists women are generally prodigal spendthrifts and this precludes the presence of prudence. The previous Qur’anic text clearly prohibits legal guardians from giving the prodigal spendthrifts (including women) their properties to be managed by themselves. In this context, the prodigal spendthrifts would only be allowed to manage their properties if there is a sign of the presence of prudence. ‘And try orphans (as regards their intelligence) until they reach the age of marriage; if then you find sound judgment in them, release their property to them’. In short, these jurists considered women as incompetent to conclude any valid legal transaction, including the Islamic guarantee.

On the other hand, some other jurists considered women as competent enough to contract with others so long as they had attained physical puberty and prudence. In this respect, the status of women in commercial transactions is comparable to that of men; there is no difference whatsoever between men and women. All the Hanafis, Shafi’is, Hanbalis, Abu Thawr, al-Thawri, ‘Ata’, Ibn Mandhar and Dawud al-Zahiri maintained that the legal principles with regard to interdiction, physical puberty and prudence are equally applicable to both men and women. Women have equal rights with men with regard to their own property and there is no difference whatsoever between the genders. Gender should not preclude a female from entering into a contract with others. Indeed, in some cases it appears that women are more astute than men. The Qur’an states, ‘And try orphans (as regards their intelligence) until they reach the age of marriage; if then you find sound judgment in them, release their property to them’. The only difference between men and women with regard to contractual capacity in commercial transactions

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93 The Qur’an; 4:6
94 Subhi Mahmassani, al-Nadhariyyat al-‘Ammah li al-Mujabat wa al-‘Uqud fi al-Shari’at al-Islamiyya, p. 383
95 The Qur’an; 4:6
is the presence of prudence. Hence, if it is evident that women are of prudent judgment in their financial transactions, the legal interdiction should be lifted. From the aforementioned Qur'anic text, it is apparent that the principle applies to both men and women and there is no discrimination with regard to this legal injunction. To quote the words of Ibn Hazm (d. 456H), "The law that governs man and woman is the same due to the general application of the law".66 Thus man and woman share the same status in dealing in commercial transactions, including that of the Islamic guarantee.

In view of the above, it appears that the consensus amongst jurists indicates that women are capable of becoming guarantors. In this context, the only prime considerations are the attainment of physical puberty and prudence. Ibn 'Abidin (d. 1252) maintains that it is a prime consideration under the Islamic guarantee contract that a guarantor should be a person of full competence, *ahlīyyat al-tabarru*'.67 It is not evident in any of the classical works, except those of the Malikis, that women have a special status in respect of the Islamic guarantee. In fact, al-Muti'i (d. 570H) emphasizes in *Takmilat al-Majmu'* that the guarantees given by women are valid and enforceable so long as they are allowed to contract with others, i.e. so long as they attain physical puberty and prudence.68 This further indicates that there is no differentiation between men and women in respect of legal capacity in the Islamic guarantee contract. The law is that, regardless of gender, the guarantee that has been given by a person who lacks legal capacity is null and void. Al-Buhuti (d. 1051H) remarks that the guarantee is void unless it has been given by a person, man or woman, who is allowed to contract with others.69 Hence, a woman can be a guarantor and the guarantee that has been given by her is valid and enforceable. This legal principle applies to a woman regardless of whether she is a virgin, married, or whether or not she has obtained permission from her husband. The researcher feels strongly that this standpoint should be upheld in contemporary legislation, since women

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66 Abi Muhammad 'Ali bin Ahmad Ibn Hazm, *al-Mahila*, vol. 5, p. 117 (n.d.)
69 Mansur bin Yunus al-Buhuti, *Kasshaf al-Qina' Min Main al-Iqna'*, vol. 3, p. 366 (n.d.)
have a valid role to play in modern commercial transactions and current economic developments.

a. The Maliki Stance on the Status of Women within Contracts

The Malikis school of thought has specific criteria relating to the status of women as guarantors under classical Islamic law. They place women into the following three categories; a virgin unmarried woman, a married woman and a widow. The Malikis perceive the former group as being akin to minors, thus a virgin is precluded from entering a contract as guarantor because she does not possess the necessary competence to conclude a valid contract of the Islamic guarantee. If a virgin did give a guarantee, then it would be null and void, even though her legal guardian had given permission.

According to Saleh, because the Malikis perceive the virgin to be under the control of her father in that he may marry her off without her consent, then she herself has no legal competence. Ibn Qudama (d. 630H) points out, ‘a female is not to be given control of her property until she is married and has been bedded by her husband, because as long as her father has the right to marry her without her consent, interdiction is not lifted from her, just as it is not lifted from the minor’. It is clear from this that the interdiction will only be lifted when the woman is married and no longer a virgin. Mahmassani maintains that the interdiction of a virgin woman is lifted when she has been married; and she will enjoy the status of full competence within the period of one to seven years of her marriage. Thus from the Maliki standpoint, marriage is of significant importance in the determining of the legal capacity of a woman. Indeed, some jurists such as ‘Umar Bin al-Khattab, al-Qadi Shuraih, al-Sha’bi, Ishaq and Ahmad Bin Hanbal (one of his opinions is

100 In al-Mudawwanah, it is stated that Malik was of the opinion that the guarantee given by a virgin woman is invalid even though her father has given the permission. See’Abd al-Salam bin Sa’id al-Tanuki al-Sahnun, al-Mudawwanah li al-Imam Malik Riwayat Sahnun, vol. 13, p. 283 (n.d.)
102 As cited in Noel J. Coulson, Commercial Law in Gulf States; the Islamic Legal Tradition, p. 36 (1984)
not popular) maintain that a virgin woman, who has reached the age of majority, shall not be given her property unless she has been married and given birth from that marriage or a period of not less than one year of the marriage has lapsed.\textsuperscript{104}

In view of the above, it appears that the Malikis have afforded only limited status to a married woman in respect to the Islamic guarantee. A married woman is competent to give her guarantee for up to one-third of her total assets. To quote the words of Sahnun (d. 240H) in the \textit{al-Mudawwanah}, 'In Malik's view a married woman is allowed to give her guarantee up to one-third of her total assets. This limitation is made due to the legal nature of the Islamic guarantee i.e. gratuitous contract. This principle of law is applicable to a person who is terminally ill'.\textsuperscript{105} It follows that a guarantee given beyond this limitation is ineffective, unless prior permission from the husband has been obtained. Imam Malik said that the guarantee given by a married woman is ineffective unless the husband gives permission.\textsuperscript{106} The permission of the husband is important since a transaction that involves a married woman is regarded as a 'suspended', \textit{mawquf} transaction. In this regard, the validity of the guarantee that is given by a married woman for more than the prescribed limitation is suspended, pending the permission of the husband. This is because the transaction involves the interests of the husband. Therefore, it seems that the married woman is temporarily interdicted to protect the husband's interests. In the event of the husband giving his permission, then the guarantee will be valid and enforceable, otherwise it will be considered as null and void \textit{ab initio}.

It is interesting to note at this point that the Malikis have given a different status to a married woman in accordance with the transaction in which she is involved. In this context, the Malikis have divided the commercial transactions into two different categories; the first includes transactions that involve commutative contracts, \textit{'aqd al-mu'awadat}, and the second includes transactions that involve gratuitous contracts, \textit{'aqd

\textsuperscript{104} Subhi Mahmassani, \textit{Ibid.}
\textsuperscript{105} See 'Abd al-Salam ibn Said al-Tanuki al-Sahnun, \textit{al-Mudawana li al-Imam Malik Rawayat Sahnun}, vol. 5, p. 277
\textsuperscript{106} Muhammad Najib al-Muti'i, \textit{Takmilat al-Majmu' Sharh al-Muaddhab}, vol. 14, p. 10

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al-tabarru'\textsuperscript{107}. In the case of transactions that involve commutative contracts, the Malikis maintain that a married woman is free to contract with others even if the husband does not give permission. This reflects the nature of the transaction that gives benefits to both the offeror and the offeree. In the case of transactions that involve gratuitous contracts, the Malikis maintain that prior permission from the husband should be obtained. This is because the transaction involves detrimental actions that entail a definite loss on the part of the offeror but not the offeree. Moreover, it has also been suggested that the transaction involves the interests of others, from whom the permission should have been obtained. In case of the Islamic guarantee, the transaction involves the interests of the husband, and therefore his permission must be obtained first.

It has been raised that a guarantee given by a married woman could have the potential to affect the financial status of the family, because the latter may be partially dependent on her assets. Hence, if the wife gives a guarantee that covers the value of all her assets, the family financial status could be affected adversely. The researcher feels that this may be a major contributory factor to the Maliki’s emphasis on the importance of the husband’s permission.

The Malikis maintain that the status of a widow is the same as that of a man in respect to the legal capacity of becoming a guarantor. A widow is free to give her guarantee without any limitation, and her guarantee is valid and enforceable. In al-Mudawwanah, it is stated that with regard to a widow who has no legal guardian, her status in respect of the Islamic guarantee is the same as the status of a man.\textsuperscript{108}

In summary, the Malikis have given special status for a woman in respect of the Islamic guarantee. In this regard, while a virgin is totally interdicted from involvement in the Islamic guarantee contract, a married woman has a limited status. The Malikis have based

\textsuperscript{107} See Subhi Mahmassani, Nazariyyat al-'Ammah li al-Mujabat wa al-'Uqud fi al-Shari'ah al-Islamiyyah, p. 385

\textsuperscript{108} 'Abd al-Salam ibn Said al-Tanuki al-Sahnun, Al-Mudawana li al-Imam Malik Riwayat Sahnun, vol. 5, pp. 283-7
their opinion on two important Islamic Shari’a injunctions. In Sura al-Nisa’ the Qur’an reads, ‘Men are the protectors and maintainers of women, because Allah has made the one of them to excel the other, and because they spend (to support them) from their means’. 109 While in Nayl al-Awtar, the Prophet is reported to have said that, ‘It is not permissible for a [married] woman to dispose of property in liberty (‘atiyya) without the permission of her husband’. 110

In spite of this, the writer is of the view that the approach of the majority of the classical jurists is more appealing. This is not only because of the significant contribution that women have made to economic development, but also because the arguments employed by the Malikis are disputable. In a contemporary economic climate, women can appear to be more astute than men in the management of their financial affairs and the writer submits that so long as a woman has attained the age of competence, she should have the right to act as guarantor. There is no single Qur’anic text that precludes a credible and creditworthy woman from being a guarantor. Furthermore, the interpretation of the texts that the Malikis offered in support of their claim may be erroneous. As al-Dayyib suggests ‘the legal principles in the Qur’anic text actually refer to family matters and not the financial matters of a woman’. 111 In fact, women have an equal right in respect of their own property. Men or husbands have no right to interfere in the management of a woman’s own property. To quote the words of Mahmassani ‘the husband has no jurisdiction over the property of his wife’. 112 Thus, women should not be interdicted in transacting with others in respect of their own assets, so long as their actions do not affect the interests of others in an adverse manner.

109 The Qur’an; 4:34
111 See Mahmud Abd al-Hamid al-Sayyid al-Dayyib, Kafalat al-Dayn fi al-Shari’ah al-Islamiyyah, p. 190
112 Subhi Mahmassani, al-Nazariyat al-‘Ammah li al-Mujabat wa al-‘Uqud fi al-Shari’ah al-Islamiyyah, p. 385
4.6 Subject Matter of Islamic Guarantee

It is accepted that the main objective of the Islamic guarantee is to assure that the obligation of the principal debtor will be performed and therefore the creditor is protected from suffering loss. In cases of default, the creditor will have the alternative recourse in which case he can recover his debts from the guarantor. In this context, the liability of the guarantor is collateral to that of the principal debtor whereupon he will be rendered liable to the creditor to the extent that the principal debtor is liable.

The Islamic guarantee is dependent upon the existence of the principal contract that has been concluded between the principal debtor and the creditor. Hence, it would seem that the existence of the 'principal obligation' is of significant importance in order to conclude a valid contract of the Islamic guarantee.

It is apparent therefore that the principal obligation is the main object of the Islamic guarantee. In this context, the principal obligation could generally be justified as a claim or debt that arises from a principal contract between a creditor and a debtor. This debt, being known as *al-dayn* in Islamic terminology, could be either in the form of unpaid assets or unperformed duties. Al-Kasani maintains that the term of debt might be the expression for the unperformed duties, such as the failure to hand over an asset; or on the other side it might be the expression for the unpaid assets which exist in the *dhimma*. This concept of debt suggests that the term debt is dissimilar to the term 'thing' or *al-`ayn* in the Islamic term. This is because a claim on a debt could be made upon *dhimma* while a claim on a thing should be made upon the corpus itself. In the case of the Islamic guarantee, a claim on the principal obligation could be made upon *dhimma* and therefore it presupposes the existence of the principal debtor prior to the conclusion of the Islamic guarantee contract.

113 'Ala'uddin Abi Bakr bin Mas'ud bin Ahmad al-Kasani, *Bada'i al-Sana'i*, vol. 6, p. 25 (1986)
With regard to the principal obligation, the law has stipulated certain pre-conditions that need to be observed by the parties involved in the Islamic guarantee. The majority of the classical jurists concur that;

a. The principal obligation must be existed and established
b. The principal obligation must be determined or specific
c. The principal obligation must be dischargeable

a. The principal obligation must be existed and established

It appears from the above that the most important feature of the Islamic guarantee is the undertaking of a guarantor to ensure that the principal obligation will be performed. In addition, in order to undertake such obligation, there is a pre-condition that the principal obligation must be in existence prior to such undertaking. Classical Islamic law also stipulates that the principal obligation must be legally established on the part of the principal debtor. In this context, Ibn Nujaym (d. 980H) maintains that in order to conclude a valid contract of the Islamic guarantee, it is a pre-condition that a principal obligation should be first established in the *dhimma* of the principal debtor.\(^{114}\) In the Majalla it is stated *inter alia* that in suretyship for the delivery of something, it is a condition that the thing, for which the guarantee is given, falls on the person primarily liable, that is to say, that performance of it is compulsory of the principal debtor.\(^{115}\) Thus, an obligation that is not established in the *dhimma* of the principal debtor, such as the obligation for family maintenance,\(^{116}\) before a court decree has been obtained is not subject to the Islamic guarantee. It is also suggested that the duty to pay a sum prior to the conclusion of the sale contract, is not subject to the Islamic guarantee.\(^{117}\) Hence, in order to create a valid contract of the Islamic guarantee, it is a pre-condition that the subject matter, i.e., the principal obligation of the contract, exists and is established in the

\(^{114}\)Zainuddin Ibn Nujaym, *al-Bahr al-Ra‘iq Sharh Kanz al-Daqaiq*, vol. 6, p. 224 (n.d.)

\(^{115}\) Article 631 of the Majalla


dhimma of the principal debtor before or at the time the contract is concluded. The classical jurists were unanimous on this matter.

The jurists, however, were not unanimous in the case of the obligation not being established, yet having the potential to be so at a future date. In this context, the majority of the classical jurists maintained that such obligation could also be the subject for the Islamic guarantee. Al-Dirdir (d. 1201H) states that it is not pre-conditioned that the principal obligation should be established in the dhimma of the principal debtor before or at the time the Islamic guarantee is concluded. As such, the obligation that is not established but has the potential to be established in the future, could also be the subject for the Islamic guarantee. This includes the ju'ala contract, in which case the offeror might suggest 'If you bring me my lost camel you will be rewarded for one Dinar'. The guarantee for this transaction is valid. Therefore if the recipient brought the lost camel and the offeror did not fulfill his promise, the guarantor would be held liable.

The aforementioned points appear to illustrate that both the existence and the establishment of the principal obligation in the dhimma of the principal debtor are pre-conditions of the Islamic guarantee. In the UAE Civil Transaction Code it is stated inter alia 'it is a pre-condition for the conclusion of a valid contract of the Islamic guarantee that the subject matter [principal obligation] of the arrangement be capable of being guaranteed be that a debt, or a thing, or a person that has been determined. It is also a pre-condition for the conclusion of a valid contract of the Islamic guarantee that the subject matter of the arrangement be capable of being handed over'. According to Ahmad this provision could be defined as follows; that the principal obligation must be existing and established at the time the contract is concluded. With regard to this there is an accepted legal principle, which suggests that the principal debtor is the person who should be liable to the creditor at the first instance. However, as far as the UAE Civil

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118 The Hanafis, Malikis, Hanbalis, the old version of the Shafi’is, Shi’ah al-Imamiya and Zaydiyya
120 Article 1061 of the UAE Civil Transaction Code 1985
Transaction Code is concerned, there is an exceptional engagement in which the establishment of the principal obligation is not a pre-requisite to conclude a valid contract of the Islamic guarantee. This engagement includes the obligation for family maintenance. The UAE Civil Transaction Code provides that the guarantee for the obligation to pay the wife and the nearest relative family maintenance is valid even though a court decree has not been obtained.\(^{122}\)

b. The principal obligation must be determined or specific

The classical jurists were not unanimous with regard to this matter. The popular view\(^{123}\) however suggests that the Islamic guarantee is valid even though the scope of the obligation is not determined. In this context, Ibn Humam (d. 861H) maintains that the Islamic guarantee, like a solemn pledge, is one of the gratuitous contracts. The conclusion of which is not dependent upon consideration but the reward from the almighty God. In this context, the objective of the Islamic guarantee is to give support to a principal debtor. It follows therefore issues that relate to the extent to which the principal debtor is liable should have not arisen in order to conclude a valid contract of the Islamic guarantee.\(^{124}\)

Al-Mirghinani (d. 593H) concurs where he mentions that the Islamic guarantee is valid so far as the principal obligation is established in the dhimma of the principal debtor. This means that it is not a pre-condition that the guarantor should have prior knowledge of the scope of the principal obligation. This is because the objective of the Islamic guarantee is to help the principal debtor.\(^{125}\)

\(^{122}\) Article 1062 of the UAE Civil Transaction Code 1985


\(^{124}\) Imam Kamaluddin Ibn Humam, \textit{ibid.}

The Shafi’is, however, contended that the Islamic guarantee that has been based upon the unspecified scope of the principal obligation is not valid. This is because the undetermined thing could normally lead to gharar, which is as a general principle repugnant to Islamic law. Shirazi (d. 476H) remarks that it is not permissible to conclude a contract of the Islamic guarantee which is based upon the unspecified scope of the principal obligation. This is because the Islamic guarantee involves the assets of a person. Hence, it is not permissible to give a guarantee for the unspecific obligation as in the case of he who sells something with undetermined price. 126 al-Bakri (d. 1072H) agrees with Shirazi where he said that it is pre-condition that the scope of the principal obligation be determined. This follows that the unspecific obligation should not be the subject for the Islamic guarantee. Hence, the guarantee that is based upon such obligation is deemed to be null and void. 127 Ibn Hazm (d. 456H) who concurs with the Shafi’is maintains that it is not permissible to give a guarantee for the unspecified obligation such as ‘I will be the guarantor for whatever the principal debtor owes you’. This is because the Qur’an states, ‘O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent’. 128 Also, from the tradition of the Prophet, it is narrated that it is not permissible to take the property of a fellow Muslim unless there is a good conscience that come out from the owner. The principle of ‘mutual good-will’ as well as ‘good conscience’ will not arise unless the subject matter of the contract has been determined. 129

It appears that the opinions of the Shafi’is and Ibn Hazm (d. 456H) are based upon the general principle of the Islamic law of contract. Therefore, it has been suggested that in cases where the guarantor limits his liability, such as by saying, ‘I will be the guarantor for Mr X up to 20,000 GBP’, then the guarantee is valid. 130 In modern Islamic legislation the first view has been adopted. Under Article 630 of the Majalla, it is stated inter alia ‘if

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126 Shirazi, Kitab al-Majmu’, vol. 13, p. 18
128 The Qur'an; 4: 29
the subject matter of the suretyship be the person of a man, his being known is a condition. And if it be property, there is no condition that it be known’.

c. The principal obligation must be dischargeable

It is generally accepted that in order to make the guarantee possible, the nature of the principal obligation must be capable of being discharged. Thus, obligations that include criminal offences such as the hudud and qisas offences are not subject to the Islamic guarantee. The classical jurists, except for the Shafi'i School, maintain that it is not permissible to give a guarantee for obligations that involve the execution in such criminal offences. In one hadith the Prophet says, ‘there is no guarantee for hudud offences’. In reference to this the Majalla provides that ‘no substitution is possible in criminal punishment’.

4.7 An Absolute and a Provisional Undertaking

In line with the principle of the freedom to contract, the Islamic guarantee does not stipulate that the undertaking of a guarantor should be the same as the principal debtor. In respect of this, al-Salus suggests that the validity of the Islamic guarantee is not affected by the mere fact that a guarantor undertakes a portion of a total amount of debt or undertakes the obligation that is more than the principal debt. In this case the principal debtor is still liable for the whole amount of the debt even though the guarantor is held to be liable for the portion that he undertakes. Hence, it seems that the undertaking could either be absolute or provisional.

In cases where the undertaking is absolute, i.e. to be responsible for the whole amount of the debt, then the guarantor will be rendered liable for whatever the principal debtor is

132 Article 632 of the Majalla
133 'Ali Ahmad al-Salus, al-Kafala wa Tatbiqatuha al-Mu'asirah, p. 58
liable for. In this context, the liability of the guarantor is co-extensive with that of the principal debtor. Hence, it might include those principal debts but not extra charges that might accrue on the part of the principal debtor. This is the apparent construction of the classical definition of the Islamic guarantee. In the Majalla, it is stated inter alia 'the Islamic guarantee is the amalgamation of one's dhimma into another's dhimma in respect of a demand for a particular thing. That is to say, there will be a person joining himself to another person, and binding himself to meet the obligation which accrues to that other person'. ¹³⁴ The guarantor will be rendered liable the same as the principal debtor and not more than that.

In modern practice, however, some of new Islamic legislative bodies impose 'extra charges' on the guarantor. In the UAE Civil Transaction Code, for example, it is stated that 'the Islamic guarantee shall cover all charges due to the creditor including the surcharge of the debt as well as the demand processing fee unless it has been stated otherwise in the contract'. ¹³⁵ According to Ahmad, in view of the above provision, the undertaking of a guarantor is not confined to the principal debt but includes extra charges such as the surcharge of the debt and other charges that are not mentioned in the Islamic guarantee contract. Therefore according to him, the undertaking (obligation) of the guarantor could be for:

i. The principal debt(s)
ii. The compensation due to the failure of the principal debtor to fulfill his obligation
iii. The charges accrued by the creditor while performing his diligent acts in order to recover his due debt(s)
iv. The expenses that have been used in order to perform the principal obligation¹³⁶

¹³⁴ Article 612 of the Majalla
¹³⁵ Article 1067 of the UAE Civil Transaction Code 1985
That is the case for the absolute undertaking. In cases where the undertaking is provisional or qualified, i.e., the guarantor agreed to be responsible for the part of the principal obligation then he will be rendered liable to the extent that the undertaking has been performed. As such, it should not be confused with the ‘principle of co-extensiveness’ since the principle means that the liability of a guarantor should not be more than that of the principal debtor. Therefore, if the guarantor undertakes the liability for less than the principal obligation, the contract is still valid. Foster maintains that in accordance with this principle, the obligation of the guarantor must have the same object as, and cannot impose a greater obligation than, the principal obligation. It may be less onerous: for example, if it is possible validly to guarantee part of the principal obligation.137

In line with this principle, the guarantor is also allowed to make a stipulation that the guarantee is to be enforced at some future date. In this context, al-Sarkhasi (d. 483H) states that in the case where the principal obligation becomes due and the guarantor undertakes to give the guarantee to be realized at a future date, the guarantee is still valid. In this case, the principal debtor is liable to the creditor at the time the principal obligation becomes due. Thus, if a person advanced 1000 Dirhams to another, and a third person gives his guarantee for a period of one year, the guarantee is permissible to that particular period.138 Similarly Ibn Qudama (d. 630H) suggests that the guarantee that has been given for the debt that has become due is valid even though the guarantee is to be realized in the future. In this case the creditor will have the right of demand immediately towards the principal debtor, while against the guarantor the creditor will have to wait until the stipulated time lapse.139

In the Majalla, it is stated that, 'in suretyship taking effect at once without any condition, if, as regards the principal debtor, the debt is payable in cash, the surety becomes liable to be called at once, if it is a deferred payment, he can be called upon on the completion of

137 Nicholas H.D. Foster, “The Islamic Law of Guarantees”, (2001) 16(2) Arab Law Quarterly 133 at 146
138 Shamsuddin Abi Bakr al-Sarkhasi, al-Mabsut, vol. 20, p. 31 (n.d.)
139 Abi Muhammad 'Abdullah Ibn Qudama, al-Mughni, vol. 5, p. 80
the time fixed'. If someone has said, 'I am surety for the debt of a man', if the debt is payable in cash, at once, and if it is payable at a future time, at the end of that time, the creditor can demand from the surety the payment of it. But in a contract of suretyship on which it is agreed that it is dependent on a condition, or subject to a future time, the surety cannot be called upon until the condition is fulfilled, or that time comes.

4.8 Modes of Islamic Guarantee Engagements

The other important aspect that needs to be taken into consideration while creating the Islamic guarantee is the time the contract is intended to take effect. It is worth noting at this point that as a general rule a contract is effective as soon as it is concluded, provided that all foundations and conditions are duly observed. As such, it is apparent that in certain circumstances the parties to contract however might intend the contract not to take effect immediately, but at some future date. In this case the law has to examine whether or not such intention is acceptable. This situation is also applicable to the Islamic guarantee.

In view of this, the Islamic guarantee engagement could be broadly divided into two types, i.e. the absolute and the conditional. The absolute involves the arrangement that is free from stipulations and conditions. It is also referred to as the 'executed contract' of the Islamic guarantee. The executed Islamic guarantee is a contract whereby a guarantor intends that the arrangement will take effect immediately. This is a simple contract of the Islamic guarantee whereby the arrangement is valid and effective at the time it is concluded. As such, it is suggested that it is immaterial as to whether the principal obligation has become due or will become due at a future date. In other words, the Islamic guarantee is effective as soon as it is concluded even though the principal obligation has not become due, but will do so.

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140 Article 635 of the Majalla
141 Article 636 of the Majalla
142 See, for example, Muhammad al-Husaini, al-Nazariyat al-'Ammah li al-'Aqd fi al-Fiqh al-Islami, p. 365
The Hanafis however maintain that such undertaking would not take effect 'automatically'. Instead of being immediately effective, the contract would take effect following the nature of the principal obligation. Thus, if the principal obligation has become due at the time the contract concluded, the undertaking will take effect immediately. On the other hand, if the principal obligation will become due in the future, the undertaking will not take effect unless the principal obligation has become due. al-Kasani (d. 587H) states that if the principal obligation has become due, the Islamic guarantee will take effect immediately. On the other hand, if the principal obligation will become due at a future time, the Islamic guarantee will not take effect unless the principal obligation has become due. This is because the intrinsic nature of the Islamic guarantee is to perform the principal obligation [collateral obligation] therefore it shall follow the principal obligation. 143

This Hanafi doctrine has been adopted in modern Islamic legislation. In the Majalla it is stated, 'in suretyship taking effect at once without any condition, if, as regards the principal debtor, the debt is payable in cash, the surety becomes liable to be called upon at once, if it is a deferred payment, he can be called upon the completion of the time fixed'. 144 In this context, the Majalla illustrates that if someone has said, 'I am surety for the debt of a man', if the debt is payable in cash, at once, and if it is payable at a future time, at the end of that time, the creditor can demand from the surety the payment of it.

The conditional Islamic guarantee is an arrangement in which stipulations or conditions are included. As previously mentioned, although the general rule is that the Islamic guarantee will take effect as soon as it is concluded, there are however certain circumstances whereby the contract is not effective at the time it is concluded but pending the occurrence of conditions that have been stipulated in the arrangement. The classical jurists asserted that in order to be accepted as valid conditions, it should be in keeping with the nature of the Islamic guarantee. According to al-Zuhaili these conditions

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143 *Ala'uddin Abi Bakr bin Mas'ud bin Ahmad al-Kasani, *al-Bad'i al-Sana'i*, vol. 7, p. 3405
144 Article 635 of the Majalla
should be prevalent and acceptable among reasonable people. To give one example, the suitable condition includes stipulation that involves certain actions as the reason for the obligation to be undertaken. In this instance, if X makes a stipulation that if Y advances a certain amount of money to A, he will be the guarantor, and such stipulation is valid. Similarly if X makes a stipulation that if A fails to repay the money, he will be the guarantor, such stipulation is also valid. At this point such conditional Islamic guarantee might be comparable to the concept of guarantee under English common law.

The conditional Islamic guarantee could be further divided into three kinds, i.e. conditional upon time limit, conditional upon future time and conditional upon future incidents. 'Conditional upon time limit' means that a guarantor puts a period limit in respect of his responsibility in the contract of the Islamic guarantee. In this context, the guarantor stipulates that he will be responsible in the Islamic guarantee for a certain period only, for example from 1st March to 1st September. The effect of such an undertaking is that within that period the guarantor will be rendered liable to the creditor, and when the period ends the guarantor will cease to be responsible. Some of the classical jurists did not allow such an undertaking. The Shafi’is, for example renounced the inclusion of such a stipulation in the Islamic guarantee. Al-Ramli (d. 1004H) maintains that the prevalent view in our school of law is that it is not permissible to put such stipulation in the Islamic guarantee arrangement. This is because the purpose of the Islamic guarantee is to satisfy the creditor where he is supposed not to suffer loss from the arrangement. With regard to this the inclusion of a time limit would certainly refute this objective of the Islamic guarantee.

'Conditional upon future time' means that a guarantor does not want the guarantee to take effect immediately but at some time in the future. This contract is valid upon its

146 With regard to this Article 639 of the Majalla provides *inter alia* 'in a suretyship limited in time, the surety becomes liable to a demand, during the time of the suretyship alone'. For example, when someone has said, 'I am surety for one month from today', he becomes liable to a demand during that month only. At the expiration of it he is free from the suretyship.
147 Shihabuddin Ahmad al-Ramli, *Nihayat al-Muhtaj ila Sharh Minhaj*, vol. 4, p. 456
conclusion but ineffective until the stipulated time is due. With the exception of the Shafi'is, the majority of the classical jurists accepted such a stipulation as valid. In fact, the Malikis further maintained that such stipulation is valid even though the future time is undetermined. In the Majalla it is stated *inter alia* 'in the same way the suretyship without any condition, becomes a completed contract, a suretyship which is conditional with a condition for immediate or future performance, that is to say, with a condition to pay immediately or at such a time, becomes a concluded contract'. Hence, the contract is valid upon its conclusion but will not take effect until the stipulated time comes. In addition, the Majalla provides, 'but in a contract of suretyship on which it is agreed that it is dependent on a condition, or subject to a future time, the surety cannot be called upon until the condition is fulfilled, or the time comes.'

'Conditional upon future incidents' means that the Islamic guarantee will not take effect unless a future incident has occurred. The legal effect of this kind of Islamic guarantee is that the contract will only take effect at a future time upon the occurrence of certain events. Also it is not valid until such contingency happens. Again the Shafi’is disallowed this kind of stipulation, based on their doctrine that any stipulation or condition is not allowed in the Islamic guarantee.

These varying facets of the Islamic guarantee serve to illuminate classical juristic opinion and perception of such a contract. The Majalla represents modern Islamic legislative procedures and the previous discussion has illustrated that in general, it has adopted the Hanafi doctrine on the Islamic guarantee.

In the modern practice of the Islamic guarantee, this classical doctrine on the classification of the Islamic guarantee engagement has been developed. The UAE Civil

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149 Most of the Hanafis, Malikis and Hanbalis; see 'Alauddin Abi Bakr al-Kasani, *al-Bada’i al-Sana’i*, vol. 7, p. 3407; see also Mansur bin Yunus al-Buhuti, *Kasshaf al-Qina’*, vol. 3, p. 376


151 Article 625 of the Majalla

152 Article 636 of the Majalla
Transaction Code, for example provides that the Islamic guarantee is valid if it is either absolute, or qualified with acceptable condition, or dependent upon suitable condition, or dependent upon future time, limited upon certain period.\textsuperscript{153} Being the genesis of the Hanafi’s Majalla, the UAE Civil Transaction Code is therefore more in line with Hanafi doctrine on the classification of the Islamic guarantee engagement. In the annotation of the Code, which is published by the Ministry of Justice, it is stated that this provision has been duly adopted from articles 617, 624 and 625 of the Majalla. In fact, this provision is also similar to Article 953 of the Jordanian Civil Code, again the genesis of the Hanafi’s Majalla.

4.9 Conclusion

Although the Islamic guarantee is gratuitous in nature, the prevalent view remains that the Islamic guarantee is an enforceable contract. This refers to the classical theory of contract that covers not only commutative transactions but also gratuitous engagements. Indeed, if we were to refer to the classical works on the Islamic guarantee we would find that some of the jurists referred to the Islamic guarantee as a contract. In \textit{Fiqh ‘ala Madhahib al-Arba’ah}, for example, while defining the Islamic guarantee the Shafi’is have clearly stated the word ‘contract’, ‘\textit{aqd}’ in respect to the Islamic guarantee. In this context, the Shafi’is have suggested that the Islamic guarantee is a ‘contract’, ‘\textit{aqd}’, in which one person undertakes the obligation of another. Hence, as far as the classical definition is concerned the Islamic guarantee is an enforceable contract, and in the term of the classical theory, the Islamic guarantee is classified as ‘nominate contract’.

Being a nominate contract, the law provides special rules and regulations that govern the Islamic guarantee. At this point, we find that in practical terms, contract in the classical Islamic law is different from that of the western laws including the English common law. The difference is apparent in the issues of acceptance and consideration. In this context, while the English common law insists on the occurrence of acceptance, the Islamic

\textsuperscript{153} Article 1060 of the UAE Civil Transaction Code 1985
guarantee does not necessitate such requirement as a pre-requisite element to conclude a valid guarantee. Similarly, while, as a general rule, the English common law insists on consideration, the Islamic guarantee does not need a valid consideration from the creditor to conclude a valid guarantee.

From the above discussion, we also find that Islamic law requires the guarantor to attain the age of full competence, i.e. *ahliyyat al-wujub* and *ahliyyat al-ada’* in order to conclude a valid guarantee. At this point the guarantor shall not only attain physical puberty, *bulugh* but also sound judgment, *rushd*. Therefore, minors, lunatics, imbeciles and prodigal spendthrifts are not competent to enter the contract of the Islamic guarantee. In view of this, it is suggested that the guarantee given by a minor, for example is ineffective even though it is being ratified at the age of full competence. In reference to the general requirement of legal capacity in the Islamic guarantee, the Ja'fariah Shi’ah has further stipulated that the prospective guarantor shall not only attain physical puberty and prudence but also he should be a person of creditworthiness.

As far as women are concerned, the Malikis hold specific views regarding their legal competence to conclude a valid guarantee. They maintain that a virgin woman has no capacity to contract with others even if she has obtained permission from her legal guardian. The position of a virgin woman is, thus, like a minor whose dispositions are invalid. As for a married woman, she is allowed to contract with others but is restricted to either one-third of her assets or, she must obtain prior permission from her husband if she intends to give a guarantee for more than that portion. In spite of this the Malikis maintain that a widow has the capacity to contract with others, just like a man.

As such, being a personal security the subject matter for the Islamic guarantee consists of the ‘principal obligation’ of the principal debtor. In this regard, to make the guarantee possible, the classical jurists have put certain conditions on the principal obligation. As a general principle of law, the conditions include establishment, determination and the ability to discharge the principal obligation/debts. However, there is an exceptional case,
in which the principal obligation has not been established but has the potential to be so. This scenario has been accepted as a valid principal obligation. With the exception of the Shafi'is, most of the classical jurists have approved such exceptional cases. In relation to the determination of the subject matter of guarantee, i.e. the principal obligation, most of the classical jurists maintain their view that it can be the subject for the guarantee even though its nature and scope are not determined. It is apparent that this consensus has been duly adopted within modern Islamic legislative systems, such as the Majalla and the UAE Civil Transaction Code 1985.

Regarding the nature of the undertaking of the principal obligation, it may be either absolute or provisional. Therefore, in cases where the undertaking is absolute, the guarantor will be rendered liable to the same extent that the principal debtor is liable. In the opinion of the writer, this is the true construction of the classical definition of the Islamic guarantee, although in modern practice some 'extra charges' have been included in the liability of the guarantor. A clear example for this can be found in Article 1068 of the UAE Civil Transaction Code 1985. If the undertaking is provisional or qualified to certain conditions, then the liability of the guarantor will be limited to such stipulations. It has been suggested with regard to this issue that the liability of the guarantor should not be onerous but it can be less than the principal obligation.

It is also apparent from classical works on the Islamic guarantee that the time when the guarantee takes effect within the contract can be generally divided into two types, i.e. an absolute engagement and a conditional engagement. As for the absolute engagement, the classical jurists (with the exception of the Hanafis) maintain that the Islamic guarantee takes effect immediately after the contract has been concluded in a valid manner. The Hanafis, however, contend that the Islamic guarantee would not take effect 'automatically' but would be dependent on the nature of the principal obligation. Hence, if the principal obligation (or debts) has become due, the Islamic guarantee takes effect immediately otherwise it will follow the nature of the principal obligation. Despite the prevailing view that the Islamic guarantee takes effect immediately, it seems that modern
Islamic legislations, such as the Majalla, have adopted the Hanafi view on this issue. As for the conditional engagement, the Islamic guarantee will not take effect immediately but will be dependent upon the occurrence of stipulations that have been put in the contract. Here, the conditional engagement could be further classified into three types, i.e. conditional upon time limit, conditional upon future time and conditional upon future incidents.

In summary, in view of the previous points, it appears that Islamic law places more importance on the competence of the guarantor than the formalities of contract. This contrasts with the priorities specified within the area of ‘contract’ in English common law. The reason for this lies in the Islamic guarantee being considered as a gratuitous contract that involves detrimental actions, which entail a definite loss for the offeror. Consequently, the law emphasizes that the guarantor must be absolutely competent, fully aware of the effects and consequences of the contract and also creditworthy. Once these requirements are satisfied, the principle of formalities becomes less significant for the conclusion of a valid guarantee. Hence, it appears that in Islamic law an oral guarantee is valid and the guarantor will be held liable for his undertaking.
CHAPTER FIVE

EFFECTS OF THE ISLAMIC GUARANTEE

5.1 Introduction

In the previous discussion, it appears that although the Islamic guarantee is gratuitous in nature, the prevalent view remains that the guarantee is an enforceable contract. This follows that the general principles of contract law, such as the effect of contract, will also be applied in the Islamic guarantee. Thus, the Islamic guarantee, like other modern devices, accords the parties with rights and obligations.¹

This chapter will examine legal issues surrounding the effect of the Islamic guarantee. Hence, issues such as the commencement of the guarantor’s obligation, rights of both the creditor and the guarantor will be the main focus of investigation.

Similar to the previous chapters, considerable classical material has been consulted for the purpose of the investigation. At this point, modern Islamic legislations as well as the English common law principles have also been referred to in this chapter. It is hoped that the chapter will provide some desirable results upon which a further suggestion for the development of the law could be made.

5.2 The Effect of Islamic Guarantee

The most apparent effect of the Islamic guarantee is that the guarantor will be rendered responsible to the creditor for the default of the principal debtor. At this point, the

¹ It is generally accepted in law that when a contract is formed, it spells out the rights and obligations of the contracting parties and the standard of performance expected of them. This enables or facilitates the parties to come up what is called as ‘forwarding planning’ with regard to their future transactions should things work out well. Alternatively, should things not work out as expected, the parties can make some other arrangements to cover those contingencies.
creditor will be given the right in law to call upon the guarantor to settle the unpaid debts. Thus, the issue that dominates the discussion at this point is the rights and obligations of the parties involved in the Islamic guarantee.

5.3 The Commencement of a Guarantor's Liability

It appears from the previous discussion that a contract of the Islamic guarantee may take effect either at the time the contract is concluded or at some future time. This will be determined by the terms and conditions of the contract. Therefore, if the contract is free from any stipulations and conditions, the contract will take effect immediately upon its completion. On the other hand, if the contract is contingent upon certain stipulations and conditions, then the contract will not take effect unless such stipulations and conditions have been satisfied.

As such, the question that might arise is when is the exact time the guarantor is held liable to the creditor? In other words, does the guarantor assume the liability at the time the contract is concluded or at the time the contract takes effect? A straightforward answer for this is not without hindrance since the classical manuals of the Islamic law did not provide a clear explanation on the issue. Therefore, a method has to be developed in order to determine the exact time at which the guarantor is liable. In respect to this, it seems therefore pertinent to refer our discussion to the previously mentioned different types of promises in the Islamic guarantees. Moreover, classical jurisprudential debates will also be referred to, as it is hoped that this will lead us to some identifications on the issue.
5.3.1 Different Types of Promises

In the classical works, there are at least three identified arrangements of the Islamic guarantee.\(^2\) This includes the *kafala al-munjiza* (completed or executed), the *kafala al-mudafa ila zamanin mustaqbal* (conditional upon future time) and the *kafala al-mu’alaqa* (conditional upon certain stipulations).

The *kafala al-munjiza*, which is also known as an absolute undertaking, is an arrangement in which the parties to contract intend the contract to be valid and enforceable at the time it is concluded. It is described as an absolute undertaking because the nature of the promises, in reference to the principal obligation, is unconditional. Under the contract, a guarantor accepts the liability without condition and stipulation. An example of this includes when a person says, ‘I will be the guarantor for the debt of that person’. The legal effect of such arrangement is that a guarantor undertakes the liability of a principal debtor categorically and unconditionally. Thus, the arrangement is effective and enforceable the moment the contract is completed. It is observed, therefore, that the obligation of a guarantor arises and he becomes answerable to the creditor the moment the principal debtor defaults.

The *kafala al-mudafa ila zamanin mustaqbal* is an arrangement in which the parties to contract intend the contract to be valid at the time it is concluded but the enforcement of

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\(^2\) The Islamic guarantee as a whole can be broadly classified into three categories; first, in respect of its creation (contract), second, in respect of a guarantor’s undertaking (the nature of a guarantor’s liability, i.e. the scope, extend and limitation of the guarantor’s liability), and third, in respect of the subject matter. The first is our subject of discussion whilst the second includes the absolute nature of undertaking; the limited undertaking, which is stipulated upon time; the immediate undertaking; and the delayed undertaking. The third includes debt, person and returning a borrowed thing.
which will be dependent upon an agreed future time. An example of this includes when a
person says, ‘I will be the guarantor for the debt of that person after six months’. The
legal effect of such arrangement is that the contract is valid at the time it is concluded but
the enforcement of which will be effective after the six months expires. This follows that
the obligation of a guarantor will only arise after the six months expires. In other words,
before the six months has expired, the guarantor will not be rendered liable due to the fact
that an obligation has not yet been established in his dhimma.

The *kafala al-mu'alaqa* is an arrangement in which the parties to contract intend the
contract to be valid and enforceable upon the satisfaction of certain stipulations. It is an
arrangement that is dependent upon the satisfaction of the agreed conditions. An example
for this includes when a person says, ‘I will be the guarantor for the debt of that person if
he does not pay you’. The legal effect of such an arrangement is that the contract would
be regarded as non-existent or at least inoperative unless and until such a person fails to
make the payment. Thus, the obligation of a guarantor will not arise unless and until such
a condition has been satisfied. It is worth noting at this point that, being uncertain in
nature, some classical jurists have refused to accept such kind of arrangement.

In short, as far as the obligation is concerned, a guarantor under the Islamic guarantee
will not be rendered liable unless and until the contract is ‘enforceable’. Therefore, until
the contract is enforceable, the guarantor will not be bound to fulfill his promise. Hence,
the basis for the commencement of a guarantor’s liability is perceived to be the

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3 In connection to this, Ibn Nujaym said that, at this point, the person will be regarded as a guarantor but he
will only be liable upon the expiring of the stipulated time. See Zainuddin Ibn Nujaym, *al-Bahr al-Ra'iq
Sharh Kanz al-Daqiq*, vol. 6, p. 227 (n.d.)

4 At this point, most of the classical jurists agreed that to conclude a valid contract, the arrangement should
be ‘certain’ and it does not involve any element of *gharar*.

5 The Shafi’is, for example, have refused to accept *ta'ilq* (contingency) in the Islamic guarantee. In this
context, al-Nawawi insisted that ‘In case if the guarantee is made contingent upon time or anything else
such when a person said, ‘I will be the guarantor [for that man] when the first day of a month appears’ or ‘I
will be the guarantor [for that man] if Malik does not pay his debt tomorrow’, the arrangement is not valid.
This is what our school holds. The principle is also applied when a person said, ‘I will be the guarantor [for
that person] for one month, therefore when the time elapses I should be discharged’. See al-Imam Abi
enforceability of the contract. The moment that the contract is enforceable determines the time at which the guarantor is liable.

5.3.2 A Jurisprudential Approach in Determining the Exact Time on which the Guarantor is Liable

a. Classical Debates on Etymological Aspect of the Islamic Guarantee

The classical debates on the etymological aspect of the Islamic guarantee could also contribute to some clues pertaining to the exact time the guarantor is liable. With regard to this, in the *Kasshaf al-Qina’*, for example, al-Buhuti suggests that the original word of ‘daman’ is derived from the word ‘damm’, which literally means ‘joining’ or ‘bring together’. On the other hand, Ibn ‘Uqail contended that the original word of ‘daman’ is not derived from the word ‘damm’ but from the word ‘damina’, which literally means ‘inclusion’ or ‘incorporation’.

As a consequence, the question of the exact time the guarantor is liable under a contract of guarantee is not consistent. As far as al-Buhuti is concerned it seems that the guarantor could be rendered liable either at the moment the contract is concluded or at some other times, both of which of course depends upon the intention of the parties. This due to the reason that under this approach there could be two different obligations (dhimma) in the contract of the guarantee; one the obligation of the principal debtor and second is the obligation of the guarantor.

The Ibn ‘Uqail’s approach however could suggests that the guarantor could be rendered liable at the time the contract is completed. This is because at the time the contract is completed the obligation of the guarantor is being incorporated into the obligation of the

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6 To some schools of law, like the Shafi’is and the Hanbalis, the word *daman* is common to connote the concept of the Islamic guarantee.
principal debtor. In other words, the obligation of the principal debtor is being established in the *dhimma* of the guarantor. Thus, the guarantor should be rendered liable together with the principal debtor at the time the contract is completed.

**b. Classical Debates on the Nature of Guarantor’s Undertaking**

The above is the method in which the time is determined through the etymological discussion. As such, there are some other methods that could help us in determining the time to which a guarantor is liable. At this point, it is observed that the nature of the guarantor’s undertaking could also help us to determine the issue. Again, the classical jurists were not unanimous in respect to the nature of a guarantor’s undertaking. At this point, the issue which arises is whether the undertaking could be regarded as specific, or absolute; and whether the obligation arises on demand or otherwise.

Thus, according to the Hanafis, the undertaking should be regarded as absolute; and it should be dependent upon the demand that has to be made to the guarantor. The Malikis, Shafi’is and Hanbalis, however suggested that the undertaking should be regarded as specific and it could arise even without a prior notice of demand.

In the *Hashiyat Radd al-Mukhtar ‘Ala al-Durr al-Mukhtar*, Ibn ‘Abidin (d. 1252H) has suggested that the Islamic guarantee is essentially the joining of the two *dhimmas* in respect of a principal debt. Therefore, the undertaking should be regarded as specific as it refers to the principal debt alone but not others. A similar construction of the Islamic guarantee could also be found in the *al-Mughni*. At this point, Ibn Qudama (d. 630H) has suggested that the basic meaning of the Islamic guarantee is to bring together the two *dhimmas* (i.e. the obligation of a principal debtor and a guarantor) in respect of a principal debt but not others.

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10 See Abi Muhammad 'Abdullah Ibn Qudama, *al-Mughni*, vol. 4, p. 590
It follows that upon completion of the contract, a guarantor will be rendered liable together with the principal debtor in respect of the debt. Thus, the obligation of a principal debtor will be established in the *dhimma* of the guarantor, and therefore he is responsible to the creditor at the time the contract is completed.\(^{11}\)

The Hanafis however have a different view as they contend that the undertaking should be regarded as absolute; and it should be dependent upon the demand that has to be made to the guarantor.\(^{12}\) Further, due to the 'collateral' nature of the Islamic guarantee, the principal debt is not established in the *dhimma* of the guarantor at the time the contract is concluded but after a proper demand has been made to the guarantor.\(^{13}\)

In the *Fath al-Qadir*, while defining the Islamic guarantee, Ibn Humam suggests that it is the joining of two *dhimmahs* (i.e. the obligation of a principal debtor and a guarantor) in respect of a possible demand from the creditor.\(^{14}\) This means that at the time the contract is completed, the creditor does not have the right over the principal debt from the guarantor but the right to claim, or demand, in the event of default.\(^{15}\) Note that the right over the principal debt and the right to claim is a different legal principle since in first the creditor could have a direct access to the guarantor's asset but not in the second. The basis for this argument has been made upon the fact that the initial promise of the guarantor was not to undertake the principal debt (in the sense that the guarantor being indebted to the creditor) but to give the right to the creditor to make a claim, of demand, from the guarantor in cases of default.\(^{16}\) In short, with this approach the Hanafis could

\(\text{\textsuperscript{12}}\) A reference could be made to the definition of the Islamic guarantee that has been offered by the Hanafis
\(\text{\textsuperscript{13}}\) This is what is meant by ‘*al-damm fi al-mutalabat min ghair an tanshaghila dhimma al-kafil*'; see Mahmud ‘Abdul Hamid al-Sayyid al-Dayyib, *Kafala al-Dayn fi al-Shari’ah al-Islamiyyah: Bahth Fiqh al-Mugaran*, p. 7 (n.d.)
\(\text{\textsuperscript{14}}\) See Imam Kamaluddin Muhammad bin ‘Abdul Wahid Ibn Humam, *Sharh Fath al-Qadir*, vol. 6, p. 283; see also Ibn Nujaym, *al-Bahr al-Ra’i’iq Sharh Kanz Daga’iq*, vol. 6, p. 321 (n.d.)
\(\text{\textsuperscript{15}}\) According to the Hanafis, to suggest that the guarantor is liable at the time of the contract is being concluded is to suggest that there are two different debts; one being in the *dhimma* of the guarantor and the other being in the *dhimma* of the principal debtor. This proposition is unmistakably unacceptable even to those who suggest that the guarantor is liable.
suggest that the liability of a guarantor does not arise unless and until there is a default and a proper demand has been made.

This approach is comparable to the modern practice of the law of guarantee. Thus, under the Malaysian legal system, for example, it has been suggested that the liability of a guarantor arises the moment the principal debtor defaults. In *Universiti Kebangsaan Malaysia v Zainal Abidin Ahmad & Anor* it was decided by the Supreme Court of Malaysia that a guarantor could not be rendered liable under a guarantee unless the principal debtor was in default under his contract with the creditor. Due to the collateral nature of the arrangement, the liability cannot arise unless and until there has been a default on the part of the principal debtor. Therefore, unless provided otherwise in the contract, the commencement of the liability is not dependent upon the following situations;

i. The creditor notifying the guarantor of the principal debtor’s default;

ii. The creditor making a demand on the guarantor;

iii. The creditor suing the principal debtor for the indebtedness;

iv. The creditor realizing other instruments of security to recover the debts.

Thus, unless and until the principal debtor defaults the guarantor will not be rendered liable.

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17 In *Keene v Devine* [1986] WAR 217 at 223, for example, it was held that the guarantor had no prestable obligation unless and until the debtor failed to pay; see also *Rickaby v Lewis* (1905) 22 TLR 130; see also *Pattison v Belford Union Guardians* (1856) 1 H & N 523; 156 ER 1309

18 [1988] 2 MLJ 303

19 See *Re Lockey* (1845) 1 Ph 509; see also *Moshi v Lep Air Services* [1973] AC 331 at 348

20 See *Hitchcock v Humfrey* (1843) 5 Man & G 559; see also *Moshi v Lep Air Services* [1973] AC 331 at 348; see also *Kwong Yik Bank v Transbuilder* [1989] 2 MLJ 301; see also *Re Tosrin ex parte Equity Finance* [1989] 3 MLJ 428

21 See *Belfast Banking v Stanley* (1867) 15 WR 989; see also *Bank Bumiputra v Esah binti AbdulGhani* [1986] 1 MLJ 16; see also *Bank Bumiputra v Doric Development* [1988] 1 MLJ 462; section 90 of the Malaysian Contracts Act is relevant to this point. It provides, ‘[m]ere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety’.

22 See *Evart v Latta* (1865) 4 Macq at 989, per L Westbury C; see also *Perwira Habib Bank v Wastecol Mfg* [1988] 3 MLJ 215; see also *Kwong Yik Finance v Mutual Endeavour* [1988] 1 MLJ 135 at 136;
5.4 Rights of a Creditor under the Islamic Guarantee

5.4.1 Right to Call a Guarantor

From the previous it appears that a guarantor will not be rendered liable unless the contract is valid and enforceable. Besides, it is also suggested that the obligation of a guarantor cannot arise unless and until the principal debtor is in default. These two main criteria should be met before the creditor is given the right to make his claim from a guarantor. In respect to this, Ibn Rushd points out that the creditor should prove that the principal debtor has defaulted in his payment.

5.4.2 Rights upon Default

Upon default a creditor will have the right to call upon a guarantor to settle the unpaid debts. At this point, default could be defined as the non-performance on the part of the principal debtor. Hence, if a principal debtor fails to fulfill his promise he could be said to be in default to the creditor. However, if the contract provides that the performance could be made upon certain terms, say thirty days, the principal debtor could not be regarded as in default until the thirty days expires. A corollary to this is that the creditor cannot enforce the guarantee until the principal debtor defaults. A clear example for this includes when the principal contract involves with the debt that will become due at future time, or *dayn ila ajal*.

As such, under the English common law, the determination of what default could mean will be dependent on the nature and terms of the principal contract. Thus in *Wshelfy v Federated European Bank Ltd.* the guarantor was freed from the guarantee since the principal debtor was not in default to the creditor.

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22 [1932] 1 KB 423
5.4.3 The Requirement of Demand

As previously stated, in the event of the contract being made upon certain conditions, the creditor will not have the right to call upon the guarantor unless such conditions have been satisfied.24 At this point, it is observed that among the conditions includes the serving of a proper notice of demand to the guarantor. Thus, if the serving of a proper notice has been made as a pre-condition, the creditor shall not be given the right to claim from the guarantor unless the notice has been properly served.

As such, in cases where the contract does not provide that notice of demand as a pre-condition, the question arises as to whether it could be implied in the contract. The jurists were not unanimous in the matter. Thus, from the definition of the Islamic guarantee, we could suggest that there are at least two groups that are concerned with the issue.

The first, that represents the Malikis, Shafi'is and Hanbalis, suggests that the notice could not be implied in the contract. At this point, if the contract did not provide a provision on the notice the creditor could have the right to call upon the guarantor when default occurs. Indeed, notice of demand is not an important element for this group. The situation would be different if the contract initially provides that the notice is important.

The second, that represents the Hanafis, suggests that the notice should be implied in the contract. At this point, the Hanafis contended that the notice is important to make the

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24 Perhaps a similar connotation can be found in the English common law, which is termed as 'conditions precedent'. With regard to this, Low Kee Yang has divided the condition into two types; the first is conditions precedent to the operation of the guarantee (contingent conditions), the second is conditions precedent to the guarantor's liability (promissory conditions); see Low Kee Yang, The Law of Guarantees in Singapore and Malaysia, pp. 117-120 (1992). In this context, a guarantor will not be bound by the guarantee if a condition precedent to the operation of the guarantee is not fulfilled. The simple technical reason for this is that the contract is inoperative, hence refutes the liability of a guarantor. Similarly, a creditor will not have the right call upon the guarantor if a condition precedent to the guarantor's liability is not fulfilled. Conditions precedent to the guarantor's liability include the conditions discussed in the earlier section, namely notifying the guarantor of default, making demand on the guarantor, suing the principal debtor and realizing securities.
guarantor liable to the creditor. The Hanafis has further contended that it is unacceptable to give the right to the creditor while the guarantor has not aware about the situation.

This classical principle of the Hanafis has been adopted in the modern Islamic legislations. In the Majalla, it is stated, “Kafala is to add obligation to obligation in respect of demand for something”. This follows that to establish his right a creditor has to make a proper demand on a guarantor.

5.4.4 Notice of Demand under English Common Law

Similar to classical Islamic law, the English common law also provides different opinion with regard to the necessity of a notice of demand prior to the enforcement of a guarantee. The general view was that a notice of demand is not necessary to give the creditor the right to claim from a guarantor. To quote the words of Phillips and O'Donovan, the learned scholars said, “There is no necessity for the creditor to make a demand upon the guarantor before enforcing the guarantee, unless the terms of the guarantee so require”. On a similar note Shankar J. in Kwong Yik Bank Bhd. v Chan Siok Lie & Ors. held that when a guarantee did not provide for a notice of demand to be served on a guarantor, the making of a demand for payment was not a pre-condition to make the guarantor liable. In this connection, His Lordship said,

“There is no general rule that in all cases, regardless of the terms of the document, a prior precise demand is a sine qua non to the commencing of an action. Nor is there any general rule that a prior notice must be given in all cases. The writ itself is a notice ... [T]here is no necessity for the creditor to make a demand upon the guarantor before enforcing the guarantee unless the terms of the guarantee so required”.

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25 Article 612 of the Majalla
27 [1989] 2 MLJ 305
28 Id. at pp. 308 & 309
However, there is also a body of opinion, which suggests that before a creditor is entitled to bring an action against a guarantor, a demand for payment has first to be made on the guarantor. In *Esso Petroleum Co. Ltd. v. Alstonbridge Properties Ltd.*⁹, for example, Walton J. expressed the view that when a debt was made payable on demand, the giving of a notice of demand was not a pre-requisite to the bringing of an action to enforce payment of the debt, but in the case of a surety, a demand was generally necessarily before an action may be brought. His Lordship said at p. 1483;

“I fully accept, of course, that where there is a pre-existing debt which is payable ‘on demand’, such a demand (other than the service of proceedings) is not a pre-requisite to the bringing of an action to recover that debt ... [W]here the character in which payment is required is that of surety, a demand is, in general, necessary”.

A similar view was also expressed by Lloyd J. in *General produce Co. v United Bank Ltd.*, ³⁰ where Lloyd J. in commenting on a creditor’s duty to give notice of demand to a guarantor said that ‘Normally where a debt is repayable on demand it is not necessary for the creditor to make a demand before bringing his action. It is otherwise in the case of a guarantee. If a guarantor is liable on demand he cannot be sued until after a demand has been made on him’.

In practice, a guarantee will normally provide that before a creditor is entitled to call upon a guarantor to make payment under the guarantee, a notice of demand must first be served on the guarantor. ³ⁱ In such a case, the duty to serve the notice by the creditor will be construed as a condition precedent to the liability of the guarantor. This follows that the liability of a guarantor will not arise until he is served with a proper notice of demand.

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²⁹ [1975] 1 WLR 1474  
³⁰ [1979] 2 Lloyd’s Rep. 255  
³¹ In *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri Bin Wan Rashid v Kwong Yik Bank Bhd.* [1989] 3 MLJ 155, it was decided by the Supreme Court in Malaysia that when a guarantee expressly provided that a notice of demand was to be given to a guarantor, a creditor had no cause of action against the guarantor until a demand for payment had been duly made under the guarantee. An example for this is a guarantee to pay “on demand all money which may from time to time hereafter be owing or unpaid” or a guarantee, which requires the creditor to request payment of the principal debt before proceeding against the guarantor.
On another circumstances, the condition of the demand could also mean that the creditor would be denied from relying upon a principal debtor clause in the guarantee.  

5.4.5 Right of Free Choice

It is well accepted that when the principal debtor defaults the creditor will have the right to call upon the guarantor to settle the unpaid debts. However, as Ibn Rushd has suggested the actual default should have first been proven; and the burden of proof lies upon the creditor. Thus, once the creditor is able to show that the principal debtor has failed, he is entitled to bring a legal proceeding against the guarantor to recover the unpaid debts. At this point, all the classical jurists agreed that the guarantor should be held responsible to the creditor for the non-performance. Further, the jurists also agreed that the creditor should have the right to realize the guarantor's property in order to recourse the unpaid debts.

As such, although the guarantor is rendered responsible to creditor for the non-performance this does not mean that the principal debtor is freed from his obligation. Indeed, the principal debtor is still liable and his obligation has not been extinguished by the mere undertaking of the guarantor. At this point, one could suggest that both the guarantor and the principal debtor are liable to the creditor. This follows that, under the Islamic guarantee, the creditor will have an alternative in order to recourse the unpaid debts.

32 See Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri Bin Wan Rashid v Kwong Yik Bank Bhd. [1989] 3 MLJ 155

33 In the Justinian of the Roman, it was provided that a guarantor cannot be sued before an 'excussion' (seizure) has been made from the principal debtor. In this context, the rule of beneficium excussionis personalis has further stipulated that when suing the guarantor, the creditor had to prove that he had 'excussed' the principal debtor first. See Ernst J. Cohn, 'The Form of Contracts of Guarantee in Comparative Law', [1938] ccxiv The Law Quarterly Review 220 at 226. Moreover if there was other collateral being charged, the creditor cannot render the guarantor liable unless he has exhausted the remedies from the charged collateral. This has been adopted in most civil law countries. The French Civil Code, for example, requires that the principal debtor's property be 'discussed' by the creditor before the latter can proceed against the guarantor. See detailed discussion on the subject in Ralph Slovenko, 'Suretyship', [1965] xxxix Tul. L. Rev. 427 - 490
In short, the non-performance or 'failure' on the part of the principal debtor has given right to the creditor to make a claim either from the principal debtor or the guarantor. At this point, the word 'failure' has been defined to include situations in which the principal debtor has been declared as absent, or unable, or deceased. Further, it also includes situations in which the creditor has experienced stark difficulties in obtaining his debts from the principal debtor. At this point, al-Musi explains;

"The previous view of Imam Malik is that the creditor should be given the right to choose either the principal debtor or the guarantor. Therefore, if it is evident that the principal debtor is absent, or death, or at present but faces with some difficulties with regard to the payment, the creditor should be given a free choice to call upon the guarantor".34

This is the previous view of the Malikis and a similar stance could also be found in other classical manuals of the Islamic law. Thus, it appears that so far as the issue is concerned the classical jurist maintained that in the event of default the creditor will have the right of free choice either to make a claim from the principal debtor or the guarantor.

However, when the principal debtor is available, i.e., in present and able to settle the debts, but has avoided to do so, the classical jurists were not unanimous on the matter. At this point, it seems that the standard opinion is to give the creditor a free choice so that he can make up his mind either to call upon the principal debtor or the guarantor. The new version of the Malikis however contended that if there is proof that the principal debtor is available, then the guarantor should have first exhausted the remedies from the principal debtor.

a. The Standard Opinion35

Most of the classical jurists36 hold the opinion that the creditor is free to call upon a guarantor even though the principal debtor is proven to be solvent and is able to make the

34 See Muhammad bin Ibrahim bin 'Abdullah al-Musi, *Nazariyyat al-Daman al-Shakhsi*, p. 466 (n.d.)
35 In this context, the standard opinion means the opinion of the majority of the classical jurists.
payment. This view has been made based upon the fundamental principle of contract law as well as the theory of the amalgamation of the obligations.

In relation to this, al-Kasani said, ‘due to the basic notion of the Islamic guarantee, which is created upon the amalgamation of one dhimma into another, [i.e. the obligation of the principal debtor and the obligation of the guarantor] the creditor shall have the right of choice [to make a claim either from the principal debtor or from the guarantor] if there is a default’. 37

In a similar vein, al-Sharbini al-Khatib also said, ‘and for the creditor, he has the right to make a claim either from the guarantor or the principal debtor. This freedom of choice shall mean that he has the right to choose one of them; and it also shall mean that he has the right to make a claim from both of them simultaneously’. 38

Again, in the Mughni, Ibn Qudama said, ‘and for the creditor, he has the right to make a claim either from the guarantor or the principal debtor. This right is given to the creditor because the obligation [to pay] has been established in the dhimma of the guarantor [at the time the contract is concluded]. At the same time, the obligation of the principal debtor [to pay] has not been extinguished from his dhimma. Therefore, in addition to the guarantor, the creditor has also the right to make a claim from the principal debtor.’ 39

In short, most of the classical jurists hold the view that in the event of default, the creditor shall have this right of choice even though it is proven that the principal debtor is able to make the payment. This right arises on the basis that the obligation to make the payment has been established in the dhimma of the guarantor at the time the contract was concluded. Further, it was also submitted that the guarantor should be rendered liable

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36 These include the Hanafis, the Shafi'is and the Hanbalis
37 'Ala'uddin Abi Bakr bin Mas'ud bin Ahmad al-Kasani, Bada'i al-Sana'ifi Tartib al-Shara'i, vol. 7, p. 3423 (1986)
38 Muhammad al-Sharbini al-Khatib, al-Iqna' fi Hilla Alfadh Abi Shuja', vol. 1, p. 289 (1940)
39 Abi Muhammad 'Abdullah Ibn Qudama, al-Mughni, vol. 4, p. 605 (n.d.)
based upon his promise. At this point, the Prophet used to say, 'The Muslims shall fulfill their promises'.

As against the principal debtor, his obligation has not been extinguished and therefore he is not freed from his principal contract. This means that through the Islamic guarantee the principal debtor will be held responsible together with the guarantor. This follows that in the event of default the creditor shall have the right to choose either to call upon the principal debtor or the guarantor or both simultaneously for the settlement of the unpaid debts.

b. The Malikis' Stance on the Issue

The Malikis have a different opinion. In Bulghat al-Salik it is mentioned that although in his first opinion Imam Malik agreed that a creditor has a free choice, then he withdrew his opinion by suggesting that a creditor does not have the right to call upon the guarantor if the principal debtor exists or is able to make the payment. In this regard, Imam Malik said, 'our first opinion was based upon a practice of the people of Fass, which is more appropriate to the people of that time'. Thus, at that time the creditor was given the right to choose. However, in the course of development, Imam Malik has changed his opinion, so that it appears that Imam Malik has suggested that the creditor should have first recourse to the payment from the principal debtor if there is proof that he is able to do so. At this point, Imam Malik said that the fundamental concept of the Islamic guarantee should not be read to mean that a creditor has free choice to call upon the guarantor if the principal debtor is proven to be solvent and able to make the payment. Thus, the creditor should have first exhausted the recourse from the principal debtor unless there was an agreement that the creditor has the right to call upon the guarantor without first going after the principal debtor.

41 In the Hashiyat al-Dusuqi, al-Dusuki said, 'In cases if the guarantee is given in respect of the six situations [i.e. alive or death; present or absent; straightforward or difficult] or it is stipulated in the
In al-Mudawana al-Kubra, Sahnun reported that ‘when I asked is it possible for the creditor to call upon a guarantor while at the same time a principal debtor exists and is able to make the payment, Imam Malik responded that it is not possible. In this context, Imam Malik contended that the creditor should have first exhausted the recourse from the principal debtor. However, if the creditor did not obtain a full remedy from the principal debtor then he is allowed to call upon the guarantor’. 42

Therefore, it appears that the Malikis will not allow the creditor to call upon the guarantor unless a prior agreement has been made or the resource is not enough to cover the debt of the principal debtor. 43 In the Jawahir al-Iklil, al-Azhari added, ‘in cases of default, a creditor should not have the right to call upon a guarantor if the principal debtor exists or is able to make repayment. This is based upon the second opinion of Imam Malik that is reported in al-Mudawana al-Kubra. This is also what most of the scholars in our school have accepted. In this regard, the opinion has also been accepted by Ibn al-Qasim who has practiced and adjudged the same’. 44 In addition, Ibn Hajib supported that a creditor should not be given the right to call upon the guarantor if the principal debtor exists and he has the source make such repayment. 45

In summary, the Malikis do not allow the creditor to call upon the guarantor except in three situations. These three situations include;

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43 This proposition of the Malikis might be comparable to the guarantees in the Roman civil law. In respect to this, the Roman civil law does not only gives the guarantor the right to choose but also the right to compel the creditor to sue the principal debtor before having recourse to the guarantor unless the creditor could show that such a proceeding would be futile because the principal debtor was absent or insolvent or unless the guarantor had expressly waived this right. Furthermore the Magna Carta contains a provision that preventing the Crown from distraintg a guarantor as long as the principal debtor is sufficient for the payment of the debt. See John Phillips and James O’Donovan, The Modern Contract of Guarantee, p. 458 (1992); see also H.A. de Colyar on Guarantees (3rd ed.) p. 148 (1897); see also P.K. Jones, ‘Roman Law Basis of Suretyship in Some Modern Civil Codes’, (1977) 52 Tul.L.Rev. 129; see also W.D. Morgan, ‘The History and Economics of Suretyship’, (1927) 12 Cornell L.Q. 153
i. Where the principal debtor has been declared bankrupt or under liquidation

ii. Where the principal debtor is absent and he does not leave enough money for the repayment. If there is some money that amounts to enough for the repayment and there is no difficulty in realizing it, the creditor should not be given the right to call upon the guarantor

iii. Where there is a prior arrangement that gives the right to the creditor to call upon the guarantor

In addition, in the Bulghat al-Salik it is stated that the creditor could make the claim from the guarantor if the guarantee has been made upon the six situations, i.e., alive, or deceased, present, or absent, straightforward, or difficult. Thus, regardless of the situation of the principal debtor, whether he is available or not, the creditor will have the right to call upon the guarantor.

It is observed that the basis for the Malikis contention is perceived to be based upon the analogous deduction. At this point, the Malikis have compared the Islamic guarantee with that of the contract of al-rahn. Thus, similar to al-rahn the creditor in the Islamic guarantee is not allowed to realize the 'security devise' unless the principal debt cannot be recovered from the principal debtor. Therefore, the guarantor could not be called upon unless it is proven that the principal debtor is unable to make the payment.

Further, it was contended that the purpose of the Islamic guarantee is to give an alternative recourse for the creditor but not the absolute right. Hence, the creditor should not be given a straight right to call upon a guarantor unless it is proven that the creditor has exhausted all his efforts from the principal debtor. It was also contended that being collateral in nature, the guarantor should not be burdened with obligations that he does not benefit from. At this point, it seems that the initial engagement of the guarantor was to help both the principal debtor and the creditor, and therefore he should not be burdened

46 'Abdul Rahman al-Jaziri, Kitab al-Fiqh 'Ala Madhahib al-Arba'ah, vol. 3, p. 239
47 Ahmad bin Muhammad al-Sawi, Bulghat al-Salik, vol. 2, p. 157
with the principal debtor's obligations while he is still solvent and able to make the payment.

In the modern practice, the standard opinion on the issue has been adopted as a general rule for the Islamic guarantee. Therefore, in the Majalla it is stated that the creditor will have the right of free choice if there is a default on the part of the principal debtor. At this point, the creditor will have free discretion to make a claim either from the principal debtor or from the guarantor. In Article 644, the Majalla provides, *inter alia*, 'the claimant has an option as regards his demand. He can claim to take the thing, if he likes, from the surety, and, if he likes, from the person primarily liable'. Moreover it is also stated that once a demand has been made upon one of them, this does not necessarily relinquish the right of the creditor to make a demand upon another. A similar provision can also be found in the UAE Civil Transaction Code 1985. It is provided in Article 1078 (1) of the Code that the creditor has the right to make a claim either from the principal debtor or from the guarantor or both of them at the same time. The legal effect of such a provision is that the guarantor does not have the right to compel the creditor to recourse payment first from the principal debtor. However, if there is a stipulation stated in the agreement that the guarantor could have the right to compel the creditor then he should be allowed to do so.

This modern Islamic law, which is the genesis of the standard opinion of the classical jurists, is comparable to that of the English common law. In this regard, the English common law propounds that the creditor shall have the right either to call upon the principal debtor of the guarantor in the event the principal debtor has defaulted. It is suggested that as a general rule the creditor cannot be compelled to recourse the payment

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48 See Article 1078 (1) & (2) of the UAE Civil Transaction Code 1985. Under Article 1078 (1) it is provided 'as regard to the creditor, he has the right to make a claim either from the principal debtor or the guarantor or both simultaneously'. Under Article 1978 (2) it is provided 'The fact that the creditor has made a claim against one of them, this does not relinquish his right to make a claim against another'.

49 Under Article 1083 of the UAE Civil Transaction Code 1985, it is provided that it is permissible for the guarantor of a guarantor to make a stipulation in the guarantee that the creditor shall first recourse payment from the principal debtor'. It is submitted that although the Article is provided in relation to the guarantor of a guarantor, the general rule could also be applied in cases of a guarantor for a principal debtor.
first from the principal debtor. Nor is he obliged to realize collateral securities held in respect of the guaranteed debt before suing the guarantor. 50 In Moschi v Lep Air Services Ltd, 51 Lord Simon of Glaisdale made it clear where he held that it is not an implied condition of a guarantor's liability that the creditor proceeds first against the principal debtor before suing the guarantor or that he exercises simultaneous recourse against other guarantors. This also follows that the creditor is under no duty to realize securities provided by the principal debtor for the enforcement of the guaranteed obligation before proceeding against the guarantor.

Similarly, in Ewart v Latta, 52 Lord Westbury L.C. held that it is quite a misapprehension to suppose that there is any equity entitling the surety to compel the creditor to discuss the principal — unquestionably the surety has no such right unless he pays the whole debt.

A similar proposition is also found in the Malaysian jurisdiction. Thus in Bank Bumiputra Malaysia Bhd. v Esah binti Abdul Ghani, 53 it was decided by the Federal Court that a guarantor had no special right to demand that a creditor call upon a principal debtor to pay off the principal debt before asking the guarantor to make payment under his guarantee. In fact, the creditor is also given the right to call upon the principal debtor and the guarantor simultaneously, all at the same time. 54 It is also decided that the creditor has no obligation to exhaust the security provided by the principal debtor before proceeding against the guarantor. 55

50 John Phillips and James O'Donovan, The Modern Contract of Guarantee, p. 460
51 [1972] 2 All ER 393 at 408
52 (1865) S.C. 36 at 41
53 [1986] 1 MLJ 16
54 In Malaysian International Merchant Bankers Bhd. v G&C Securities Sdn. Bhd. & Anor [1988] 2 MLJ 471, Shankar J. held that it was opened to a creditor to proceed against a principal debtor and a guarantor simultaneously.
55 In Kwong Yik Finance Bhd. v Mutual Endeavour Sdn. Bhd. [1989] 1 MLJ 135, it was contended that when security was provided by a principal debtor, the right of a creditor to sue a guarantor did not arise until after the creditor had exhausted the security provided. In rejecting this contention, it was decided by Siti Norma Yaakob J. that a guarantor had no right to require a creditor to resort to the security provided by a principal debtor before he was entitled to call upon the guarantor to make payment under the guarantee.
Perhaps the nearest reason for this is that it is the duty of the guarantor to ensure that the principal debtor performs his obligation. Therefore, the creditor should have almost unbridled control over the remedies, which his contract gives him. This follows that the creditor should not be hampered in pursuing a specific course of legal action to recover his debts. In short, as a general rule the creditor cannot be compelled to recourse payment first from the principal debtor. Indeed, he has an unfettered discretion to choose whoever he finds convenient as to avoid extra expenses.

5.4.6 The Extent to which a Creditor can Claim from a Guarantor

The fundamental principle of the Islamic guarantee is that in the event that the principal debtor fails to perform his obligation the guarantor is deemed to make it good to the creditor. With regard to this, it is also observed that the obligation of the guarantor is the same as the principal debtor. This means that the guarantor shall not be obliged to perform for more than what the principal debtor is liable.

This follows that the extent the creditor could recover from the guarantor is the extent to which the principal debtor is liable. In other words, in the event of defaults the creditor is allowed to recover from the guarantor the sum of the principal debt but not additional costs. In the Bada'i al-Sana'i, al-Kasani has made up this point when he suggested that the extent of the demand should be restricted to the principal debt that is established in

56 Moschi v Lep Air Services Ltd [1972] 2 All ER at 408, per Lord Simon; Wright v Simpson (1802) 6 Ves 714 at 734, per Lord Eldon; Re Lockey (1845) 1 Ph 509 at 511, per Lord Lyndhurst
57 As such, there are some exceptional cases where the guarantor can compel the creditor to call upon the principal debtor. This includes the right that is given under equity, the right that arises from the contract of guarantee that was entered into by the guarantor at the debtor’s request and the right that arises from the initial agreement, i.e. under the arrangement there is a stipulation stated that in the even of defaults the creditor should have first proceeded against the principal debtor. See D.G.M. Marks and G.S. Moss, Rowlatt on the Law of Principal and Surety, p. 132; see also Moschi v Lep Air Services [1972] 2 All ER 393 at 401, per Lord Diplock; see also John Phillips and James O’Donovan, The Modern Contract of Guarantee, pp. 419 and 460
58 Cf. Under the Roman fideiusissio, a guarantor was not liable for any interest or penalty incurred by the debtor. See Phillip K. Jones, JR., ‘Roman Law Bases of Suretyship in Some Modern Civil Codes’, [1977] 52 Tul. L. Rev. 129 at 131
the dhimma of the principal debtor.\textsuperscript{59} When we look at this principle, it shows that the original obligation of a guarantor is to pay the principal debt but not any interest or penalty incurred by the principal debtor. At this point, it can be said that to claim for more than the guarantor is liable is to claim for what the other is not obliged to do so. If this is to be allowed it could possibly involve the practice of riba, which is prohibited under the Islamic law.

Some modern legislation however has been made contrary to the above classical principles. At this point, it seems that interest and penalty could be included as the obligation that the guarantor has to observe. Thus, in the UAE Civil Transactions Code 1985, for example, the creditor not only has the right to recover the principal debt but also all cost incurred in the process of the recovery. With regard to this the Code provides that the guarantee shall include the principal debt and its cost; and it also shall include all cost incurred during the process of recovery.\textsuperscript{60} Therefore, in cases of default the creditor has the right to claim from the guarantor all amounts including:

i. the principal debt

ii. damages that crystallizes from the non performance of the principal debtor, and

iii. all cost incurred during the process of recovery.

This follows that although in a limited guarantee where the guarantor could stipulate that his liability is restricted to certain amount of the debt, the creditor still has the right to call upon the guarantor to satisfy all costs including damages as well as the cost that incurred during the process of recovery. Such provision, in the writer’s opinion, does not only obviate the main objective of Islamic guarantee, that is, its gratuitous nature, but also to some extent it might infringe the cardinal principle of Islamic Shari’a; a person should not ask for what he has no right. However, it must be noted that if the parties in the

\textsuperscript{59} 'Ala’uddin Abi Bakr bin Mas’ud al-Kasani, Kitab Bada’i al-Sana’i fi Tarbih al-Shara’i, vol. 6, p. 10

\textsuperscript{60} See Article 1067 of the UAE Civil Transactions Code 1985
contract agree that the guarantor shall be liable to all costs that result from the arrangement, then the creditor should be given the right to recover his debt up to the agreed terms.

5.5 Rights of a Guarantor under the Islamic Guarantee

The onerous liabilities, which fall upon the guarantor who assumes the obligation of a guarantee, are offset to some extent by the rights given by law. These rights are, of course, consistent with the fundamental principles of the guarantee. One of the principles is that the principal debtor is primarily liable for his own debt while the guarantor assumes secondary obligation, dependent upon the principal debtor’s default.

Thus, in view of this cardinal principle of the Islamic guarantees, the law provides that a guarantor under a guarantee shall be given the right of exoneration, the right to be indemnified and the right of defenses.

5.5.1 Right of Exoneration

In parallel with the fundamental principle of the Islamic guarantee, the law gives the guarantor a reasonable right to defend himself from the guarantee. Having accepted that the principal debtor is primarily liable for his debt, the guarantor should have all possibility to compel the principal debtor to make his debt good.

In relation to this, it is stated in classical works on the Islamic guarantee that before payment has been made the guarantor should have the right of exoneration. The guarantor is entitled to call upon the principal debtor to exonerate him from any liability that might arise from the guarantee.\(^6^1\) This right arises only if the guarantee has been given upon the

\(^6^1\) It is interesting to mention at this point that in the classical works the guarantor does not only have the right to call the principal debtor to release his obligation but to some extent he has also the right to call the creditor to the same objective. In this regard, in the al-Khurshi 'Ala Mukhtasar Khalil it is stated that when the debt is due the guarantor has the right to call the creditor to release his liability if it is evident that the
request of either from the principal debtor or the creditor. Thus, in the *al-Mughni*, Ibn Qudama said that the guarantor should have the right of exoneration if the guarantee is given upon request and the creditor has made a proper demand. Similarly in the *al-Kasshaf al-Qina’*, al-Buhuti suggested that before payment has been made the guarantor has the right to call upon the principal debtor to release him from the guarantee.

The basis for such right was made upon the fact that the principal debtor is, at first instance, rendered liable for his own debt. At the time the guarantee is given, the obligation to pay rests upon the principal debtor’s *dhimma* and this obligation is not extinguished unless and until the principal debt has been paid. It seems therefore that this right of exoneration arises the moment the liability is incurred by the principal debtor.

It is worth mentioning at this point that this right is given not as a mere calling of the principal debtor to satisfy the debt. Indeed, the guarantor has the right to compel the principal debtor to make the payment. In the *Kitab Mawahib al-Jalil*, al-Hattab has made it clear when he said that in the event that the creditor makes a demand the guarantor does not only have the right to call upon the principal debtor but also to compel the principal debtor to satisfy the debt.

This coercive right, however, is much more relevant when it is proven that the principal debtor is sufficient and is able to make the payment. In respect to this, al-Musi has made several propositions with regard to the right of compulsion. According to al-Musi, the situations where the right is given include cases where the guarantee has been made upon the six situations, among others the principal debtor is at presence, the principal debtor

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65 The six situations include alive or deceased, present or absent, straightforward or difficult.
is well-off and it is proven that the principal debtor has unnecessarily delayed the payment.\textsuperscript{66}

Thus, before payment is made the guarantor has the right to be exonerated, and the basis for such right is upon the obligation that still exists in the dhimma of the principal debtor. Under the English common law, the right is normally implied from the agreement. In this regard, both Phillips and O’Donovan said,

"An express contract of indemnity between the principal debtor and the guarantor may confer upon the guarantor a right of exoneration, as distinct from a right of reimbursement of losses sustained by reason of his liability as guarantor. It appears that in such a case the guarantor might be able to maintain an action against the principal debtor for exoneration even before he is sued by the creditor where the debtor covenants not merely to indemnify the guarantor but to ‘save, protect, defend and keep him harmless’ from all debts and liabilities and all actions in respect of such debts and liabilities".\textsuperscript{67}

In \textit{Re Anderson-Berry},\textsuperscript{68} Lord Hanworth M.R. said, “... there is a right on the part of the surety to exoneration by his principal, and that as soon as any definite sum of money has become payable to the creditor, the surety has a right to have it paid by the principal and his own liability in respect of it brought to an end ...”.

In short, as the duty of the guarantor is to see that the principal debtor performs his obligation, the guarantor is given the right to compel the principal debtor to perform his obligation and thus release him from the guarantee. In \textit{Moschi v Lep Air Services},\textsuperscript{69} Lord Diplock suggested that where the contract of guarantee was entered into by the guarantor at the principal debtor’s request, the guarantor has the right in equity to compel the principal debtor to perform his obligation to the creditor.

\textsuperscript{66} See Muhammad bin Ibrahim bin ‘Abdullah al-Musi, \textit{Nazariyyat al-Daman al-Shakhsi}, p. 504
\textsuperscript{67} John Phillips and James O’Donovan, \textit{The Modern Contract of Guarantee}, pp. 478-479
\textsuperscript{68} [1928] 1 Ch. 290 at 304
\textsuperscript{69} [1972] 2 All ER 393 at 401, per Lord Diplock
Apart from the right of exoneration, the English common law also provides another relief, which is available under the equity as a means to mitigate the guarantor’s hardship as imposed under the common law. This relief is called as *quia timet* action. *Quia timet* is intended to protect the guarantor from first having to pay the debt. In this regard, it said that the guarantor should be given the right to remove the cloud that hanging over his head before it starts to rain.\(^{70}\)

5.5.2 Right of Reimbursement

It is mentioned in the *al-Mughni* that if the payment is made out of generosity without the intention of reverting a claim from a principal debtor then, the guarantor will not be entitled to any right of reimbursement.\(^{71}\) At this point, the payment will be regarded as being made on the basis of gratuitousness where all sums of money paid under the guarantee will be regarded as a donation. Therefore, a general principle of donation will apply and the guarantor will be denied from any right of reimbursement since the principal debtor has no obligation as against the guarantor.

On the other hand, if the payment is made with the intention of reverting the claim back from the principal debtor then there is difference of opinions between the classical jurists. At this point, we shall reduce our discussion to cases that include the payment that has been made upon a valid request of the principal debtor and cases that include the payment that has been made voluntarily.

As far as the payment that has been made upon a valid request from the principal debtor, the majority of the classical jurists agree that the guarantor shall be given the right to reimbursement.\(^{72}\) With regard to this, Ibn Humam suggested that in the event the

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\(^{70}\) See John Phillips and James O’Donovan, *The Modern Contract of Guarantee*, p. 481

\(^{71}\) The principle is applied even though the payment is being made upon the request from the principal debtor.

\(^{72}\) At this point, some of the classical jurists like the Zahiris, Ibn Abi Layla, Ibn Shibrimah and Abu Thawr suggested that a guarantor does not have the right of reimbursement even though the payment has been made out of the request. The basis for this contention is that upon completion of the contract of guarantee,
guarantor has entered into the contract at the request of the principal debtor, he should have the right to be reimbursed from the principal debtor upon what he has paid. Similarly, in the *al-Mughni*, Ibn Qudama said that when a principal debtor has called for a person to be his guarantor and has asked him to make payment then the guarantor is entitled to the reimbursement from the principal debtor.

Again, the basis for the right was made upon the obligation that exists in the *dhimma* of the principal debtor. Having requested the guarantor to make repayment, the principal debtor is regarded as indebted to the guarantor. Therefore the guarantor is allowed to make a claim against the principal debtor not on the basis of contract but upon the basis of obligation that the principal debtor owes to the guarantor. The principal debtor is indebted to the guarantor.

In the *al-Muhalla*, it is stated that in the event that the guarantor has voluntarily entered into the contract, the principal debtor shall be released from all of his obligations. At this point, the guarantor does not have the right to be reimbursed except if the contract has been entered upon the request of the principal debtor. Again, the reason given was that the principal debtor was being regarded as having indebted to the guarantor. In the *Fath al-Qadir*, Ibn Humam said that the consequence of the request is that it gives the guarantor the right of reimbursement on the basis of the indebtedness. In other words, having requested the guarantor to make payment means that the principal debtor is asking the guarantor to advance his money on his behalf. This follows that the basis for the claim is not made on contract but upon the debt.

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the obligation of the principal debtor is transferred to the *dhimma* of the guarantor. It seems therefore the principal debtor would not have any commitment in the arrangement. It also seems that the denial of the right, as far as this group is concerned, is not made upon the 'gratuitous' criterion but upon the extinguishments of the obligation that held by the principal debtor.

73 See Imam Kamaluddin Muhammad bin ‘Abdul Wahid Ibn Humam, *Sharh Fath al-Qadir*, vol. 7, p. 188 (n.d.)
74 See Abi Muhammad bin Ahmad bin Sa’id Ibn Hazm, *al-Muhalla*, vol. 8, p. 111 (n.d.)
75 Ibid.
76 Imam Kamaluddin Muhammad bin ‘Abdul Wahid Ibn Humam, *Fath al-Qadir*, vol. 6, p. 304
It is worth explaining at this point that the classical jurists have translated the word ‘request’ to mean any action from the part of the principal debtor, which has given rise to another obligation in the dhamma of the guarantor.

It appears, therefore, if the element of the obligation does not exists then the guarantor will not have a locus standi for the reimbursement. Instead, the guarantee will be regarded as a gratuitous one. With regard to this, Ibn Humam said that in the event that the guarantee has been entered into voluntarily and the payment is made out of his generosity then the guarantor should not have the right for reimbursement since it is regarded as a gratuitous act. At this point, all sum of money will be regarded as a donation.

In short, the basis for reimbursement is made upon obligation that exists in the dhamma of the principal debtor and the debt that the principal debtor owes to the guarantor. This follows that if the above elements disappear the guarantor would not have the right for reimbursement. In view of the above, the negative intention to revert the claim from the principal debtor is a prima facie that the guarantor would not have the right for reimbursement. On the other hand, the payment that has been made at the request of the principal debtor is a prima facie that the guarantor would have the right to reimbursement.

A similar rule has been adopted in the Majalla where in Article 657 it is mentioned that when a person has become a guarantor at the request of the principal debtor then he has the right to be reimbursed from the principal debtor’s property. A similar principle has also been adopted in the modern Islamic legal practices. Thus, under Article 1090 (1) of the UAE Civil Transactions Code 1985 it is provided that a guarantor does not have the right for reimbursement unless the guarantee has been given upon the request of a principal debtor or the principal debtor has ratified the guarantee after he learns of its existence and the guarantor has accordingly made a payment.
Under the English common law, the right of reimbursement can either be expressed or implied from the agreement. In cases where the agreement has expressly mentioned that the guarantor has the right of reimbursement then such right will be referred to the terms and conditions of the contract. However, in practice the guarantee seldom confers such an express right of reimbursement. In such a case, the right has often been implied from the agreement. With regard to this, the right of reimbursement is readily implied whenever the guarantee is given at a valid request of the principal debtor unless the guarantee provides otherwise.

However, if no request has been made, the law as a general rule will refuse the right of reimbursement. In Owen v Tate,\(^77\) the debtor obtained a GBP 350 loan which was secured by a charge by way of legal mortgage on the property of Miss L, who later consulted the plaintiff who offered to help her to get her deed back by becoming the guarantor to the loan. The plaintiff was neither asked by the debtor, who apparently objected to the release of Miss L's deed nor did he consult them before doing so. When he brought an action against the defendant seeking reimbursement, the court held that since he had acted behind the back of the defendant in order to oblige another, and despite the protest of the defendant, it would not be just and equitable to give him the right of reimbursement.

A similar position has also been adopted in the Malaysian jurisdiction. In relation to this, the Malaysian Contract Act 1950 provides that 'in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but not sums which he has paid wrongfully'.\(^78\)

Although on the surface of this statutory provision one could suggest that in every contract of guarantee there shall be an implied right of reimbursement, from the decided cases the motive of the contract shall be made clear. At this point, an antecedent request

\(^77\) [1976] QB 402; [1975] 2 All ER 129
\(^78\) See section 98 of the Malaysian Contract Act 1950
is an important element, which could secure the right of reimbursement. It is not surprising therefore that the Malaysian courts will only revert to the above statutory provision when there is a valid request has been made that the guarantor shall pay the debts.79

It appears therefore that if the guarantee is given without a prior request from the principal debtor, the guarantor will not have the right of reimbursement. However, as far as the English common law is concerned, in such a situation the law will normally provide the guarantor with the right of restitutionary claim. On this basis, a guarantor can recoup the amount he pays in reduction of the principal debt if he satisfies the following conditions;

i. that he made the payment under the compulsion of law, not under a mere moral compulsion
ii. that the payment was reasonably necessary in the interests of the creditor or himself or both the creditor and himself
iii. that the payment discharged the liability of a debtor, who as between himself and the guarantor, was primarily and ultimately responsible for the debt and consequently obtained the benefit of the payment by an absolute or pro tanto discharge.80

From the above, it seems that the basis of reimbursement is made upon the agreement that is completed between the principal debtor and the guarantor. In this regard, it is said that the right could arise from the express terms that contain in the agreement. Similarly, the right could also arise from an implied terms that insinuated from the agreement. In this context, a valid request from the principal debtor could be an implied term, if there is no an express term on the contrary.

79 See Muthu Raman v Chinna Vellayan (1917) AM 83
80 See John Phillips and James O’Donovan, The Modern Contract of Guarantee, pp. 501-502

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The situation is different if it is compared with the classical Islamic law. As suggested earlier, the basis of the reimbursement was not made upon the agreement but upon the obligation that exists in the dhimma of the principal debtor. In other words, the measure for this was whether the principal debtor has an obligation to repay the guarantor for the sum of money that he has paid in the guarantee. If it is proven that the principal debtor has an obligation then the guarantor should be given the right to be reimbursed from the principal debtor. This is because the principal debtor is regarded as being indebted to the guarantor. This follows that in cases if the guarantee has been given on the basis of ‘gratuitous’, the guarantor shall not have the right to be reimbursed.

5.5.3 The Extent to which a Guarantor can Claim from a Principal Debtor

In the *al-Mughni*, Ibn Qudama said, in cases where the guarantor has paid the creditor he is allowed to revert a claim from the principal debtor for what he has paid or the sum total of the principal debt. Thus, if the guarantor has paid for more than the sum total of the principal debt, he has no right to claim for what he has paid, only the sum total of the principal debt. At this point, the surplus cost of the sum total that is paid will be regarded as a donation, *tabarru'*. This proposition of Ibn Qudama was being supported by most of the classical jurists including the Malikis⁸¹ and the Shafi’is.⁸²

In view of the above, it seems that the basis for such a claim was made upon the actual act that has been performed on behalf of the principal debtor. In other words, the guarantor is allowed to make a claim on the basis of what he has paid to the creditor. This includes cases where the principal debt has been paid in a different currency. In other words, the guarantor could make a claim from the principal debtor on that particular currency.

⁸¹ The Malikis are very consistent to the principle that the guarantor is allowed to revert a claim ‘for what he has paid’. In this regard, when Imam Malik was asked about his position with regard to the person who has paid a different kind of currency, the Imam asserted that the person should claim from the currency that he has paid. See ‘Abd al-Salam ibn Said al-Tanuki al-Sahnun, *al-Mudawana al-Kubra*, vol. 5, p. 267

⁸² See, for example, in Abi Zakaria Yahya bin Sharaf al-Nawawi, *Rawdat al-Talibin*, vol. 4, p. 267 (1992)
There is another group of the classical jurists who suggest that the basis of the claim is not made upon the actual act but upon what the guarantor has undertaken. In the *Bada'i al-Sana'i*, al-Kasani suggested that the guarantor could make a claim on the basis of what he has undertaken but not on the basis of what he has paid.\(^8\) With regard to this, al-Kasani argued that having paid the principal debt, even half of it, the guarantor possesses what is in the *dhimma* of the principal debtor, i.e. the whole of the principal debt. Therefore, he is allowed to make a claim for the whole of the principal debt. At this point, it seems that a clear basis for such a claim is the obligation that accrues in the contract, i.e. the principal debt. In respect to this, having performed his obligation, even half of it, the principal debtor is being rendered liable to the guarantor since he is regarded as indebted to the guarantor.

In the writer’s view, the first proposition seems to be more sensible than the second one. This is because a person should not be allowed to make a claim for what he has no right upon. At this point, if the case is allowed it is wondered if the transaction could involve the practice of *riba*, which is clearly prohibited under the Islamic law. Moreover, the first proposition seems to be in line with the spirit of the Islamic guarantee. As mentioned elsewhere at the above the purpose of the Islamic guarantee is to help the principal debtor, and if such a claim were allowed the whole purpose of the Islamic guarantee would be defeated.

However, if the performance releases the principal debtor from his principal contract then the guarantor should be allowed to make a claim for the whole debt.

### 5.5.4 The Guarantor's Defenses

There are various types of defenses available to the guarantor under the Islamic guarantee. While it is quite impossible to fit in all types of defenses, it is nevertheless desirable to discuss the issue under two main categories. With regard to this, the

\(^8\) 'Alauddin Abi Bakr bin Mas'ud al-Kasani, *Bada'i al-Sana'i*, vol. 6, p. 15
discussion may include defenses that refer to the contract of guarantee itself, and defenses that refer to the principal contract between the principal debtor and the creditor.

It is well accepted that one of the fundamental principles of the Islamic guarantee is that the guarantor is rendered liable collateral to that of the principal debtor. This follows that in the event that the principal debtor is discharged from his liability for whatever reasons the obligation of the guarantor should also cease to exist. This fundamental principle of the Islamic guarantee could be the basis for the guarantor’s defense when a creditor starts a proceeding against him.

Besides, the defense that is primarily available to the principal debtor is also available to the guarantor. At this point, the guarantor is said to have all sorts of defenses that the principal debtor has in respect to the principal contract. As such, if it appears that the principal contract is void by whatever reasons then the guarantor’s undertaking is also void. The result is that in this situation the creditor shall not have the right to sue the guarantor because the principal contract is void.

On another occasion, if the principal contract has been induced through duress, misrepresentation, undue influence or mistake, the contract could be vitiated and accordingly it gives the guarantor the right to defend himself on such grounds. A similar principle is also applied in cases where a principal debtor has not reached at the age of majority when he entered into a principal contract between him and a creditor.

As regard to the contract of the guarantee, various types of defenses are available to the guarantor. Similar to the principal contract, a general principle of contract law is applied in the contract of guarantee. Thus, the contract that has been induced through duress, misrepresentation, undue influence or mistake, or if it has been entered by a guarantor, who does not have a legal capacity, then the contract could be vitiated. At this point, if the creditor continues to bring his claim against the guarantor then he could possibly defend himself on such grounds.
An interesting point with regard to the contract of guarantee is that under the contract the parties can put on their own terms and conditions. In respect to this, as far as the guarantor is concerned, he can put certain conditions that favour himself. A clear example for this is that the guarantor can stipulate in the guarantee that before proceedings are brought against him the creditor should put all efforts to recover his debt from the principal debtor. At this point, if the creditor continues to bring his claim against the guarantor then he could possibly defend himself on such a ground. This can also include the foreclosure of the collateral security that is provided by the principal debtor.

5.6 Conclusion

In this chapter, issues such as the commencement of a guarantor’s liability, the rights of a creditor and the rights of a guarantor have dominated the discussion. It should be admitted at this point that to some extent the study has become difficult when in certain issues no direct classical provision is found. Moreover, in most cases the classical jurists were not unanimous in their opinions with regards to certain issues that are being discussed. Thus, a method has to be derived in order to get a clear picture of the classical Islamic guarantee, especially in matters that relate to the enforcement of such contract.

In determining the exact time at which a guarantor is liable, the writer has to develop his own method to reach at desired conclusions. At this point, three main issues have been referred in the discussion. This includes the different types of the Islamic guarantee arrangements, the classical debate on the definition of the Islamic guarantee and the classical debate on the nature of a guarantor’s undertaking. Through a careful study it is observed that there are two main criteria in determining the exact time the guarantor is liable. This includes the enforceability of the contract and the default that has occurred from the part of a principal debtor.

Thus, when these two criteria have been fulfilled a creditor shall have the right to call upon the guarantor. However, some classical jurists have suggested that this right that is
given to the creditor does not arise immediately. Instead, as suggested by the Hanafis, the creditor should have first served the guarantor a proper demand. This stipulation is more apparent when one reads the definition of the Islamic guarantee that has been put by the Hanafis.

The extent to which the creditor can make a claim from the guarantor should be similar to the exact amount of the principal debt. In other words, it is not appropriate for the creditor to claim for more than the principal amount of the debt. However, if there is a prior agreement between the two, the creditor shall have the right to claim for what has been included in their terms and conditions of the arrangement.

On the part of the guarantor, he has a similar equilibrium right in the arrangement. At this point, it is observed that the guarantor will have the right of exoneration, the right to be indemnified and the right of defense.

The right of a creditor to choose a course of action rests the most interesting issue in this chapter. At this point, it is observed that most of the classical jurists, including the Hanafis, Shafi'is, Hanbalis and old version of the Malikis, were of the view that a creditor should be given the right of choose in the event of defaults. In other words, in the process of recovering his debt the creditor shall have the right either to call the principal debtor, or the guarantor, or both simultaneously to settle the unpaid debts. This principle includes cases where the principal debtor is available and has no difficulties in making the repayment.

The new version of the Malikis, however has a different view with regard to the above matter. Thus, it was contended that in cases where the principal debtor is available and has no difficulties in making the repayment, the right to choose should not be given to the creditor. Instead, the creditor has to exhaust his recourse from the principal debtor first before going after the guarantor.
This opinion seems reasonable and therefore should be one of the alternative resolutions for current problems of law of guarantee in modern legal practice. This suggestion will be discussed in the next chapter.
PART 2

THE APPLICATION OF THE CLASSICAL ISLAMIC GUARANTEE IN MODERN ISLAMIC BANKING AND LEGAL PRACTICE
6.1 Introduction

The business of banking involves a high risk. This is explainable through the transaction of extending credit facilities to its customers. At this point, the bank is facing the possibility of loss if the customers do not return the debts to the bank’s account. From a legal perspective, it is imperative for the bank to ask for some forms of security to safeguard the risk of loss. This will not only protect the bank but also ‘reinforce’ the bank’s right to recover his debts. The guarantee, being simple and having less management costs, have been common in the practice of extending credit facilities.

This chapter is an attempt to examine the role of the guarantee in the business of modern banking. The contribution of the guarantee towards economic development will be the main focus for the discussion. With regard to the classical Islamic guarantee, the extent to which the rules have been applied in Islamic banking will also be examined in this chapter. At this point, a reference will be made to fatwas that has been issued by the authorized bodies in response to questions. Since there is not much legal decision on the issue, or perhaps none, the reliance on the fatwas has become important in the evaluating and assessing of the development of the classical Islamic guarantee in modern banking transactions.

6.2 Commercial Banks as the Loan Providers

Commercial banks as financial intermediaries are the mobilizers of funds from those with surplus funds to those lacking funds. These institutions receive funds as deposits from
customers or capital from shareholders and lend these out as loans and advances to persons and business units who need them. The practice of extending these loans and advances has become common and it is important for banking businesses.

Thus, the extension of credit facilities is one of the highest priorities in the banking business. The fact that bankers are businessmen, the main objective of their business is making profits; and bankers seek profits through lending and investing.

Clifton and Olin suggested, lending commands the second highest priority in the use of bank funds, for the simple reason that bankers are profit-seeking businessmen and that lending is the most profitable use they can make of their funds. Lending is something like one and one-half times as profitable as the banker's next-best alternative use of funds, investments for income, so it is no wonder that bankers usually prefer lending to investing.

In addition, commercial banks are also directed to extend their credit facilities according to the current needs and priorities of the nation. In parallel to government policies, these credit facilities have mostly been channeled for the purpose of national development especially in the fields of manufacturing, agricultures and infrastructures. Thus, a vast portion of credit facilities has been channeled to entrepreneurs with the hope that the credit could enhance economic development of the nation.

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1 See Clifton H. Kreps, JR. and Olin S. Pugh stated that in order of priority, the uses to which the bankers put their funds at their disposal are as follows; first, liquidity reserves; second, loans; and third, investment for income. See Clifton H. Kreps, JR. and Olin S. Pugh, *Money, Banking and Monetary Policy*, p. 63 (1967)

2 See Clifton H. Kreps, JR. and Olin S. Pugh, *Id. at p. 57*. The same motive of banking business also applies to the Islamic banks. The only thing that differentiates between the banks and the normal commercial banks is that besides profit-making the Islamic banks have also to consider moral objectives. See Sudin Haron, *Islamic Banking: Rules and Regulations*, p. 7 (1997)

3 Clifton H. Kreps, JR. and Olin S. Pugh, *Id. at p. 66*

4 In the case of Malaysia, for example, the government, through the Central Bank, has a direct control over commercial banks to maintain and establish high standards of banking practice, to protect both depositor's and shareholder's interests, and to change the bank's attitudes so that they would make a more significant contribution to the economic development of the country.

5 These are regarded as the most apparent priority areas in Malaysia as regards to banking lending transactions as they could help to attract more direct investment from foreign sources.
Credit extension could help to enhance social development, which benefits the general public. Through credit, the standard of living could be upgraded; investment would develop and production would grow. In short, credit is important and banking and the granting of loans are the two features that are synonymous that cannot be separated. In fact, the very existence of banks is based upon the loan-making activities.\(^6\)

However, the business of the banking is not escaped from risk. The banks are facing the risk of loss if due diligence has not been taken in the practice of granting a loan to its customers especially in the event that the credits extended are not returned to its account. Therefore, it is prudent for the banks to take a precautious step to avoid such a risk; and the taking of security is regarded as the most appropriate step in order to cover the unforeseen circumstances.

### 6.3 Islamic Banks, Loans, Finances and Security

Philosophically, the existence of Islamic banks was based upon the prohibition of riba and the excessive making of profits. Haron remarks that ‘the main principles of Islamic banking comprise of prohibition of interest [i.e. riba] in all forms of transactions, and undertaking business and trade activities on the basis of fair and legitimate profit’.\(^7\)

However, this does not mean that the banks cannot make a fair profit. Indeed, profits are also one of the objectives of the Islamic banking. In respect to this, Mirakhor said that it is considered an injustice for Islamic banks if they are unable to provide sufficient returns to the depositors who entrusted their money to them.\(^8\) Here the banks will not be able to provide sufficient returns to their depositors if the banks do not make a reasonable profit.

Despite the fact that business and profits are also outlined as the main objective of

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\(^7\) Sudin Haron, *Islamic Banking: Rules and Regulations*, p. 7
Islamic banks, the banks are expected and encouraged to consider their moral obligations towards the community.9

Thus, similar to commercial banks, most of the Islamic bank’s profits are made from the full utilization of the customers’ funds. These funds are mobilized either in the form of loans,10 finances or investments. It is worth mentioning at this point that the Islamic bank like any other commercial bank, while mobilizing these funds cannot escape the risk of loss. The finance being extended may turn out to be a problem asset for the bank. The projects that are being financed may stumble upon the unforeseen problems. There is also a possibility that the contractors will not be able to carry on their projects. If this were to happen, a detrimental outcome could befall the bank, whose duties are not only to make profit but also to keep the customer’s monies in safe custody. Due care should be exercised, and therefore it is imperative for the bank to exercise sound financial policies11 including the taking of security.

6.4 The Need for Security in Loan Transactions

The extension of credit facilities to customers is one of the most important functions of both commercial and Islamic banks. In fact, a cursory glance at a ‘Balance Sheet’ of a typical commercial or Islamic bank reveals that the single largest asset item consists of loans, advances and finances to customers. As these incomes form the ‘bread and butter

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9 In Sura al-Zariyat, for example, the Qur’an reads, ‘And in their wealth and possessions (was remembered) the right of the (needy), him who asked, and him who (for some reasons) was prevented’. [The Qur’an; 51:19]. It is upon this principle that the Islamic banks should, while making profits, have to consider the welfare of the community. The Islamic banks are expected to be more sensitive to the needs of society, promote more social programs and activities, and make contributions towards the needy and poor families.

10 In Islam, the practice of granting loans to the people who are in need is not only seen as a means to upgrade the socio-life but also to hold with the teaching of the Qur’an. In this context, the Qur’an prohibits the accumulation of wealth to one person as the concept of ownership vests to Allah. This means that all that a Muslim owns are regarded as trust, and in cases of limp in the society he is responsible to make it good. In Surah al-Maidah, Allah s.w.t. said, “And to Allah belongs the dominion of the heavens and the earth, and all that is between them. He creates what He wills. And Allah is able to do all things”. [The Qur’an; 59:7]

11 According to Sudin Haron, the financing practices of Islamic banks are very similar to that of the conventional banks. The 5Cs, i.e., Character, Capacity, Capital, Collateral, and Condition, criteria will normally considered while extending credit facilities to customers. See Sudin Haron and Bala Shanmugam, *Islamic Banking System: Concepts & Applications*, pp. 120-126 (1997)
livelihood' of the commercial or Islamic banks, it is of critical and paramount importance that the banks must exercise prudence and care in evaluating the merits and viability of applications for loans, advances and finances and also in their credit management and credit control and follow-ups.

There has been a common practice among bankers to have their own guidelines regarding the extension of such loans, advances and finances. In the United Kingdom, for example, the acronym of 'CAMPARI' has been developed to ensure that the bank will not lose but gain more profit while extending credit facilities. In this context, the acronym 'CAMPARI' stands for C-Character; A-Ability; M-Margin; P-Purpose; A-Amount; R-Repayment; I-Insurance (security). Since the real practice of insurance cannot be applied in normal loan transaction, the bank has used security as the banker’s insurance against unexpected default.

The security is therefore important to cover the risk of loss. The priority of both commercial and Islamic banks is not only making profits but also protecting the welfare of others. In fact, the vast portion of the bank’s fund comes from depositors. It is mandatory for the bank to ensure that the monies deposited are in safe custody.

Security maximizes the banker's prospect in recovering most of their debts especially in cases when a customer has purposely avoided of making payment. Hence, it is prudent that the banks ask for adequate security to cover the debts from loss. With regard to this, Professor Sheridan remarks;

“A creditor may not doubt his debtor’s capacity to pay, but may doubt his willingness. A solvent but refractory debtor may have to be sued by an unsecured creditor, thus causing the latter trouble, expense (which he will

12 It is not the purpose of this chapter to discuss the banker lending policies.
14 Some others have used the alliterative 5Cs, viz, Character, Capacity, Collateral, Capital and Conditions.
15 A commercial bank does not only have legal but also moral, social and economic responsibilities to the depositors, the shareholders, the government and the country.
16 It was suggested that depositors supply more than 92 per cent of the bank’s funds. See Clifton H. Kreps, JR. and Olin S. Pugh, Money, Banking and Monetary Policies, p. 61
mostly get back when awarded costs, but will have to lay out, at least in part, first), nervous tension and delay in receiving payment. The secured but unpaid creditor, on the other hand, to whom some property of the debtor's has been appropriated by way of security (e.g., by mortgage) can generally sell the property himself or by order of the court”.  

Sometimes, the failure of a customer to pay on time may be based upon genuine reasons, such as the unavoidable decline in the economic growth. This could be the result of the local government monetary policies, or it could also be the result of the global economic decline. The effect of such situations then might be the winding up of the customer's businesses. Here, if is nothing has been put as security to safeguard the credits, the bankers might also have to wind up their businesses. Hence, the security does not only cover the risk of loss but also provide an alternative recourse when such a situation happens. As Professor Roy Goode remarks;

"The question which any lender has to consider is whether he can be sure that his loan will be repaid on the due date. The proven quality of the debtor company's management over a number of years may be sufficient assurance without the need for any special safeguards, but even well-run companies can be seriously affected by events over which they have little control: international incidents which affect supplies; adverse exchange rates; a trade recession; prolonged or repeated industrial action; the unexpected financial collapse of the borrower's own customers; and unforeseen reduction in demand for the borrower's product". 

Therefore security is vital in the business of banking. It will give a wider prospect to the bankers in recovering the unpaid debts. The fact that lending is a risky business, it is prudent for the bank to ask for some sort of security to cover the credit extended to its customers.  

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19 The capital lent does not only involve bank's capital but also a vast portion of customers' monies. In this context, the banks have to be careful with the funds and investments that have been entrusted to them where the bank should always be on guard against moral hazard. See Leong Toong Peng, The Business of Banking in Malaysia, p. 106
The taking of security would certainly affect the level of risk.\textsuperscript{20} In the Report of the Cork Committee, it is stated, "The creditor who stipulates for security does so with the specific object of minimizing his loss or avoiding it altogether in the event of the debtor’s insolvency. By taking security he acquires a proprietary interest in the mortgaged assets; only the equity of redemption remains the property of the debtor and available, in the event of his insolvency, for the general body of creditors. On the debtor’s failure, the secured creditor may resort to his security, which he is usually free to realize for his own benefit and at a time of his own choosing without reference to and independently of the insolvency, and without regard to the effect upon other creditors".\textsuperscript{21}

It is upon this theory that the notion of additional rights emerges. The security is not only meant to cover the unforeseen circumstances but also to reinforce the right of the banker in pursuing his recourse for the repayment. It is assumed that through security, the right of a banker will increase. With regard to this, the banker will have the right not only to recourse the payment from the customer but also from the security advanced to the bank. Hence, as Professor Sheridan said;

\begin{quote}
"A creditor seeks security when, for some reasons, he is not satisfied that the mere obligation of the debtor to pay him will give him a good enough chance of receiving all the money due to him. The giving of security is the making of an arrangement under which the creditor is to have some rights over and above the right to sue the debtor for the money if it is not duly paid".\textsuperscript{22}
\end{quote}

Further, in \textit{Burgess on Law of Loans and Borrowings}, Robert Burgess suggested that "the obtaining of security therefore confers on the lender rights additional to those deriving from the obligations of the borrower to pay the interest due and to repay the principal debt in accordance with the provisions of the loan agreement; it confers a right to look to some identified fund or property [see \textit{Singer v. Williams} [1921] 1 A.C. 41 (H.L.) at 49 \textit{per} Viscount Cave L.C.], or to some other person [such as a guarantor, see also see

\textsuperscript{21} As cited in Robert Burgess, \textit{Ibid.}
\textsuperscript{22} L.A. Sheridan, \textit{Rights in Security}, p. 1

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Singer v. Williams [1921] 1 A.C. 41 (H.L.) at 49 per Viscount Cave L.C., for payment. 23

In conventional banks, the taking of security could also reduce the interest rate. This is proven in the practice of the CIBC Bank in Canada when it charges 18% on its unsecured credit card loans, 7.2% for a five-year car loan secured by the car, and only 5.2% for a loan secured by a first charge on a house for a term of up to 25 years. 24

In short, it appears from the above that, as far as the business of banking is concerned, be that conventional or Islamic, security serves two main functions. First, from economic perspective, security is regarded as insurance for the credit that has been extended to the customers. Second, from the legal perspective, security is regarded as an additional right given to creditors to recourse payment for credit that has been extended to the customers. Thus, the taking of security does not only protect the banks from suffering loss but also to confer upon them an additional right in respect to recourse payments due to them.

The taking of security is also vital because the law so requires. At this point, the banker takes the security not because he is worried about the ability or readiness of a customer to repay, but because the loan could not otherwise be lawfully made. 25 In some countries, the law requires that prior to the granting of credit facilities, bankers have to consider that adequate security is available. In relation to this, the Malaysian Banking and Financial Institutions Act 1989 26 provides that no licensed institution shall give to any person any credit facility without security. 27 Therefore, security is important and need to be observed.

25 For example, a trustee is not allowed to lend money to individuals without security, unless specifically authorized to do so by the instrument creating the trust.
26 Section 60
27 Although some may argue that this legal impediment restricts the freedom of a bank to formulate its own lending policies, regard must be had to protecting the interests of depositors, shareholders, and creditors of the lending institution. It is worth mentioning that such legal regulation enables the government to ensure that lending polices of financiers accord with the objectives of national development. Further, it should also
6.5 The Advantage of Secured Transactions over the Unsecured

The essence and importance of security is apparent when the law gives priority to the secured creditor over unsecured creditors. At this point, the law recognizes that when the principal debtor faces financial distress, the secured creditor shall have the right over the security for the purpose to recover his debts. In relation to this Professor Baird remarks;

"In other context, the primary purpose of a security interest may be to give a secured creditor a priority over a firm's other creditors in the event that the firm encounters financial distress and cannot meet its fixed obligations. In the case of the equipment financier, however, the security interest may serve a different purpose. A lender may lend because it is confident that the procedures available to it in the event of default will allow it to realize much of the amount of the loan in the event of default. Thus, the lender may take a security interest in large part because its rights upon default against the debtor are greater than they would be if it did not take security". 28

In addition, the taking of security is also important to avoid the rule of pari passu in cases of bankruptcy. 29 According to McCormack, in cases of bankruptcy, the preferential creditors including the secured creditors are paid ahead of general creditors whose rank comes after the secured creditors. At this point, the unsecured may only have a little hope of recovering. 30

In Malaysia, when the debtor is declared bankrupt, the Official Assignee will gather together the bankrupt's assets and realize them for the benefit of all the creditors, i.e. bankers. However, if an asset is in the hand of the banker as security for a debt, he is able to realize the security, settle the debt and hand over the balance, if any, to the Official

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29 According to Professor Roy Goode, one of the reasons the creditors take security is to avoid the rule of pari passu distribution. By taking security, the creditors are able to ensure themselves a privileged status, i.e. by establishing a real right over security or by having recourse to a third party (a guarantor). See Roy Goode, Commercial Law, p. 636
30 See Gerard McCormack, Id. at pp. 6-7
Assignee. In the above, the Official Assignee has no right to claim from the banker unless the value of which exceeds the total amount of the debt. The situation is different if the banker does not have any security over his debt. The banker, as unsecured creditor, has nothing but to depend upon the distribution made by the Official Assignee.

Hence, it appears at this stage that, for the unsecured banker, the reliance could only be made upon contract, while for the secured banker, it is not only be made upon contract but also upon security. In a survey conducted in the United Kingdom, it shows that about 75% of the unsecured creditors get nothing from the insolvent debtors. Further, it was also stated that only 2% of the unsecured creditors could expect to receive 100% returns.

To some customers, the willingness of the bank to accept personal security may obviate the necessity of having to realize assets at inconvenient time, while such a course may permit a customer for business purposes to continue the business rather than causing it to fold, a result which 'often in the ends proves advantageous to the other creditors, to the employees and to the community'.

6.6 Guarantees as Personal Securities

Guarantee is a personal security provided to secure credit facilities extended by banks. The difference between the guarantee and other real securities is that in the former the claim be made upon personal whilst in the latter the claim is made upon asset. Being the simplest and least expensive, the guarantee has become the most popular form of security mechanisms taken by the bankers.

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31 This might further be suggested that the true reliance is then upon the trustworthiness as well as the creditworthiness of the customer.
32 This is cited from Gerard McCormack, Secured Credit Under English and American Law, p. 7
33 Robert Burgess, Burgess on Law of Loans and Borrowings, para. 4.02, p. 4002
34 The guarantees are very popular in the business of private companies, international trades and even at the lower business level that involves the advance of cash and the purchase of goods on credit.
There are many reasons, which show that the guarantees are better than other types of securities. To mention a few, these include, the point that has been mentioned above, the simplicity and the cheapness of the guarantee arrangements. In this context, the guarantees are simple documents to execute and are very cheap as they attract only a nominal stamp duty. In contrast to other securities, the guarantees follow a simple procedure and if they are taken with due cares, the realization of which could be made through a simple demand on the guarantors. In short, under the guarantee, the creditor is ensured that the debt will be paid and obligation will be performed. This sort of assurance is difficult to be found in other forms of security, where under mortgage, for example, the creditor could only hopes that the value of the asset could cover the unpaid debt.

The advantage of the guarantees can clearly be seen when the value of assets does not represent the true market price in the event of defaults. With regard to this, the assets of a customer, which have been tendered as security, may look good at their book values but should realization be necessary, few assets would fetch the values shown. Thus, tendering a guarantor does not only mean to cover the debts but also to give extra rights upon the creditor to recourse his payment.

For the new entrepreneurs with good innovative ideas, expertise, and initiative to run a business but lack of capital, the traditional sources of credit are not available if they cannot provide enough collateral. Here, guarantees could help to solve the problem. At this point, the guarantees are vital because without which such persons may have not been able to begin their businesses.

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35 To execute the guarantee arrangements, the parties only have to put their signatures and registered the documents with the relevant authorities.
36 Subject to the general principle of the law of contract, such as fraud, mistake and misrepresentation, and subject that the guarantor does not dispute his liability under the guarantee instrument.
37 Other securities are governed by strict procedures in which case the failure to comply with such procedures would result to the invalidity of the instrument created. In Malaysia, for example, to create a charge the bank has got to go to either the land or district office to make necessary searches. This, of course, not only involves complicated procedures but also may attract various costs. For detail discussion on the procedures that involve the security arrangements in Malaysia, please see Ong Kok Bin, Banking Securities in Malaysia, (1993)
On the advantages of the guarantees, it is also observed that, from the economic perspective, the arrangement can reduce the banker's cost of credit. The fact that supplying credit facilities is a risky business means that it attracts various costs on the part of the banker as to monitor credit facilities that have been extended to its customers. This may include the cost of investigation, risk-assessment, supervision and collection of debts in the event that the debtor defaults. Therefore, by accepting guarantees as security, these costs, at least some if not whole, could possibly be vested upon the guarantors. In this context, potential guarantors are considered to be the best persons who can monitor the customers' behavior rather less expensively than the banks could.

On the part of the customers, the guarantees can provide a better chance to obtain loans with low interest rates. A creditworthy guarantor whose credit history is very well established and has a good relationship with the bank could possibly help a customer to obtaining loan with a low interest rate. This particularly happens when such a customer does not have a good experience in loan transactions, or his credit history has not been well established, like a fresh graduate student.

At this point, it appears, therefore, that the guarantees are important when (i) the principal debtor has not yet established a credible credit history; (ii) the principal debtor is a limited corporation, and the bankers are very concerned about the principal debtor's leveraged capital structure and relative lack of marketable assets; and (iii) the principal debtor wishes to borrow for a new project from a banker, a commercial bank with whom he has not dealt previously. As such, the guarantees are preferable to other types of securities, in which case the guarantees can support the application for loans from bankers who are not very convinced by the credit history of the principal debtor.

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38 Information obtained from an interview with Mr. Mohd. Azid Abu Saurah, a branch manager for Bank Bumiputra Commerce Berhad.
39 It is an established theory in the business of banking that the higher the risk involved in the lending transaction a higher interest rate will be charged. To reduce the risk, hence to reduce the interest rate one could provide guarantor as security for the loan extended to him. In the case of transactions that involve Islamic banking such practice of interest is prohibited because it is regarded as riba. At this point, the advantage that can be achieved from such an arrangement is that such a potential debtor could possibly receive a large amount of credit as the bank deems fit as compared to unsecured arrangement.
Finally, the advantage of the guarantees can clearly be seen when it accords with some commitment to the successful of a project funded by bankers. In this regard, Lord Reid said,

"A person might undertake no more that that if the principal debtor fails to pay installment he will pay it. That will be conditional agreement. There would be no prestable obligation unless and until the debtor failed to pay ... On the other hand, the guarantor's obligation might be of different kind. He might undertake that the principal debtor will carry out his contract". 

It is observed that from this statement of Lord Reid, under the guarantee arrangements the guarantor does not only undertake to make payment but also to ensure that the principal debtor performs his promise. Hence, the guarantor is duty bound to supervise the principal debtor and the project during the life of the loan. This could not only help the creditor to have their monies back but also to have benefit from the successful project. In fact, this moral duty of a guarantor does not only ensure the successfulness of the principal debtor's project, but also reduce the cost of monitoring incurred by bankers. That is why the guarantees are mostly welcomed by bankers and the use of which as a personal security in the banking lending transactions is very popular.

6.7 Islamic Guarantees as Personal Securities in Modern Banking Transactions

As mentioned earlier, the reason for the establishment of the Islamic bank was made upon the prohibition of *riba*. Otherwise, the objective of the bank is relatively similar to that of conventional banks, especially in the making of profits. At this point, however it is important to note that besides making the profits, the bank has to consider its moral obligation towards the community.

It is observed that one of the bank's moral obligations is to provide services that conform to the Islamic principles. Hence, we found that among the objectives of the Faysal

40 *Moshi v Lep Air Services Ltd. and Anor* [1972] 2 All ER at 398
Islamic Bank of Bahrain, for example, are (i) it will serve the Muslims contemporary Islamic financial services, helping to execute their financial dealings in strict respect of the ethical individual and social values of Islamic Shari'a, without contravening the heavenly imposed prohibition of dealing in *riba*; (ii) to serve all Muslim communities in mobilizing and utilizing the financial resources needed for their true economic development and prosperity within the principles of Islamic justice assuring the right and obligations of both the individual and the community; (iii) and to serve the Muslim communities and other nations by strengthening the fraternal bonds through mutually beneficial financial relationships for economic development and the enhanced environment for peace. 41

Again, in the Articles of Association of the Jordan Islamic Bank, it is stated that the bank aims for meeting the economic and social needs in the field of banking services, financing and investment operations on a non-usurious basis. It is further stated that the objective shall include (i) expanding the extent of dealings with the banking sector by offering non-usurious banking services with special emphasis on introducing services designed to revive various forms of collective social responsibility on a basis of mutual benefit; (ii) developing means to attract funds and savings, and channeling them into participation in non-usurious banking investment; (iii) providing the necessary financing to meet the requirements of the various sectors, particularly those which are not likely to benefit from usurious banking facilities. 42

In Malaysia, the Bank Islam Malaysia Berhad provides that among the objectives of the bank is to provide banking facilities and services in accordance with Islamic principles, rules and practices, to all Muslims as well as the population of this country. The Islamic principles, rules and practices are essentially those belonging to the body of Islamic principles on commercial transactions, *ahkam al-mu'amalah al-Islamiyah*, that relate to banking and finance. 43

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41 Faysal Islamic Bank of Bahrain 1993  
42 Jordan Islamic Bank for Finance and Investment Law 1978  
43 Bank Islam Malaysia Berhad 1985
In short, providing loans and finances are among the bank’s services that are provided to its customers. In fact, if a reference is made to a particular Islamic bank’s ‘Balance Sheet’, one would find that loans and finances rank the second highest of the bank’s priority. To mention a few, examples of these loans and finances include equity participation such as al-Mudharabah, al-Musharakah, al-Murabahah, al-Bay’ Bithaman Ajil, and al-Ijarah, and benevolent loans, or al-Qardu al-Hasan. Other Islamic bank’s services include letters of credit, letters of guarantee and traveler’s cheques.

As such, an Islamic bank like the conventional is a financial intermediary. It uses its customers’ funds to run its business. Hence, it is prudent for the bank, while exercising its right to use the funds, to use it wisely. In other words, prior to the granting of any loans or finance or embarking on any projects the bank should to consider all aspects of loans, finances or the prospective projects. Besides, the bank should also consider security as an important instrument that need to be observed in the banking lending transactions.

In relation to this, the Qur’an has, in numerous occasions, outlined the importance of security while dealing in business transactions. In Sura al-Baqarah, for example, the Qur’an states, “And if you are on a journey and cannot find a scribe, then let there be a pledge taken (mortgaging), farinanun maqbudah; then if one of you entrust the other, let the one who is entrusted discharge his trust (faithfully), and let him be afraid of Allah, his Lord. And conceal not the evidence for he, who hides it, surely his heart is sinful. And Allah is All-Knower of what you do”. In the practice of the Prophet, security has been widely used to cover the credit facilities extended to another. In this context, to mention a few, the Prophet himself surrendered something as security for the credit given to him. In Sahih al-Bukhari, it was reported that the Prophet had bought some foodstuff on credit for a limited period and thereby gave his Armour as security for the loan. On the other hand, in one occasion Abu Hurairah reported that the Prophet said, “I am closer to the believers than their own selves, so if a true believer dies and leaves behind some unpaid

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44 The Qur’an; 2:283
debt, I am responsible [as a guarantor] for him and if he leaves behind some properties, it will be for his heirs." 45

In short, classical Islamic guarantee has been accepted in the modern banking practices as a useful mechanism for security purposes. Being a simple and less expensive form of security management, Islamic guarantee attracts many people to use it as security in loan transactions. In fact, it has been widely accepted in the business of Islamic bank; at one time the guarantee is being asked by the customers to cover the safe custody of their deposits with the banks, and on the other, the bank has asked the customers to provide the guarantee to safeguard the loans or finances granted to them. Examples of these guarantees can be referred at Appendix 1.

6.8 Forms of Guarantees in Islamic Banks

Generally, the practice of the guarantee in Islamic banks is similar to that of the conventional one. Thus, similar to the conventional banks the guarantee in the Islamic banks includes personal guarantees as well as bank guarantees. The personal guarantee is the kind that is being the subject of our discussion. It is a guarantee that is provided by customers to the banks for loans. The bank guarantee includes letter of guarantee as well as shipping guarantee. The letter of guarantee further includes the tender guarantee; performance guarantee; guarantee for advance payment; supply guarantee; guarantee for sub-contract; guarantee for exemption of custom duties and the custom bond.

All these facilities are made based upon the concept of the kafala or the Islamic guarantee. For business reasons, the banks normally charge fees for the guarantee given to its customers. This has been justified through the use of the concept of wakala or contract of agency. 46 Some banks, however, do issue the guarantee without any service charge. The Faisal Islamic Bank of Sudan, for example, issues letters of guarantees on

46 See the attached fatwas on the issue at Appendix 1
behalf of its customers based on a profit-sharing concept. The bank is remunerated based on the percentage of profit received by customers on the transaction covered by the guarantee.\textsuperscript{47}

6.9 Fatwas on the Practice of Islamic Guarantees in Modern Islamic Banking Transactions

6.9.1 Fatwa as a Progressive Agent for Islamic Legal Development

Fatwa that relates to modern practice of the Islamic guarantees is one of Islamic legal sources in the subject area. In some Muslim countries, like Malaysia, such fatwa has become important rules that can serve as a reliable guideline to the modern practice of Islamic banking. In this context, the role of a mufti or other authorized body has become significant in producing a reliable fatwa.

Although, in most cases, fatwa has not been regarded as binding in the legal practice, the authority of which should not be disregarded. It is observed that the process of fatwa making is stringent; the procedure of which should always conform to the general method of Islamic legal research. Hence, it is not exaggeration, in this context, to equate the value of fatwa with that of court decisions.

Being responsive in nature, fatwa serves as a progressive agent for development in Islamic legal thought. At this point, it is observed that most practical aspects of Muslim affairs are being treated by fatwas rather than legal theories that are embodied in the compendiums of Islamic law. To quote the words from Muhammad Khalid Masud, Brinkley Messick and David S. Powers, 'while the more theoretical aspect of the Shari'\textasciiacute; is embodied in the literatures dealing with the 'branches' of substantive law (fur\u00e7u' al-fi\u00e7\u0131h) and the 'roots' of legal methodology and jurisprudence (usul al-fiqh), its more

\textsuperscript{47} See Sudin Haron and Bala Shanmugam, \textit{Islamic Banking System: Concepts and Applications}, p. 139 (1997); see also Bachir Georges Affaki, 'Demand Guarantees in the Arab Middle East', (1997) 12(7) \textit{Journal of International Banking Law} 271 at 272
practical aspect is embodied in fatwas issued by muftis in response to questions posed by individuals in connection with ongoing human affairs.\textsuperscript{48} Thus, fatwa has an important role in Islamic legal development.

It is suggested therefore that at this point fatwa can be a stepping-stone to the introduction of Islamic legal principle in modern banking transactions. In Malaysia, the requirement made by law pertaining to the establishment of the Shari'ah Supervisory Board in Islamic banking and financial institutions\textsuperscript{49} should be considered as a golden opportunity to induce such principles in the business. In this context, the Board will act as an authoritative body who will officially issue reliable fatwas on any questions of Islamic law concerning the business of Islamic banking. To quote the words from Mohamed Ismail b Mohamed Sharil, the director for the Bank Muamalat Malaysia Berhad, 'but it is reasonable to conclude that, since the setting up of a Syariah advisory body is a condition precedent for the granting of a license, the Act [The Islamic Banking Act 1983] envisages a central role for that body in the sphere of the law. It may even be seen as a mini Parliament, entrusted with power to “enact” laws (by rendering advice to the bank) applicable to Islamic banking'.\textsuperscript{50} Thus, the fatwas being issued should be regarded as authoritative and should be applied in the business of Islamic banking.

6.9.2 Fatwa and its Place in Legal Practice

Fatwa literally means the opinion of a jurist on a point of law. The person who proclaims a fatwa is called a mufti and a person who requests a fatwa is called a mustafti. The act of giving fatwa is called futya or ifta.\textsuperscript{51}

\textsuperscript{48} Muhammad Khalid Masud, Brinkley Messick and David S. Powers, 'Muftis, Fatwas, and Islamic Legal Interpretation', in Islamic Legal Interpretation: Muftis and Their Fatwas, Muhammad Khalid Masud (eds.) P. 4
\textsuperscript{49} Section 3(5)(b) of Islamic Banking Act 1983; section 124(7)(a) of Banking and Financial Institutions Act 1989
\textsuperscript{51} Historically, the fatwa contributes a significant role to the development of Islamic legal principles. It is observed that when difficult questions of law arise, it was a common procedure to refer the matter to a
Generally, fatwa can be regarded as a personal opinion of a scholar with regard to issues that have been forwarded to him. In practice, when an issue has been brought up, a mufti will examine the case and consider the relevant legal texts\textsuperscript{52} to solve the problem. The answer that will be given will be based on these legal texts, which are considered as genuine Islamic legal sources. Hence, it can be said that the opinions or suggestions of a mufti are legal opinions, and therefore it should have a legal effect on Muslims.

The fatwa that is made upon a systematic study has a great value. This value of fatwa may be compared with that of the classical legal texts.\textsuperscript{53} The only difference between the two is that the legal opinion concerning the former is the response to current issues whereas in the latter it is regarded as a compilation of classical legal opinions. In addition, the classical legal texts are normally found in the form of compilations of general issue of Islamic legal problems. In this context, we can see, for example, in the Majmu' of Imam al-Nawawi, the issue that has been discussed is not only general in nature but also comprises different opinions from different sources and scholars. This is not the case for a compilation of fatwa, from which we can see that it is more specific, simple, and normally given with reference to only one source.

The fatwa that is issued is considered as one of the Islamic legal sources. Although, fatwa does not have a special place in legal practice, in most cases the fatwa has served as a useful instrument for legal courts in determining issues of law. Thus, it has been stated that in Iraq, before the drafting of the personal status code, fatwas were treated by jurists as a source of established legal rules to guide a court for the outcomes.\textsuperscript{54} At this point, a qualified jurist for his opinion. The response given was regarded as authoritative in the practice of the Islamic law.

\textsuperscript{52} Beside reference be made to the provisions of the classical Islamic law, the mufti will also use other Islamic jurisprudence method such as Ijtihad, Qiyas, Istithsan, Istitislah, Istitishab, Talfiq and so on.

\textsuperscript{53} Some writers have even gone further by suggesting that fatwa is in fact a mere reflection of legal opinions that have been discussed in the classical legal texts. Indeed, said one of the writers, what has been discussed in the classical texts is actually a compilation of fatwa and opinions collected from different sources and jurists. See, for example, in Dr. Mohd Daud Bakar, 'Instrumen Fatwa Dalam Perkembangan Perundangan Islam', Jurnal Syariah 5, Bil. 1, p. 2

\textsuperscript{54} See Muhammad Khalid Masud, Brinkley Messick and David S. Powers, 'Muftis, Fatwas, and Islamic Legal Interpretation', in Islamic Legal Interpretation: Muftis and Their Fatwas, Muhammad Khalid Masud (eds.) p. 28
collection of fatwas that were ‘given at different times, in reference to heterogeneous circumstances’ were considered authoritative and were applied in case rulings by Iraqi judges no longer qualified as *mujtahids* competent to carry out their own independent interpretations of the law.\(^{55}\) This important function of fatwa also applies in contemporary Muslim states. In Malaysia, for example, there have been cases where judges in civil courts have constantly referred to fatwas in determining issues pertaining to Islamic law in the courts proceedings.\(^{56}\) In this context, the late Professor Ahmad Ibrahim suggested that any court other than the Shari’ah Court could request the opinion of a mufti on any question of Islamic law, which calls for decision.\(^{57}\) Thus in *Re Dato Bentara Luar Decd. Haji Yahya bin Yusof v Hassan bin Othman & Anor*,\(^{58}\) we found that Raja Azlan Shah CJ, stated,

"Whilst we are not bound to accept his fatwa as we are entitled to expound what the Islamic law on a given topic is, we are equally not bound to reject the opinion stated in the fatwa just because Islamic law is the law of the land and the duty to expound this law falls on us. In our view as the opinion was expressed by the highest Islamic authority in the State, who had spent his lifetime in the study and interpretation of Islamic law and there being no appeal against the fatwa to His Highness the Sultan in Executive Council under the relevant State Enactment, i.e., Enactment No. 48, now re-enacted by Enactment No. 14 of 1979, we really have no reason to justify the rejection of the opinion, especially when we ourselves were not trained in the system of jurisprudence and moreover the opinion is not contrary to the opinions of famous authors of books on Islamic law".

This high value of the fatwa has made the instrument as a persuasive authority in court proceedings. In short, fatwa is an important Islamic legal source as the opinions given are

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\(^{55}\) Ibid.


\(^{57}\) Ahmad Ibrahim, *Islamic Law in Malaya*, pp. 147-173 (1975); see also Ahmad Ibrahim and Alihemah Joned, *The Malaysian Legal System*, p. 52 (1995)

\(^{58}\) [1982] 2 MLJ 264 at 271-272
modern and up to date. Further, in practice, the opinions that have been given are fresh, in which case the legal court may have not decided the same.

6.9.3 Shari’ah Supervisory Board and the Fatwa

In Islamic banking, fatwa is made in response to the questions posed either from the public or from the bank itself. This fatwa is normally known as a resolution. The Shari’ah Supervisory Board is the responsible body to give such fatwa. To give one example of this special function of the Shari’ah Supervisory Board, the memorandum of the International Association of Islamic Banks (IAIB) outlines; (i) to study the fatwa previously issued by the religious supervisory boards of member banks, in an attempt to make decisions identical; (ii) to study the previously issued fatwa to see how far they conform with the rulings of the Islamic Shariah; (iii) to supervise the activities of the Islamic banks and financial institutions and members of the Association to ensure their conformity with the rulings of the Islamic Shariah. In addition it has to draw the attention of the concerned parties to any potential violation of these activities. In discharging its duties, the Board has the right to go through the laws and bylaws of member banks and financial institutions and to draw their attention to whatever violation might have been made in this respect. In doing so, utmost confidentiality must be observed; (iv) to issue legal religious opinions on banking and financial questions in response to requests by member Islamic banks and financial institutions, or their religious supervisory boards or the secretariat general of the Association; (v) to study matters relating to financial and banking operations in response to requests for advice from Islamic financial institutions; (vi) decisions and fatwa of the Board are obligatory and binding on member banks and financial institutions in cases where these are already approved by all members. However, any member bank or financial institution is entitled to ask for consideration of any decision. A detail note must then be submitted in cases of disagreement as any bank entitled to follow any course of action in the disagreement unless it is, otherwise, enforced by the Board; and (vii) to clarify legal religious on new economic questions.59

59 As cited in Sudin Haron, Islamic Banking: Rules and Regulations, p. 113-114
In line with all these functions, the members of the Board shall not only possess a strong religious background, but are also expected to have knowledge in banking practices, accounting and economics.

In some Muslim countries the establishment of such Board in Islamic banking is a legal precondition to supervise the operation of the bank in accordance with the Islamic teachings. In Malaysia, for example, section 3 of the Islamic Banking Act 1983 stipulated that the Central Bank will not recommend the granting of a license to the Islamic bank unless it is satisfied that there is, in the articles of association of the bank concerned, provision for the establishment of a Shari'ah Supervisory Board. Similarly, in Egypt the same stipulation has been put under Law No. 48/1977 with regard to the establishment of the Faisal Bank of Egypt. The Jordan Islamic Bank for Finance and Investment Law No. 13 of 1978 not only specifies the appointment of Shari'ah Consultant but also describes the procedures for the dismissal of the appointed consultant if necessary. In

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60 Section 3(5) provides that the Central Bank shall not recommend the grant of a license, and the Minister shall not grant a license, unless the Central Bank or the Minister, as the case may be, is satisfied – (b) that there is, in the articles of association of the bank concerned, provision for the establishment of a Syari'ah advisory body to advise the bank on the operations of its banking business in order to ensure that they do not involve any element which is not approved by the Religion of Islam. The same stipulation can also be found in section 124(7)(a) of the Banking and Financial Institutions Act 1989. In this regard, the section states, "For the purpose of this section-(a) there shall be established a Syariah Advisory Council which shall consist of such members, and shall have such functions, powers and duties as may be specified by the Bank to advise the Bank on the Syariah relating to Islamic banking business or Islamic financial business".

61 Under Article 3, the Law states;
All Bank dealings and activities shall be subjected to the basic principles and rulings of Islamic Shari'ah, particularly as related to the forbidding of riba and the paying of the religiously imposed zakat, with zakat paid by the Bank being considered as part of production costs. The Sheikh of al-Azhar and the Minister of waqf shall ascertain the Bank’s fulfillment of its obligation to appropriate the zakat and to expend it in its legitimate channels.
A Religious Supervisory Board shall be formed within the Bank to observe conformance of its dealings and actions with the principles and rulings of Islamic Shariah. The Bank Statutes shall determine the process of forming of this Board, the way it shall conduct business as well as its other functions.

62 Under section 27, the Law states;
- The Board of Directors shall appoint, within fifteen days from the date of its election, an Islamic legal consultant who is learned and specialized in the field of practical application of the provisions of Islamic law
- The consultant so appointed to this post may not be dismissed except on the basis of a Board resolution adopted by a two third majority of the members at least, and giving the grounds for such dismissal.
Kuwait the establishment of the Shari’ah Supervisory Board was not made under such specific laws but under the Articles or Memorandums of the individual banks.  

It is worth mentioning at this point that in some Muslim countries the establishment of such a Board is not required. The Islamic Republic of Iran and Pakistan represent these countries. Perhaps the reason behind this is that these countries have fully Islamised their financial institutions. Be that as it may, it is stated that in Pakistan banking and financial institutions are bound to Religious Board appointed by the government.  

6.9.4 Fatwas on the Question of Islamic Guarantee

This section discusses the fatwas that concern the modern practice of Islamic guarantees. During the process of fatwa making, all sources of Islamic guarantees have been employed. Thus, existing provisions of the classical legal texts were the prime source. Besides, general method of Islamic legal research was also employed to reach at the desired conclusion. In respect to this, the Qur’an and the Sunnah of the Prophet were considered as the primary source in case existing provisions of the classical texts were not available. The other methods of Ijma’, Qiyas, Istihsan, Istislah, Istishab, Maslahah, Talfiq were also used as the case so requires.

From the researcher’s study, it appears that the fatwas are given in response to either the questions asked by the customers or the questions asked by the bankers themselves. It is also observed that these fatwas are being made upon consistent Islamic legal principles. In this context, a reference is always made to the classical Islamic legal sources be that the Qur’an, or the Sunnah, or the classical texts of the classical jurists. In the fatwa no.

63 In the case of the Kuwait Finance House, for example, article 62 of the Articles and Memorandum of Association of the House states, “The Company shall retain consultative bodies specialized in economic, financial and legal studies. Such specialized body – or bodies – may be composed of a number of experts of international repute. For certain specialties, the Company may retain only one expert or counselor, but appointment of all such experts and counselors shall be effected by decision of the Board of Directors. The relationship between such appointees and the Company shall be limited to such studies as may be assigned to them, and their researches and recommendations shall be submitted either to the Chairman of the Board of Directors or to such Board members as may be delegated by the Board for the purpose”.

64 See Sudin Haron, Islamic Banking: Rules and Regulations, p. 107
(xiv in Appendix 1), for example, a reference has been made to the Qur'anic legal text. Similarly, in the fatwa no. (x in Appendix 1) the Sunnah of the Prophet has been referred as the basis for the fatwa. In the fatwa no. (ii and v in Appendix 1) classical legal opinions have been referred upon the giving of the fatwa.

When classical opinion is not available a method of maslahah has been employed. Fatwas that relate to the fees are the best illustration for this. As fees are considered as recent issue, the provision of which is not available in the compendium of the classical texts. Thus, the Board has to employ its juristic effort by patching other Islamic principles to reach at the desired conclusion.

It is also observed that the pattern of the fatawa is not consistent. In respect to this, the researcher finds that some of the fatawa are given in a short and brief whilst some others are long and elaborative. In the fatwa no (i in Appendix 1), for example the fatwa is very brief if compared to fatwa no (ii and xi in Appendix 1), which are very long and elaborate.

As such, it is also found that some fatawa are not very clear with regard to the legal nature of the Islamic guarantees. This can clearly be seen in the fatwa that was given as a response to the question on the issue of insurance companies as a guarantor. From the fatwa given, it is implied that for the Board, insurance can be accepted as a guarantee. The prohibition is however placed upon the premium paid, because this is regarded as accepting fees in the Islamic guarantee. At this point, the fatwa is ambiguous because the legal nature of the Islamic guarantees is different from that of the legal nature of insurance. In this context, it should be noted that a contract of the Islamic guarantee is a contract to perform others' obligation in cases where a person defaults. It is a contract to pay the bank if the debtor does not. In contrast, a contract of insurance is a contract to pay in the event of loss. The payment will be made with no regard to the ability of others to

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65 The reader can refer the fatwa in Appendix 1
66 Fatwas no. iv – viii in Appendix 1
make payment. At this point, a contract of insurance might correctly resemble to that of a contract of indemnity. Be that as it may, the effort of the Board should be appreciated, as the fatwa tends to give the intrinsic nature of the Islamic guarantee, i.e. gratuitous in nature. It therefore differentiates itself with the contract of insurance.

Nevertheless, the whole spirit of the fatawa is intended to be in line with the cardinal principles of the Islamic law. The classical nature of the fatawa still exists even though it sometime stumbles upon the current issues of financial problems. Some of the classical principles of the Islamic guarantees include the gratuitous nature of the Islamic guarantees (fatwa by the Council of the Islamic Fiqh Academy), the scope of the guarantor's obligation (fatwa no. x and xi in Appendix 1), the accessory nature of the Islamic guarantee arrangement (fatwa no. xii in Appendix 1), information about the principal obligation (fatwa no. xiv and xv in Appendix 1), and the right of the creditor to choose the recourse (fatwa no. xvii in Appendix 1). All these show that the modern practice of the Islamic guarantees is in line with the classical Islamic law, and this is applicable in modern banking practices.

6.10 Conclusion

The important role of the institution of bank as a loan provider is undeniable. Much development has been made upon this important role of the institution. In return, the bank also has made a lot of profits from such practices. However, this does not mean that the business is not free from the risk of loss. In fact, lending is a riskier business of the bank as it may face non-payment of credits.

It is at this point that security is deemed to be important. The cardinal function of the security is to cover the debts that have been extended to customers. However, some securities need more expenses. In the case of Malaysia, for example, to execute a charge, it does not only involve huge amount of money but also time and effort. In addition, the procedure to be followed is very strict. Therefore, guarantee is regarded as the best alternative for the bankers.
The guarantee is not only simple but also reliable. A creditworthy guarantor does not only help a prospective borrower to obtain a loan but also a lower interest rate. Thus, the practice of the guarantee is widespread. It is not only useable in domestic businesses but also international trades. Individuals and institutions commonly take the responsibility of a guarantor. In short, with the simplicity nature of the guarantees, the practice of which is widespread.

In Islamic banking, such practice of the guarantee has been commonly accepted. However, the practice was rather accepted in the form of classical Islamic guarantees. This is to make the arrangement consistent with the basic philosophy of Islamic banks. As such, it is observed however that not all provisions concerning the guarantees are found in the classical Islamic legal texts.

Thus, being archaic in nature, classical Islamic guarantees have been accepted with some modifications. The issue of fees accepted in return for the guarantees given is the best illustration for this. As the issue being considered is recent, no such provision is found in the compendium of the classical texts. Thus, the role of the Shari'ah Supervisory Board was vital. At this point, the role of the Board is not only explaining the classical law but also devising a new law pertaining to the issue. This practice of explaining and devising new law is called fatwa.

The method being followed while propagating such a fatwa is stringent. Apart from referring to the provisions of the classical texts, the Board also uses the established method of Islamic legal research. In this context, the Qur'an and the Sunnah of the Prophet are the prime source to reach a desired conclusion. At some other times, other methods of Islamic legal research are also being employed, depending on the nature of the case. These other methods include *Ijma', Qiyas, Ijihad, Istihsan, Istislah, Istishab, Maslahah*, and *Talqiq*. 

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Thus, the fatwa should have had great value. Be that as it may, fatwa is not regarded as binding on the court. At this point, the value of the fatwa can only be accepted as persuasive. There have been cases where the important role of fatwa has been employed in the court proceedings. Throughout early Islamic history, ranging from the era of Andalus, Mamluk and Ottoman Empire, the fatwa has been given vantage as persuasive authority in court proceedings. In Malaysia, there have been cases where judges referred such fatwa in court proceedings. *Re Dato Bentara Luar Decd Haji Yahya bin Yusof & Anor v Hassan bin Othman & Anor* [1982] 2 MLJ 264, is the best illustration for this.

As such, the fatwa can be a progressive agent for Islamic legal development. Being responsive in nature, the resolutions given do not only represent classical views but also new legal theories. Again, the role of the Shari'ah Supervisory Board is vital. As far as the Islamic guarantee is concerned, the legal mechanism could be strengthened through fatwa, which of course involves a great deal of juristic efforts.
CHAPTER SEVEN

THE APPLICATION OF THE CLASSICAL ISLAMIC LAW OF GUARANTEE IN MODERN LEGAL PRACTICE

7.1 Introduction

The previous chapter demonstrates that the guarantee has a significant contribution in the field of the economic development of a nation. In the Islamic banks this significant role of the guarantee has been acknowledged where the guarantee has been regarded as a practical method to secure the debts advanced to the customers. As such, it is also observed that the guarantee that is used in the modern banking transactions is a form that has been adapted from the classical formulations. In other words, in matters that relate to the guarantee, the classical rules have somehow influenced the modern practice of the Islamic banks.

This chapter is an attempt to further examine the influence of the classical rules in the modern Muslim legal practices. To this end, modern legislations such as the Majalla and some of the Arab legislations will be the main focus of the investigation. At this point, the UAE Civil Transaction Code 1985 has been chosen as the main focus, from within the Arab legislations, simply because the Code has been claimed to be much indebted to the classical rules. It is hoped that the investigation will provide desirable results so that further suggestions can be made about future development of the law.

7.2 Classical Islamic Law of Guarantee in the Ottoman Modern Legislation

From the nineteenth century onwards there developed an increasingly intimate contact between Islamic and Western civilization. Businesses had expanded between the two states of the Ottoman Empire and the Western powers. At this point, it was thought that a
new form of Islamic law was needed to cater for the relationship between the two states. Hence, through the proclamation of the *Hatti Sherif of Gulhane* (Imperial Edict of the Rose Chamber) in 1839, classical Islamic law has experienced a massive reformation. For the first time, classical Islamic precepts were officially codified as new rules to be governed in the Ottoman Empire. The Majalla al-Ahkam al'Adliya 1869-1876 was one of the examples of the codification of the classical Islamic precepts.

### 7.2.1 The Majalla al-Ahkam al-'Adliya 1869-1876

The Majalla was the first example of the Islamic law codification in the field of civil transactions. The Code, which was known as the Majalla al-Ahkam al-'Adliya (The Corpus of Juridical Rules), was first introduced in the Ottoman Empire circa 1869-1876. It has been translated into English by C.A. Hooper as 'The Civil Law of Palestine and Trans-Jordan' (Jerusalem, 1933); and also by C.R. Tyser as 'The Mejelle', (Lahore, 1967). The Majalla was also partly translated into Malay in the early 1900’s in the State of Johore in the British era. Besides, the Majalla has also been commented on in various languages. The most notable annotation to the Majalla was the 'Durar al-Hukkam Sharh Majallat al-Ahkam', by Ali Haidar.

The Majalla marks the turning point of the modernization of classical Islamic law in the field of civil transactions. Classical principles, which were diverse and scattered within the classical works, have been firstly codified as a guideline in court trials. At this point, it was hoped that through the promulgation of such a 'Code', the application of the law would be very practical as it was not only intended to be 'correct but also easy to understand, free from contradictions, embodying the selected opinions of the jurists and

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1 See S.S Onar, 'The Majella', in *Law in the Middle East*, (Eds.) Majid Khadduri and Herbert Liebesny, pp. 292-308 (1955); see also W.M. Ballantyne, 'The Majella: Introduction', (1986) 1 Arab Law Quarterly 364
2 See Ahmad Ibrahim, *The Malaysian Legal System*, p. 44 (1995); see also Hapipah Monel, 'Pentadbiran Undang-undang Islam Johor', Project Paper, Faculty of Law, University of Malaya 1979/80; and Abu Bakar Hamzah, 'Laporan Penyelidikan Berkenaan Majallah Ahkam Johor', Project Paper, Faculty of Law, University of Malaya 1986/87
easily readable by everyone’. In short, it was the first time that advanced opinions of the classical jurists were officially codified in one book as a reference for court trials.

Although the Majalla has been reiterated as Western in form, the substance of it was derived from classical Islamic principles. In the Report of the Draft Commission, it has been stated that;

“In accordance with the orders of His Majesty the Sultan to produce a work of this nature, sufficient for the application of the doctrines of Muhammadan jurisprudence to the daily civil obligations of the people, we met in the office of the High Court and collected together those matters of Muhammadan jurisprudence, according to the Hanafite school, which relate to civil obligations and are of frequent occurrence and of the greatest necessity at the present day. We then began to arrange them in the form of a Code, divided into Books and called Ahkam-i-Adlieh (rules of justice). When the Introduction and Book I were finished, we sent a copy to Sheik-al-Islam. Copies were also sent to persons skilled and learned in Muhammadan jurisprudence, and modifications were incorporated therein according to their recommendations, whereupon a corrected copy was sent to the Grand Vizier. The translation of this work into Arabic was put in hand, and the other books were being composed”.

It is observed therefore that classical principles of the Hanafis were the main reference to the codification of the Majalla. Advanced opinions, that are most suitable to current condition and most reconcilable to modern life and businesses, were added into the new ‘Code’. Mahmassani, the author of ‘The Philosophy of Jurisprudence in Islam’ said;

“The Majallah was mainly derived from the books of Zahir al-Riwayah in the Hanafi school. In case of conflict between the view of Great Imam (Abu Hanifah) and his companions, the Majallah adopted those opinions, which conform to the need of the age and public interest. For example, in the interdiction of a prodigal the Majallah adopted the views of the two imams, Abu Yusuf and Muhammad ibn al-Hasan al-Shaybani, discarding the opinion of the Great Imam Abu Hanifah. Also in contracts of istisna’ (manufacturing for future delivery) the Majallah adopted the views of Abu

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3 This reflects the original objective of the promulgation of the Majalla. See S. Mahmassani, *The Philosophy of Jurisprudence in Islam*, p. 42-43 (1987)
4 See Report of the Commission Appointed To Draft The Mejelle, (1986) 1 Arab Law Quarterly 367 at 369
Yusuf. In a few other cases the Majallah abandoned the views of Zahir al-Riwayyah and had recourse to other works. For example, the Majallah agreed with the views of the later jurists in the Hanafi school concerning the liability for benefits accruing from property wrongfully appropriated. This view is similar to that of the Shafi’i school.”

It is worth noting that although a great emphasis has been made on the Hanafis thought, some relevant principles in other classical schools were also incorporated in the Majalla. The principles that were embodied in the Malikis, Shafi’is and Hanbalis treaties, which did not contradict to the Hanafis’ precepts, and which were most suitable to current condition and public interest, were accepted and incorporated in the Majalla.

Overall, the Majalla was the first example of Islamic law codification in the field of civil transactions. Being modern in appearance, the Majalla was regarded as a model for modern Islamic law codification. It is not surprising therefore that in later centuries most of the Arab laws have been formulated and drafted in accordance to the principles that laid down in the Majalla. At this point, Ahmad Hidayat said;

“The Majalla played a crucial role in the process of drafting the modern civil codes of the Arab countries, sometimes as guiding principles and sometimes its provisions were assimilated into the provisions of these codes. In the deliberation of the articles of the civil codes of the Arab countries, the Majalla together with a manual on the Islamic law of

5 S. Mahmassani, The Philosophy of Jurisprudence in Islam, pp. 42-43
7 According to Dr. Muhammed Farouq al-Nabhan, the uniqueness of the Majalla was that the code was able to present and maintain the classical precepts in modern form. Thus according to him, ‘The Majella was not merely a recording of the rules of jurisprudence [classical precepts], divided, categorized, and numbered in accordance with the methods of the authoritative legal and judicial sources. It was a turning point from one method to another, a point of transfer from the dominance of a sectarian spirit of law schools to a new view which saw Islamic jurisprudence as integrative and comprehensive’. With regard to the success of the Majalla as the first example of Islamic law codification, Dr. Nabhan suggested, ‘The Majella represents an advanced stage in the course of development of Islamic jurisprudence, because it was able to differentiate, for the first time, in setting out jurisprudential rules, between the method using learned sources, and the method using ordered, numbered and simply express authoritative judicial sources. It was able to make a choice between the various opinions of the jurisprudents, and use the secular method of legal drafting’. See Dr. Muhammed Farouq al-Nabhan, ‘The Learned Academy of Islamic Jurisprudence’, (1986) 1 Arab Law Quarterly Review 388. Therefore the Majalla qualifies to be a model for modern Islamic law codification.
obligations compiled by Muhammad Qadri Pasha called *Murshid al-Hayran*, were extensively referred to by the draft committees.  

From an historical aspect, the Majalla was in application in most parts of the Ottoman Empire. Thus, with the exception of Egypt, Tunisia, Algeria and Morocco, the rest of the Arab countries like Syria, Iraq, Palestine and Jordan were subject to the rules that were laid down in the Majalla. In European countries, the Majalla has been suggested to have been in force in Bosnia-Herzegovina, Albania and Cyprus.

It is not surprising therefore that even the Majalla has been superseded the authority of which is still applicable in modern Arab legislations. In this context, it was suggested that the influence of the Majalla had far-reaching effects in Arab legal history. Again according to Ahmad Hidayat, although the Majalla was never adopted as codified Islamic legal rules in Egypt, the judges rigorously referred to the principles that were laid down in the ‘Code’. On another occasion, Hisham R. Hashim suggested that the Majalla is not only important but also useful to fill the gaps of modern civil codes. In short, it is not an exaggeration to suggest that the influence of the Majalla still exists especially in those Arab countries.

7.2.2 Classical Islamic Law of Guarantee in the Majalla al-Ahkam al-‘Adliya 1869-1876

Provision on the guarantees is contained in articles 612 – 672 of the Majalla. There are four parts that deal directly with the guarantees. This includes a preface and three chapters. In the Preface, general interpretations, including the definition of the Islamic guarantee, are provided. Chapter 1 deals with the legal nature of contract of the guarantees. Provisions on the elements and conditions of the guarantees are provided in

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10 The Encyclopedia of Islam, *Medjelle*, p. 449
this chapter. Chapter 2 deals with the effect of the guarantees. Provisions on the rights and obligation of the parties involved are provided in this chapter. In addition, the chapter also provides the rules that govern the guarantee for appearance in court trials as well as the guarantee for the delivery of goods. Chapter 3 deals with the termination of the contract.

As a whole, these provisions are the reflection of the classical precepts on the guarantees. In reference to the 'Code', this presumption seems to be apparent. In articles 612 – 633, which deal with basic nature of contract of guarantee, for example, the influence of these classical precepts, are evident. In this context, the classical precepts of the Hanafis were referred and adopted as modern legal rules in this Code.

Article 612, which provides for the definition of the guarantees, is the reflection of the Hanafis precept. The article provides that the guarantee is to add obligation to obligation in respect of a demand for something. A further examination to the classical manuals of the Hanafis, al-Kasani suggested the same. Thus, in the Bada'i al-Sana'i it is stated that the Islamic guarantee is the amalgamation of the obligation of a guarantor with the obligation of a principal debtor in respect of an abstract demand.13

It is also observed that the classical precepts of the other schools were also referred to and adopted in the Majalla. Article 621 of the Code, for instance, was the reflection of the 'standard opinions' of the classical jurists. The article provides that it suffices upon a unilateral proposal to conclude a valid and enforceable contract of the guarantees. Thus, acceptance is not necessary to conclude a valid contract of the guarantees. In respect to this, in reference to the classical manuals of the Shafi'is, it appears that, al-Ramli, for example, has suggested that due to the gratuitous nature of the Islamic guarantee, consent

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13 'Ala'uddin Abi Bakr bin Mas'ud bin Ahmad al-Kasani, Kitab Bada'i al-Sana'i fi Tartib al-Shara'i, vol. 6, p. 2 (1986)
and acceptance are not essential to conclude a valid contract. The same also can be found in other schools other than the Hanafis.

The influence of the classical precepts in the Majalla can be further seen in article 644 of the Code. In this context, article 644 provides that under a guarantee a creditor has the right to choose the recourse for his debt; he may sue the principal debtor alone, similarly he may sue the guarantor alone, and he also may sue both simultaneously. A reference to the classical manuals, it reveals that this provision is similar to that of the standard opinions of the classical jurists. In the al-Iqna', al-Sharbini al-Khatib, a great scholar of the Shafi'is offered that 'and for the creditor, he has the right to make a claim either from the guarantor or the principal debtor. This freedom of choice shall mean that he has the right to choose one of them; and it also shall mean that he has the right to make a claim from both of them simultaneously'. A similar proposition could also be found in other schools.

Similarly, the provision of article 657 appears to be the reflection of the classical precepts. In this context, the article provides that a guarantor has the right to be reimbursed for what he has paid if the guarantee was given under the request of a principal debtor. In the Fath Qadir Ibn Humam, a Hanafis scholar suggested that in the event that a guarantor has entered into a contract upon the request of a principal debtor he shall have the right to be reimbursed from the principal debtor upon what he has paid.

All in all, the classical precepts on the guarantees have a great impact on the Majalla. From the above it appears that the precepts of the Hanafis dominants the Code. As such, the opinions of the other schools were also referred to and adopted in the Code. At this

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15 See, for example, in Abi Muhammad 'Abdullah Ibn Qudama, al-Mughni, vol. 5, p. 103 (n.d.)
16 Muhammad al-Khatib al-Sharbini, al-Iqna' fi Hilla Alfadh Abi Shuja', vol. 1, p. 289 (1940)
17 See, for example, in 'Ala'uddin Abi Bakr bin Mas'ud bin Ahmad al-Kasani, Kitab Bada'i al-Sana'i fi Tarib al-Shara'i, vol. 7, p. 3423 (1986); also Abi Muhammad 'Abdullah Ibn Qudama, al-Mughni, vol. 4, p. 605 (n.d.)
18 Imam Kamaluddin Muhammad bin 'Abdul Wahid Ibn Humam, Sharh Fath al-Qadir, vol. 7, p. 188 (n.d.)
point, the method of patching up, takhayyur, the most suitable precepts was employed in
the process of the codification of the Majalla.

7.3 Classical Islamic Law of Guarantee in Modern Arab Legislations

After World War II, the Arab legislations experienced a massive reformation. One of the
reasons was the independence of the countries from colonial controls. At this point, it is
observed that the pressure of the reassertion of the Islamic Shari’a has a great impact on
the reformation of the Arab laws. It seems therefore that the process of reformation was
made upon the resurgence of classical Islamic precepts.

7.3.1 The Arab Civil Codes

a. The Egyptian Civil Code 1948

At the time the Majalla was promulgated, Egypt had already achieved judicial and
administrative independence from the Ottoman Empire. Therefore, the process of
promulgating new laws in the country was done independently to the Ottoman rules. In
1875 the Egyptian government began to circulate a new Civil Code for the Mixed Courts,
Mahakim Mukhtalita; later, in 1883, a second Civil Code for the National Courts,
Mahakim Ahliyya, was enacted. Both Codes were intended to govern civil matters;
however the Codes have been claimed to be the faithful adaptation of the French Code
Napoleon.

During the late Nineteenth century, however, it was felt that a comprehensive Islamic
civil code was essential to govern matters concerning civil transactions between Muslims.

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19 Egypt has achieved judicial and administrative independence from Turkey in the reign of Ismail Pasha by
virtue of the Khedival Firman (decree) issued in 1874; see S. Mamassani, Falsafat al-Tashri’ fi al-Islam:
The Philosophy of Jurisprudence in Islam, p. 50
20 Gamal Mursi Badr, 'The New Egyptian Civil Code and the Unification of the Laws of the Arab
Countries', [1956] 30 Tul. L. Rev. 299 at 300; see also Nabil Saleh, 'The Law Governing Contracts in
Arabia', [1989] 38 International and Comparative Law Quarterly 761 at 767
Hence, in 1891 Muhammad Qadri Pasha produced a code-like reference, which was later known as *Murshid al-Hayran*. The objective was to apply the Hanafis precepts in civil matters. Nevertheless, the Code was never implemented though it was suggested that it has been a great reference to judges in court trials.\(^{21}\)

A second attempt to Islamise the Egyptian Civil Code was initiated by the learned Egyptian jurist, Professor Abd al-Razzaq al-Sanhuri circa 1920s. The method that was used was a mixture of classical precepts and modern Western principles. As a result, in 1948 a new ‘compromise’ Egyptian Civil Code was promulgated to replace the old French *Code Napoleon*.

In this context, Gamal Mursi Badr suggested that the promulgation of this new Egyptian civil code was based upon three important criteria, i.e., (i) various Western codes; (ii) Egyptian case laws (the decisions of Egyptian courts since the promulgation of the old French *Code Napoleon*); and (iii) classical Islamic law.\(^{22}\) It was from the latter source that the principles that relate to the guarantees were reformed.\(^{23}\)

Although it was suggested that three quarters of its provisions were adapted from foreign elements,\(^{24}\) classical Islamic law remains as the main focus in the process of the codification. At this point, the attitude of the drafters was to accept foreign principles, which did not contradict the classical Islamic precepts while at the same time rigorous effort has been made to implant the classical Islamic precepts in the Code. Sanhuri confirms;

\(^{21}\) Ahmad Hidayat Buang suggests that during this time both the Majalla and Murshid al-Hayran were the two main sources referred by judges in the Mixed and National Courts; see Ahmad Hidayat Buang, *Studies in the Islamic Law of Contracts: The Prohibition of Gharar*, p. 17-18.


"We did not leave any single sound provisions of the Shari'a, which we could have included in this legislation ... we adopted from the Shari'a what we could adopt having regard to sound principles of modern legislation and we did not fall short in this respect".  

Thus, being the synthesis of classical Islamic precepts and modern Western principles, the Code was not only considered as suitable but also as a model to be adapted in other Arab countries.  

As the result, Syria has enacted its new civil code in 1949, followed by Iraq in 1951 and Libya in 1953. All these new civil codes were the Egyptian reflection as its chief drafter was Sanhuri. The important impact of such reformation was the replacement of the Majalla, which was initially in force in the countries.  

b. The Kuwaiti Civil Code 1980  

The introduction of the Kuwaiti Civil Code in 1980 has marked a new era for the reassertion of the Islamic Shari'a in the Gulf region. A comparison between the Code and the previous one, it reveals that the influence of classical Islamic law is more apparent. It is observed that classical precepts have been given a special place, if there is a lacuna in the Code. Thus, while attempting to use personal reason, judges in Kuwait are urged to refer to the classical precepts of the Islamic Shari'a. At this point, it is clear that the intention of the legislator was to make the classical rules available to judges as guidance but not as a self-imposing source of legal rules. This is to ensure that the application of Islamic Shari'a is not restricted except to allow for development in the law.

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25 As cited in J.N.D. Anderson, 'The Shari'a and Civil Law: The Debt Owed by the New Civil Codes of Egypt and Syria to the Shari'a', (1954) 1 Islamic Quarterly 30  
27 It is worth mentioning that although the Majalla has been abrogated, judges in these countries still make a reference to the 'Code' in cases of lacuna in their legislative texts.  
28 For a detail discussion on the reassertion of the Islamic Shari'a in Kuwait, a reader can refer Mohammad al-Moqatei, 'Introducing Islamic Law in the Arab Gulf States; A Case Study of Kuwait', (1989) 4 Arab Law Quarterly 138  
29 Article 1 of the Kuwaiti Civil Code 1980  
c. The Qatari Civil and Commercial Code 1971

The Qatari Civil and Commercial Code 1971 was claimed to be a truncated version of the old 1961 Kuwaiti Commercial Code 1961. Although some passages have been imported from the Egyptian legislation, the spirit of the code still remains the same as the old Kuwait laws. Therefore, the position of the Islamic Shari’a in the Code is, more or less, the same as the Kuwaiti situation.

The position of classical Islamic law in the Qatari Civil and Commercial Code 1971 can be referred to in article 4 of the Code. Under the article, it is provided that judges, when they find nothing in the legal texts, are encouraged to deduce their opinions upon the established rules of the classical Islamic law. Thus, beside legislative texts, classical Islamic law in Qatar was penetrated through the application of personal reasoning. The Majalla was also suggested to be highly persuasive in the Qatari legal practice. At this point, Ballantyne said that it is still common for the judges to refer to the Majalla when there is no legislative provision found in the Qatari Civil and Commercial Code 1971.

d. The Bahrain Contract Law Regulation 1961

Bahrain provides an interesting legal landscape in the region. While at the one hand the constitutional provision states that the Islamic Shari’a is a principal source of law, on the other hand in commercial matters it follows the English common law traditions. The Bahrain Contract Law Regulation 1961 is the best illustration for this. For this reason, the extent to which the classical Islamic law applies is not clear.

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31 W. M. Ballantyne, ‘The States of the GCC; Sources of Law, the Shari’a and the Extent to which it Applies’, (1985) 1 Arab Law Quarterly 3 at 7
32 It is worth mentioning at this point that the Majalla was in force in Kuwait as an ad hoc civil code until the promulgation of its new civil code in 1980. See Nabil Saleh, ‘The Law Governing Contracts in Arabia’, [1989] 38 International and Comparative Law Quarterly 761 at 770
33 W. M. Ballantyne, ‘The States of the GCC; Sources of Law, the Shari’a and the Extent to which it Applies’, (1985) 1 Arab Law Quarterly 3 at 7
At this point, it is observed that as far as contract is concerned the law applicable is the law contained in the Bahrain Contract Law, which is based upon the English common law tradition. However, in reference to the Judicature Law of 1971, the Law provides that in the event of lacunae the principles of the Islamic Shari'a shall be applied.

e. The Jordanian Civil Code 1976

The Jordanian Civil Code 1976 has a distinctive feature if compared to the earlier Arab civil codes. At this point, it seems that the Code has given more credence to the classical Islamic precepts. In respect to this, article 1 of the Code provides that in the absence of legislative texts, judges are urged to make their judgments in accordance with the provisions that have been laid down in the classical manuals of the classical jurists; failing this, on the general principles of the Islamic Shari'a.

Furthermore, article 3 provides that while attempting to understand, or construct, or interpret the legislative texts, judges are urged to base their deductions on the established Islamic legal method. This follows that classical legal method is the one that the legislator meant.

Moreover, in reference to the Explanatory Memorandum of the Code, it is stated that the Code has extensively relied upon the provisions of classical precepts and notably the Majalla. Therefore, it comes without surprise that most of the provisions in the Majalla were retained except in cases of inconsistency.

7.3.2 Classical Islamic Law of Guarantee in the Arab Civil Codes

From the above, with the exception of Bahrain, it seems that the classical Islamic law has been given a special place in the Arab civil codes. This follows that most of the classical precepts were and are being practiced in the Arab modern laws. If this deduction

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34 The Majalla was in force in Jordan until the promulgation of this new Code.
reflected a universal validity this would lead to the conclusion that the classical Islamic law of the guarantees was and is also being practiced in the Arab modern laws. The only question left however is to what extent the law was and is being practiced the region.

At this point, it seems desirable to discuss the issue with reference to a specific Arab law. Thus, the UAE Civil Transactions Code 1985 has been selected as the main reference for the examination.

7.4 Classical Islamic Law of Guarantee in the United Arab Emirates

A discussion on the application of classical Islamic law in the United Arab Emirates provides an interesting discourse. This is because the process of codifications of law in the union was took place in the middle of the period of reassertion of the Islamic Shari’a in Muslim life. Thus, apart from pan-Arab nationalists, principles of Islamic Shari’a were taken as the main focus in constructing the union codes.

At this point, it seems that it is interesting enough to investigate the extent to which the classical Islamic guarantee, as a branch of classical Islamic law, has been applied in the UAE. To this end, a main reference will be made on the UAE Civil Transactions Code 1985 as it is regarded as the main source for the subject. It is worth noting that as a country, which adopts a civil legal system, the principles laid down in the Code are regarded as the primary source of court jurisdictions.

7.4.1 The UAE Civil Transactions Code 1985

The UAE Civil Transactions Code was promulgated in 1985. It consists of 1528 articles composed and arranged in an introduction and four books. The introduction gives general provisions of law. It consists of provisions that relate to the application of law; the law applicable, the time the Code takes effect, and the place the Code to be applied. Certain
legal maxims, rules of interpretation; persons, things and property; rights and obligations were also included in this introductory chapter.

Book 1 provides general rules that relate to personal rights and obligations. Book 2 provides general rules that relate to specific contracts. The provisions on the guarantees are provided in this book. Book 3 provides general rules that relate to rights in rem. Book 4 provides some provisions that relate to collateral securities.

The Code was intended to govern matters that relate to civil transactions, which arise in the union. Thus, it is not surprising that the Code was termed as the 'mother' of all civil and commercial codes in the union.\(^{35}\) Thus, in the event of ambiguity or disagreement between the emirates, the provisions that are laid down in the in the Code shall prevail.\(^{36}\)

The process of codification of the Code was made upon the basis of the 'uniform Arab law' within the Arab states. Therefore, both proposals from the League of Arab States and Academy of Islamic Research were taken into consideration in formulating this new Code. Accordingly, it can be seen that provisions in the Code are interwoven from those of the Arab civil codes with that of the classical Islamic precepts.

It is interesting that at the time the Code was drafted there was an immense movement of feeling towards the reassertion of Islamic Shari'a in the Arab states. Thus, resulting from such pressure, conferences and conventions were held at different times and places. In 1973, for example, the First Convention of Law Schools Deans of Arab Universities was held in Beirut. It recommended (a) that the Shari’a should be studied in the Law Schools as it was an official source of law in the Arab countries and an historic source in all of them and (b) that Arab legislators in most Arab countries should take the Shari’a as a principle source of substantive law.

\(^{35}\) See Bryan Cave, *Business Laws of the United Arab Emirates*, p. 8
\(^{36}\) See Case No. 322 Year 1998 and Case No. 343 Year 1998 as cited in *Majallat al-Quda' wa al-Tashri'*, p. 730
The Second Convention, held in Baghdad in 1974, recommended (a) the necessity of a careful study of Islamic jurisprudence because a return to the Shari'a as a basic source of uniform Arab law is essential to the fulfillment of the Arab personality, (b) the establishment of an academy for the Shari'a and the law covering the whole Arab world, to prepare studies in both fields for the benefit of the substantive legislator and to give opinions and advice upon matters submitted by Arab governments and official bodies. The decision to set up the learned Academy of Islamic Jurisprudence was taken at the Taif Islamic Conference. The general principle involved must be taken to be a rejection of the adoption of the principles of substantive law in preference to Shari'a principles: that basis of legislation is to be totally rejected in favour of reorganization and reshaping of the provisions of the classical Islamic law, fiqh, in a modern legal mould so as to facilitate recourse thereto. Thus, the promulgation of the UAE Civil Transactions Code 1985 was the reaction of such an immense feeling towards the reassertion of Islamic Shari'a in the Arab states.

Based upon the draft proposal of a united civil code for the entire Arab nation, the UAE Civil Transactions Code 1985 is regarded as the new civil code that is firmly based upon the Shari'a principles. On this point, Ballantyne confirms that the overwhelming majority of its provisions were taken from the classical precepts, fiqh, which in turn have appeared in the Majalla.

The fact that the Code was gleaned from other Arab codes, notably the Jordanian Civil Code 1976, meant that the influence of the classical Islamic law was apparent. It is

38 Zainuddin Jaffar, The Concept and Application of Daman in Islamic Law, p. 267 (n.d.)
41 See Wahbah al-Zuhaili, al-'Uqud al-Musammat fi Qanun al-Mu'amalat al-Madaniyat al-Imarati wa al-Qanun al-Madani al-Urduni, p. 6; see also 'Abd al-Khaliq Hasan Ahmad, al-Wajiz fi Sharh Qanun al-
submitted therefore that the UAE Civil Transactions Code 1985 represent the modern Islamic civil code. Thus, in anticipation of such a presumption, it follows that the principles of the classical Islamic law of guarantees shall also be present in this Code.

7.4.2 Islamic Guarantees in the UAE Civil Transactions Code 1985

Provisions on the guarantees contained in articles 1056 – 1105 of the Code. There are four sections that deal with the guarantees. Section 1 deals with the elements of the guarantees. The basic nature of the guarantees is provided in this section. Section 2 deals with different types of the guarantees. This includes the guarantees for the appearance of a person court trial, and the guarantees that involve sale transactions. Section 3 deals with the effect of contract of guarantees. Section 4 deals with termination of the contract.

As a whole, these provisions are the reflection of the classical precepts on the guarantees. In reference to the Explanatory Memorandum of the Code, this presumption seems to be apparent. In articles 1056, 1057 and 1058, which deal with basic nature of contract of guarantee, for example, the influence of these classical precepts are evident. At this point, the Memorandum states that the original provisions of these three articles were taken from the Majalla, which in turn was the gleaned from the Hanafis precepts. In this context, articles 612, 621 and 627 of the Majalla have been referred to in the formulation of articles 1056, 1057 and 1058 of the UAE Civil Transactions Code 1985. In addition, it is also stated that articles 839 and 841 of the Murshid al-Hayran were also consulted in the process of the codification.

It is also observed that in the process of the drafting of these provisions, at least one of the Majalla commentaries has been referred. The Memorandum makes this clear when it states that the Durar al-Hukkam Sharh Majallat al-Ahkam of Ali Haidar was referred to as one of the sources for the codification of the provisions. In addition, the Memorandum

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also states that a vast number of classical manuals were also consulted in the drafting of these provisions. This includes the Hashiyat Radd al-Mukhtar 'Ala Durr al-Mukhtar of Ibn 'Abidin (the Hanafis), Kitab Bada'i al-Sana'i fi al-Tartib al-Shara'i of Kasani (the Hanafis), Nihayat al-Muhtaj Sharh al-Minhaj of Ramli (the Shafi'is), and al-Mughni of Ibn Qudama (the Hanbalis).

Quite significantly, second paragraph of article 1057 was a total reproduction of article 220 of the Majalla al-Ahkam al-Shar'iyya, which in turn referred to the Kashshaf al-Qina' 'An Matn al-Qina' li Ibn Qudama of Buhuti (the Hanbalis). At this point, the Kashshaf al-Qina' provides that due to the gratuitous nature of the Islamic guarantee, consent and acceptance from a creditor is not necessary to make the contract valid and enforceable. A similar suggestion is also found in other classical manuals including the Nihayat al-Muhtaj Sharh Minhaj and the Mughni.

In line with the spirit of uniform Arab law, the UAE Civil Transactions Code 1985 has also made some reference to other Arab Codes. In the context of the above three articles, all the Syrian Civil Code 1949, the Iraqi Civil Code 1951 and the Jordanian Civil Code 1976 were modestly referred.

On another occasion, in article 1078, which is concerned with the right of a creditor to choose a course of action, the Memorandum states that the original provision was taken from article 856 of the Murshid al-Hayran in addition to articles 626, 644 and 645 of the Majalla. A similar reference was also made to the Durar al-Hukkam in addition to some other classical manuals like the Bada'i al-Sana'i, Nihayat al-Muhtaj, al-Mughni, and Bidayat al-Mujtahid wa Nihayat al-Muqtasid of Qurtubi. Interestingly, a reference to a

42 The article provides that a contract of a guarantee is valid and enforceable even though it was made upon a unilateral proposal from a guarantor; the validity of such a contract remains until and unless a creditor repudiates such proposal.
43 The Majalla al-Ahkam al-Shar'iyya, which was based upon the Hanbalis, was compiled as a civil code to be applied in Saudi Arabia.
44 Articles 734, 741, 743 and 748
45 Articles 1008 and 1009
46 Articles 950, 951 and 952
modern literature of Islamic law was also made in the drafting of this provision. In this regard, the Memorandum states that the *al-Madkhal al-Fiqhi al-‘Amm* of Mustafa Ahmad Zarqa was also referred in the drafting of the provision.

Again, this provision is comparable to that of the other Arab Codes. This can be seen through article 673 of the Syrian Civil Code 1949, article 1021 of the Iraqi Civil Code 1951 and article 967 of the Jordanian Civil Code 1976.

Further, in article 1090, which deals with the right of a guarantor to reimbursement, the original provision was taken from articles 862 and 863 of the Murshid al-Hayran in addition to articles 641 and 657 of the Majalla. Again, the *Durar al-Hukkam* was consulted since it is regarded as the most comprehensive commentary to the Majalla. Besides, other classical manuals of the classical jurists were also referred to in formulating this provision. This includes the *Hashiyat Radd al-Mukhtar ‘Ala Durr al-Mukhtar*, *Kitab Bada'i al-Sana‘i fi al-Tartib al-Shara‘i*, *Nihayat al-Muhtaj Sharh al-Minhaj* and *al-Mughni*.

Similar to the above, the provision is comparable to that of the other Arab civil codes. Thus, article 1090 of the UAE Civil Transactions Code 1985 is comparable to articles 743, 765 and 766 of the Syrian Civil Code 1949; it is also comparable to articles 1033 and 1037 of the Iraqi Civil Code 1951; and also to article 979 of the Jordanian Civil Code 1979.

All in all, classical precepts on the guarantees have a great impact on modern legislation on the subject. From the above it seems that the Majalla has a great influence on the UAE Civil Transactions Code 1985. The provisions in the Majalla were not only referred to but were also copied as new principles of law in the Code. The reason for this straightforward influence was perhaps based upon two grounds. First, the Majalla was the only codified classical Islamic law that represents a total reflection of the Islamic Shari‘a. Second, the Majalla was in forced in the region as an *ad hoc* civil code for a long period before the...
cession of the British Crown in 1971.\textsuperscript{47} It should be noted that although the Majalla was never promulgated as a law in the union, in practice, courts in the region have used it as an \textit{ad hoc} civil code in civil trials. At the time, the Majalla was regarded as one of most important sources in court trials because there was little written law found at the time.\textsuperscript{48} Thus, it is not surprising that almost all provisions in the UAE Civil Transactions Code 1985 including to the guarantees were referred to the Majalla.

In addition to the influence of the Majalla, the UAE Civil Transactions Code 1985 is also observed to be the gleaned from the classical Islamic precepts. In this context, classical Islamic precepts on the guarantees were heavily referred to in formulating new principles on the subject. The Explanatory Memorandum declares that most of the provisions were gleaned from the classical Islamic precepts. Furthermore, from the above study, it shows that classical Islamic precepts have a great impact on the provisions that relate to the subject.

It goes without saying that the UAE Civil Transactions Code was also the gleaned of other Arab civil codes. At this point, it seems that the Syrian Civil Code 1949, the Iraqi Civil Code 1951 and the Jordanian Civil Code 1976 dominate the process of codification.

7.5 The Status of Classical Rules in Modern Legal Practice

In the process of drafting the Code, the drafters were very careful in balancing the need to refer to other Arab civil codes and the need to impart classical Islamic precepts. With regard to the classical Islamic precepts, it seems that the suitability of the law in modern circumstances was given a paramount consideration. At this point, efforts have been

\textsuperscript{47} Before 1971, the United Arab Emirates was under the control of the British Crown. Thus, during this time, the judicial system was divided into two systems, British Crown extraterritorial jurisdiction and local indigenous courts. In the former, a great source of law was available while in the latter very little written legal sources were available. It is not surprising therefore that the Majalla has been the main reference in court's trials.

\textsuperscript{48} See W.M. Ballantyne, 'The New Civil Code of the United Arab Emirates: A Further Reassertion of the Shari'\textquoteleft a', (1986) 1 \textit{Arab Law Quarterly} 245
made to put the precepts as a working legal norm hence some modifications and adjustments occurred.

Thus, it appears that while drafting the Code, the drafters were very vigilant; the drafters were very selective in choosing those classical opinions. Opinions that most befit the need for modern circumstances were more preferable than those which were regarded as strict theoretical doctrines. Similarly, principles that ascribe to fewer disagreements between the classical opinions will be chosen as new principles in the Code rather than those which belong to scattered differences. The method of patching up, takhayyur, the most appropriate opinions of the classical doctrines were adopted as a practical approach. Hence, the most ‘lenient doctrine’ was preferred and adopted to be the legal norm in the Code.

In legal practice, this intention of the drafters has appeared in article 1 of the UAE Civil Transactions Code 1985. In the article the Code states;

"The legislative provisions shall apply to all matters dealt with by those provisions in the letter and spirit. There shall be no innovative reasoning (ijtihad) in the case of provisions of definitive import. If the judge finds no provision in this Law, he has to pass judgment according to the Islamic Shari’a. Provided that he must have regard to the choice of the most appropriate solution from the schools of Imam Malik and Imam Ahmad bin Hanbal, and if none is found there, then from the schools of Imam al-Shafi’i and Imam Abu Hanifa as most befits.

If the judge does not find the solution there, then he must render judgment in accordance with custom, but provided that the custom is not in conflict with public order or morals, and if a custom is particular to a given emirate, then his judgment will apply to that emirate”.

Thus, in the absence of applicable legislative text, a judge has to resort his judgment upon a general principle of Islamic Shari’a. ‘The most appropriate’ solution that is found in the classical Islamic precepts shall be the preferred source of the judgment. At this point, legal doctrines of the Malikis and the Hanbalis are the preferred sources of the classical Islamic precepts. However, if the judge finds nothing, i.e., suitable to modern
circumstances, from those classical manuals, then he can make a reference to the Shafi’is
and the Hanafis.

The status of classical Islamic law in the United Arab Emirates legal practice was made
clear in article 2 of the Civil Transactions Code 1985. The article provides that to
understand, or to construct, or to interpret the legal principles of the Code, i.e., the
legislative texts, a judge has to apply a general principle of Islamic legal maxims as well
as those of established Islamic legal methods. Here, classical Islamic precepts shall be
referred to as they are regarded as the most persuasive and reliable precepts of the Islamic
law after the Qur’an and the Sunnah. In the Explanatory Memorandum, it was stated that
this attitude of the Code indicates the uniqueness of the law in the United Arab Emirates,
in the sense that while adapting to the modern approach the Code maintains its content to
the classical principles of the Islamic law.

The intention of the drafters was to ensure that the spirit of the Code should be in
accordance with the Islamic principles. All efforts have been made to implant the
classical Islamic precepts in the Code. In the event that a judge cannot find an applicable
text in Code, he should resort his judgment to a general principle of the Islamic Shari’a,
in which classical precepts rest as an important reference. Furthermore, while
constructing or interpreting the legislative text the judge has to apply a general principle
of the Islamic legal method. All these are to ensure that the Islamic law has its place in
the United Arab Emirates legal practice.

Thus, in the subject of the guarantees, all efforts have been made to implant the classical
Islamic precepts in the Code. A comprehensive reference has been made either to the
Majalla or to the classical manuals of the classical jurists. Precepts that are suitable for
modern needs have been rigorously adapted as new legal principles in the Code. All in
all, classical Islamic precepts have a great influence on the provisions of the guarantees in
the UAE Civil Transactions Code 1985.
Be that as it may, the extent to which the classical Islamic law of guarantees is applied in the UAE legal practice is still doubtful. It is observed that some of the provisions in the UAE Civil Transactions Code 1985 are not traceable from the classical precepts. Article 1092 of the Code, for example, seems to have no origin from the classical precepts of Islamic law. It provides that to make a guarantor remain liable, a creditor has to make a claim within six months of the date the debt fell due. Although it has been suggested that the provision was made upon a classical legal maxim, i.e., a damage shall be put to an end; a damage and a retaliation by damage shall not be allowed, it seems that no such clear provision was stated in the classical manuals.

Moreover, it is also observed that some of the provisions have gone far from the precepts of the classical Islamic law. Article 1067, for example, does not correspond to the classical Islamic precepts of the guarantees when it renders a guarantor to the incidentals of the debt as well as the cost of claiming unless the contrary has been agreed. Unless a prior agreement has been made, a guarantor will not only be liable for the principle debt but also the incidentals and the cost of claiming the debt. Hence, in Case No. 301 Year 1997 (21/12/1997), the Court of Cassation of Dubai has decided that a guarantor under a contract of a guarantee shall be liable not only for the principle debt but also the interest accumulated there from.

The legal principle that relates to the scope of the obligation of a guarantor is far removed from the classical precepts. In the classical manual of the Bada'i al-Sana'i, for example, it has been emphasized that the extent the creditor can claim from a guarantor shall not be in excess of the amount of a principle debt. At this point, it seems that the locus standi the creditor is allowed to make a claim from a guarantor is the principle obligation of a principal debtor that is established in the dhimma of the guarantor. Thus, to allow the

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49 Such a provision can also be found in the Syrian Civil Code 1949, the Iraqi Civil Code 1951 and the Jordanian Civil Code 1979
50 Case No. 301 Year 1997 (21/12/1997) as cited in Majallat al-Quda' wa al-Tashri', p. 1151
51 See 'Ala'uddin Abi Bakr bin Mas'ud al-Kasani, Kitab Bada'i al-Sana'i fi Tartib al-Shara'i, vol. 6, p. 10
creditor to make a claim beyond the principle debt is to allow the creditor to make a claim for what he is not entitled, which is not acceptable in the classical precepts.

It appears that although the Code was intended to be a model of modern Islamic civil code, in practice this objective is still far from being reached. In relation to this, it seems that although rigorous effort has been made to implant the classical Islamic precepts, at the same time some of the precepts are far removed from the practice. In reference to the above quoted case, this suggestion appears to be reasonable.

Again, beside the above principle, the court has also referred to article 1056, which laid down a basic nature of the contract of guarantee. In construing the provision, the court has departed from a general principle of the Islamic Shari'a, which is required under article 2. In this regard, meanings of article 1056 have been induced, and it was based upon modern economic interpretation. Thus, the court concluded that, as far as the provision is concerned, interest should be included in the obligation of the guarantor since the general rule suggests that 'the obligation of a guarantor is the same as the obligation of a principal debtor'. In other words, if the principal debtor is liable for the interest, then the guarantor should also be liable. This attitude of the court does not only depart from the original purpose of the provision in article 2, but also allows the practice of interest, which is prohibited under the Islamic Shari'a.

7.6 Feasible Precepts of the Classical Islamic Law of Guarantee

Although the application of the classical Islamic law of guarantee in modern legal practice is not comprehensive, the influence of it in shaping modern legal apparatus shall not be disregarded. From the above discussion, it is proven that most modern provisions were gleaned from the classical legal precepts, which were abandoned for a long time.

52 Article 1056 of the UAE Civil Transactions Code 1985 provides that the guarantee is the amalgamation of the obligation of a person with that of the principal debtor in respect to perform the principal debtor's obligation.
53 See article 2 of the UAE Civil Transactions Code 1985
These classical legal precepts were collected, reshaped and presented as new legal principles, which were intended to be the rules for modern practice of the guarantees.

Although one might suggest that classical legal precepts will not be able to cope with modern changes, the application of the classical Islamic law of guarantees in most of the Arab countries is the proof that it can survive in modern world. In this context, it seems that the readiness of modern legislators to adapt and reconcile some of the modern principles into new codes has made the classical legal precepts workable in modern changes. Moreover, it is also observed that the willingness of the drafters to assimilate those scattered classical legal precepts, which might eventually result in the obliteration of the differences between the thoughts, has also contributed to the success of the application of the classical legal precepts in modern world. In cases of hardship, the precepts of a different school, which is more suitable, could be applied in modern legal practice. Indeed, this method of patching up, i.e., talfiq and takhayyur, the most appropriate precepts from various schools of law have led these classical precepts to be acceptable in modern legal practice.

In short, it is evident that the classical Islamic law of guarantee is applicable in modern legal practice. In most cases, provisions that are laid down in modern civil codes are consistent with that of the classical legal precepts. This leads to a suggestion that the classical Islamic law of guarantee is suitable for and practicable in modern legal practice.

As such, perhaps the most feasible precept of the classical Islamic law of guarantee is the simplicity of its legal requirements. At this point, being gratuitous in nature, the Islamic guarantee neither requires a valid consideration nor acceptance to form a valid contract. It suffices upon a unilateral proposal from a guarantor, which could be communicated to the creditor. The reason behind this is that the Islamic guarantee has been regarded a gratuitous contract; it is neither a contract which is commutative in nature,\textsuperscript{54} `\textit{aqd}

\textsuperscript{54} Normally, in a commutative contract, a `conscientious consideration' from an acceptor is needed. This has been made so because under the contract there involves a pecuniary benefit. On the other hand, under a
mu'awadat, nor a contract to gain benefits. In this context, the purpose of the contract is to help others. Thus, with the classical Islamic guarantee, it is hoped that a person who faces difficulties in obtaining a loan from financial institutions could ease this through the help of another person. The simplicity of the classical Islamic guarantee will not only make the arrangement simple but also encourage lending activities, hence helping in the growth in the economic sector.

From another perspective, through a careful examination of the classical Islamic law of guarantee, it reveals that some of the precepts are much better than modern legal practice of the guarantee. At this point, the opinion of the Malikis can be a good reference. In the previous chapters, a discussion has been made on the opinion of the Malikis with regard to the right of a creditor to make a claim upon a guarantor in the event the principal debtor is proven to be available and able to make the repayment.

In Malaysia, there has been a long discussion with regard to the right of a creditor in such a situation. In view of this, both the government and the public have seriously participated in the discussion. On the part of the public there has been a suggestion to repeal the existing law that relates to the right to a creditor to make a claim upon a guarantor in such a situation.

7.7 Classical Islamic Law of Guarantee in Malaysia: An Alternative Resolution to Modern Setback

The legal system of Malaysia is based upon the English common law. However, before the arrival of the British in 1826, classical Islamic law was one of the main legal sources of the country. Islam had arrived in Malaysia by around 1303. Since then the teachings of Islam have been translated into the local people, and the classical Islamic law has come to be in force in the region. At this point, the classical Islamic law has been accepted
through the process of the validation of some established local rules and the imposition of 
the Shafi’i’s classical precepts (fiqh). Thus, classical Islamic law was developed, the 
climax of which was the codification of the law in the Malacca Empire.

Nevertheless, through the introduction of the English common law, this development was 
stunted and some of the principles have been abandoned. In this context, it is observed 
that while introducing the English common law, judges have always endeavoured to 
restrict the application of the classical Islamic law. In Baker Ali Khan v Anjuman Ara 
Begum, for example, there was great concern among the judges with regard to the 
application of the classical Islamic law in the region. Hence, the influence of the classical 
Islamic was reduced and a vast portion of the precepts have been abandoned.

7.7.1 The Modern Law of Guarantee in Malaysia

In Malaysia, the main law governing the guarantees is the Contract Act 1950 (Revised 
1974). In the Act, there are about 22 sections that deal directly with guarantees. These 
sections are outlined from section 77 to section 100. The other laws that support the Act 
are the judicial precedents and the English common law.

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55 See M.B. Hooker, 'The Translation of Islam into South-East Asia', in Islamic Law in South-East Asia 
(Ed. M.B. Hooker), pp. 8-9

56 It was suggested that the first codification of the classical Islamic law in Malaysia was the Undang-
undang Melaka (Malacca Laws). See M.B. Hooker, Adat Laws in Modern Malaya, pp. 71-90 (1970); see 
also Ahmad Ibrahim, 'The Shariah and Codification: Malaysian Experience', [1987] Syariah L.J. 47 at 47-
52; see also Mohamad Jajuli Rahman, The Undang-Undang: A Mid-Eighteenth Malay Law Text, (An 
Occasional Paper, No. 6, 1986 at University of Kent at Canterbury, Centre of South –East Asian Studies)

57 (1903) 30 I.A. 94 at 111-112

58 The Application of the English common law is made through sections 3 and 5 of the Civil Law Act 1956 
(Revised 1972). In respect to this, sections 3 and 5 of the Act provide that in the event of lacunae, the court 
of Malaysia shall apply the common law of England and the rules of equity as administered in England 
while deciding an issue or a question thereof.

Ironically, however the application of both common law and rules of equity is limited to a certain period. In 
west Malaysia, for example, the application is limited up to the 7th day of April 1956. In East Malaysia, the 
application of both common law and rules of equity in Sabah is limited up to the 1st day of December 1951 
whilst in Sarawak the application is up to the 12th day of December 1949.

Similarly, in commercial matters, the common law and the rules of equity is applied in the Malaysian 
courts up to the 7th day of April 1956 for the states of West Malaysia other than Malacca and Penang. In
Section 79 and section 81 of the Act provide for the legal nature of both the contract and the obligations that arise from the guarantees. At this point, section 79 provides that a guarantee is a contract whereby one person agrees to perform the promise, or discharge the liability, of a third person in case of his default.\textsuperscript{59} Section 81 provides that the liability of the surety [i.e., the guarantor] is co-extensive with that of the principal debtor, \textit{unless it is otherwise provided by the contract.}\textsuperscript{60}

Through the reading of both provisions, it could possibly be understood that the liability of a guarantor is co-extensive with that of the principal debtor.\textsuperscript{61} This means that the liability is in parallel to that of the principal debtor. Thus, from a further examination of the nature of the liability, we could understand that;

i. a guarantor will not be liable unless the principal debtor is liable at the first instance, i.e., dependent upon the exigibility of the principal obligation \textit{ab initio};\textsuperscript{62}

ii. a guarantor will not be liable unless a default occurs on the part of the principal debtor;

iii. the liability of a guarantor is the same as the liability of a principal debtor, and;

iv. the liability of a guarantor is no more than that of the principal debtor.

However, these are subject to the contrary provisions in the contract of the guarantee. Thus, if it is agreed that a guarantor be primarily liable the above principles will not be applied. In Malaysia, there are many instances where the liability of a guarantor has been

\textsuperscript{59} Emphasis added by the writer.
\textsuperscript{60} Emphasis added by the writer.
\textsuperscript{62} See \textit{Lakeman v Mountstephen} (1874) L.R. 7 HL 17
made primary. To mention a few, this includes Chung Khiaw Bank v Soi Huan;63 Kwong Yik Bank v Transbuilder;64 Public Bank v Chan;65 and Orang Kaya v Kwong Yik Bank.66 In other words, these contracts are not regarded as a guarantee but a contract of indemnity.

As a whole, in reference to the above, we could suggest that the position of a guarantor is the same as the principal debtor. Hence, in the event of defaults, a creditor would have the right to call upon the guarantor to satisfy his debt. This is based upon the original promise of the guarantor.67

A further examination of the intrinsic nature of a guarantor's undertaking would also suggest the same. At this point, the undertaking of a guarantor can be classified into two;

i. a promise to perform if the principal debtor fails to do so; and

ii. a promise to ensure that the principal debtor will perform.

With regard to the second point, it is observed that the usual form of the guarantees is to ensure that the principal debtor performs his principal obligation. Thus, if the principal debtor fails to fulfill his obligation, the creditor will have the right to recourse his debt from the guarantor, not upon the unpaid installment but as damages for breach of his guarantee.68 At this point, it was suggested that the obligation of a guarantor in common law is to see to it that the principal debtor performs the obligations, which were the subject of the guarantee; a breach of those obligations by the principal debtor entails a breach by the guarantor of his own contract for which he is liable to the creditor in damages to the same extent as the principal debtor.69

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63 [1986] 1 MLJ 188
64 [1989] 2 MLJ 301
65 [1989] 2 MLJ 305
66 [1989] 3 MLJ 155
67 s. 79
68 See the judgments of Lord Reid, Lord Gardiner, Lord Diplock, Lord Simon of Glaisdale and Lord Kilbrandon in Moschi v Lep Air Services Ltd. [1972] 2 All ER 393
69 Ibid.
This follows that the position of a guarantor is the same as the principal debtor. Hence, in the event of defaults a guarantor should be held responsible, to the same extent as the principal debtor, while at the same time a creditor should have been given the right to call upon the guarantor. The right of the creditor remains to exist even though he has chosen not to pursue his claim either from the available security or from the principal debtor himself.\(^70\) Here, it is suggested that a guarantor does not have the right to demand the creditor to recourse his debt from the principal debtor first before going after him.

Thus, it appears in *Bank Bumiputra Malaysia Bhd. v Esah binti Abdul Ghani*\(^71\) that a creditor has complete freedom to choose to recourse his debt. In this case, the appellant bank lent money to the principal debtor and as security took a charge over land belonging to the principal debtor and two others. The respondent was a guarantor for the loan. The principal debtor failed to pay the loan. The appellant bank took foreclosure proceedings on the land, but before the issuance of an order of sale, one of the owners died. The foreclosure was not proceeded with, instead the appellant bank took proceedings against the principal debtor and the respondent as guarantor. Judgment was entered against both and, based on the judgment, a bankruptcy notice was issued calling on the respondent to pay the amount owing. The respondent failed to do so. The appellant bank therefore filed a creditor's petition. The respondent failed a notice of intention to oppose the petition. The learned judge stayed the creditor's petition pending the decision of the petition against the principal debtor. The appellant bank appealed.

\(^70\) Under section 90 of the Malaysian Contract Act 1950 it is provided that the mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety [i.e. the guarantor]. See *Bank Bumiputra Malaysia Bhd. v Doric Development Sdn. Bhd. & 2 Ors* [1988] 1 MLJ 462; *Malaysian International Merchant Bankers Bhd v G & C Securities Sdn. Bhd. & Anor* [1988] 2 MLJ 471; *Re Tosrin bin Javarti, ex parte Equity Finance Corp. Bhd.* [1989] 3 MLJ 428; *Kwong Yik Finance Bhd v Mutual Endeavour Sdn. Bhd. & Ors* [1989] 1 MLJ 135

\(^71\) [1986] 1 MLJ 16
Among the issues to be decided was whether the guarantor has the right to compel the creditor banker to go after the principal debtor before going after him. At this point, Lee Hun Hoe CJ (Borneo) remarks;

“It must be pointed out that we are not concerned with moral but legal problems. The bank has obtained a proper judgment against the surety [i.e., the guarantor], and is entitled to enforce the judgment ... The guarantor has no special right to demand that the creditor call upon the principal debtor to pay off the debt before asking the guarantor to pay”

This statement of Lee Hun Hoe was quoted with approval in a later case. Thus, in *Bank Bumiputra Malaysia Bhd v Doric Development Sdn. Bhd.*, Peh Swee Chin J said;

“The Federal Court’s decision in *Bank Bumiputra Malaysia Berhad v Esah bt Abdul Ghani* [1986] 1 MLJ 16 has made it abundantly clear that, for the purpose of the instant case, in the absence of any express condition requiring that ‘foreclosure proceedings’ be proceeded with and completed first before suing the guarantor, the bank could not be compelled to sue the principal debtor, i.e., the company, first. Such being the case, counsel’s submission that *Esah bt Abdul Ghani*s case [1986] 1 MLJ 16 was distinguishable from the instant case because of foreclosure proceedings not being proceeded with therein at all could not possibly achieve the desired result intended by counsel”.

Thus, a creditor has complete freedom of choice. The fact that a creditor has taken steps to sell the security provided by a principal debtor this does not obviate the right of the creditor to call upon a guarantor to satisfy his debt. In other words, the law does not impose an obligation upon the creditor to have first realized the proceeds of the sale before he calls upon the guarantor to satisfy his debt. In fact, at the above case, it was contended that once a creditor had taken steps to sell the security provided by a principal

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72 Before the present case, it was suggested that a guarantor has the right to require a creditor to have first exhausted his recourse from the principal debtor before going after the guarantor. Thus, in *Ng Yik Seng & Anor v Perwira Habib Bank Malaysia Bhd.* [1980] 2 MLJ 83, the application of the guarantors was accepted to be reasonable and valid. In this case, the guarantors contended that 'in law and equity' they should only be called on to meet their guarantee if there should be any deficit after the sum to be realized from the sale of the charged property had been determined. However, in the present case, it was stated that *Ng Yik Seng*’s case should not be quoted with approval since it is regarded as a mere obiter dictum.

73 [1988] 1 MLJ 462
debtor, the creditor had no right to proceed against a guarantor as this would amount to a 'double recovery'. However, this contention was rejected on the ground that a guarantor does not have the right to demand that the creditor proceeds against the principal debtor first.

In Kwong Yik Finance Bhd v Mutual Endeavour Sdn. Bhd.74 the High Court of Malaysia has decided that a guarantor has no obligation to exhaust the recourse from a principal debtor before going after the guarantor. Thus, instead of relying upon one source, the creditor has also the right to call upon the guarantor to satisfy his debt. In disposing her judgment, Siti Norma Yaakob J said:

“Just as the guarantors have no right to demand that the plaintiff creditor calls upon the first defendant, as the principal debtor, to settle the debt before asking them, the guarantors, to pay, they too have no right to insist that the plaintiff sell off the charged property first to offset the debt before suing them on the guarantee. The plaintiff has the option to exercise which of two securities it wishes to enforce. It may even enforce both securities, as is done in this case, if it is found that one security is insufficient to settle the debt and it was to meet this eventuality that the plaintiff had in its own wisdom insisted upon two forms of security, the charge as well as the guarantee”.

It seems therefore that a creditor has an unfettered discretion in choosing the security he wishes to enforce. In addition, a creditor also has the right to proceed simultaneously against all the securities. Similarly, a creditor is also entitled to proceed against a principal debtor and a guarantor all at the same time.75 At this point, it is observed that where a loan has been secured by two collateral securities, one in the form of a charge and the other in the form of a guarantee, there is nothing to prevent a creditor bank from proceeding against the guarantor instead of the chargor for realization of the debt.76 Perhaps the most correct basis for this is that, being accepted to perform the principal obligation of the principal debtor, in the event of defaults, the liability of a guarantor is

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74 [1989] 1 MLJ 135
76 See the judgment of LC Vohrah J in Re Tosrin bin Javarti, ex parte Equity Finance Corp. Bhd. [1989] 3 MLJ 428
established in his obligation. Therefore he shall be held responsible for the debt of the creditor. Thus, as the High Court of Malaysia in Re Tosrin ex parte suggested, ‘unless the guarantee provides otherwise, the liability of a guarantor arises when the principal debt becomes due. The guarantor will be liable from that date even if the banker does not inform him that the principal debt has become due and does not demand payment under the guarantee’. Furthermore, according to Low Kee Yang, this liability arises as soon as the principal debtor defaults, and this remains in the right of a creditor unless the debt has been paid off.

As a whole, once a default has occurred, a creditor has the right to call upon a guarantor to satisfy his debt. This right remains with the creditor even though there is enough collateral to cover the debt. Besides, a creditor would also have the right to call upon a guarantor even though there is a principal debtor who is available to make the debt good. All in all, this suggests that a creditor has an enormous right to recover his debt under a contract of the guarantees.

The above situation of the law however does not please the public. On the basis of the ‘unfettered discretion’ that has been bestowed upon the creditors, the law has been suggested to be in favor to the creditors. There are cases where the principal debtors are available but the creditor bankers are still chasing the guarantors to recover their debts. As a result, it happens that some of the guarantors’ salaries are deducted from their accounts even without a prior notice. It also happens that some of the guarantors have

77 [1989] 3 MLJ 428
79 Berita Harian, “Penjamin Pinjaman Patut Dilindungi”, 9 May 1994 (Local News Paper) by Datuk Nasir Osman Abbas
81 Utusan Malaysia, “Bank Ambil Jalan Ringkas Kutip Hutang”, 4 September 2000 (Local News Paper) by Atok
received a notice of bankruptcy from the creditor banker’s solicitors\textsuperscript{83} while at the same time the principal debtors live in a luxurious fashion.\textsuperscript{84} Thus, to most of the guarantors the above state of the law should be revised so as to make the creditor to have first exhausted the remedies from the principal debtor before going after the guarantor, especially when it proves that the principal debtor is available and capable enough to satisfy the debt.\textsuperscript{85}

The above state of the law does not only affect the guarantors as such but has also some consequences on the public. It was reported that more than 30\% of bankruptcy cases involve the guarantors. This percentage is made upon a total number of 75,000 backlog bankruptcy cases in the year 2000; and 95,000 in the year 2001. Such a figure does not only concern the members of the public but also the government.

In short, the position of the modern law of guarantee in Malaysia could be explained in the manner that while it attempts to make the guarantee as a simple contract, i.e., no specific form is required, the law also seems to lack of certain protective measures to the guarantors. It is observed that in most of developed countries,\textsuperscript{86} the law either cautioned the guarantor by the introduction of a requirement as to the form of the contract or provided remedies for him, which lightened his burden to a very considerable extent. This, however, does not happen in Malaysia as the guarantor’s liability is ‘co-extensive’ with that of the principal debtor,\textsuperscript{87} that is, there is no \textit{beneficium excussionis personalis} and no \textit{beneficium excussionis realis} or \textit{divisionis}; and still the law does not require as to the form of the contract.

\textsuperscript{85} Berita Harian, “Tindakan Bank Tidak Telus Aniaya Penjamin”, 19 July 2003 (Local News Paper)
\textsuperscript{86} This includes the United Kingdom, which requires that the guarantee be made in a written form, and most of continental Europe such as the France, which provides for the rules of \textit{beneficium excussionis personalis}, \textit{beneficium excussionis realis} and \textit{divisionis}.
\textsuperscript{87} Section 81 of the Malaysian Contract Act 1950
Thus, the law needs for revision. It happens that more and more people are less willing to become a guarantor due to the above state of the law. To new businessmen, such as small and medium entrepreneurs, such a negative situation would create another problem, i.e., the complication in obtaining loans from financial institutions.\textsuperscript{88}

It is true that some steps have been taken to correct the problem,\textsuperscript{89} but this has not shown a great improvement. Thus, it is suggested that the classical opinion of the Malikis could be the alternative resolution for the above problem.

7.7.2 Classical Rules of the Malikis as an Alternative Resolution

From the previous chapters, a discussion has been made on the Malikis' stance on the right of a creditor to choose recourse for his debt. As such, the Malikis like others uphold the intrinsic object of the guarantees. In this context, the Malikis maintain the principle that a creditor banker shall have the right to call upon the guarantor if the principal debtor fails to satisfy his debt. However, the Malikis also maintain that if it is evident that the principal debtor is sufficient, and is able to set off the debt by himself, this right shall be

\textsuperscript{88} According to Roslan Awang, a President for The Malay Contractor Association of Malaysia, the members of the Association have experienced difficulties in obtaining loans from financial institutions due to lack of guarantors. Roslan Awang said, 'It seems that nowadays, people are feared of becoming a guarantor. To us, as businessmen, this phenomenon has created to another problem where it appears that no body is willing to be a guarantor for loan application. As this happens, it seems difficult to expand our businesses. This is not good for the nation economic development' (Writer's translation). See Utusan Malaysia, "Lindung Penjamin Dialu-alukan", 19 April 2000 (Local News Paper) by Noraini Razak

\textsuperscript{89} In 2001, for example, an amendment has been made to the Central Bank's Guideline so as to give more protection to the guarantors. In connection to this, in 1995 a guideline has been made where a creditor bank shall use its best endeavour to recover the debts from principal debtors, provided the loans advanced not exceeding RM 200,000; the loans are not granted to a spouse of a guarantor; and the guarantor not waives his rights which are provided under the guideline. In 2001, the 1995 Guideline has been amended where the amount of the loans has been increased to RM 250,000 and the creditor bank is no longer allowed to obtain a waiver of a guarantor's rights. In a similar vein, the Bankruptcy Act 1967 has also been amended where under section 33(a) the Official Assignee is given the power to discharge a bankrupt when a period of five years has lapsed. The 2003 amendment also provide a limited protection for the guarantors as against bankruptcy actions. At this point, under the new section 5(3) of the Act the law endeavour that a bankruptcy proceedings cannot be taken against the guarantors unless all endeavours has been made to recover the debts from principal debtors. It should be pointed that the above provision applies only to social guarantors who are defined in section 2 as those who give the guarantee not for the purpose of making profit, such as a guarantee for a scholarship; a guarantee for a hire-purchase transaction of a vehicle for personal or non-businesses use; and a guarantee for a housing loan transaction solely for personal dwelling.
suspended. At this point, the creditor banker shall not be allowed to call upon the guarantor unless and until he has exhausted the recourse from the principal debtor. In respect to this a classical manual of the Malikis shall be referred. Thus, in *al-Mudawana al-Kubra*, Sahnoun reported that;

"When I asked Imam Malik about the right of a creditor to call upon a guarantor while at the same time the principal debtor exists and is able to set off the debt by himself, he replies that the creditor does not have such a right. Imam Malik accordingly pointed out that the creditor should have first exhausted the recourse from the principal debtor; and if the creditor did not obtain a full remedy, then he is allowed to call upon the guarantor"\(^{90}\)

In another classical manual,\(^{91}\) al-Azhari emphasized that in cases of defaults, a creditor should not be given the right to call upon a guarantor if it is proven that the principal debtor exists and has sufficient sources to make the repayment.

It appears that the basis of the Malikis argument is the ability of the principal debtor to meet the payment. Therefore, in a situation where the principal debtor exists and it is proven that he is able to set off his debt, the question that follows is why should the guarantor be liable? Why should the guarantor shoulder the burden of the debt, which he gets no benefit from?

In fact, the creditor banker should have claimed his debt from the principal debtor himself. This is the main object of the guarantee. The original purpose of the guarantee is to provide a 'second pocket' to the creditor, hence if the principal debtor fails, then the 'second pocket' can be used to save the situation. However, if the 'first pocket' is readily available and sufficient to pay off the debt, the 'second pocket' should not be touched in any case.

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\(^{90}\) See Imam Malik bin Anas, *al-Mudawana al-Kubra*, vol. 4, p. 131 (n.d.)

Nevertheless, the Malikis has also stipulated that in certain cases the creditor banker can have the right to call upon the guarantor without first going to the principal debtor. These cases include;

i. where it is proven that the principal debtor has made an unnecessary delay in paying off his debt;
ii. where it is proven that the principal debtor is missing and he does not leave enough property to be used for the purpose of the payment;
iii. where the principal debtor has been declared bankrupt, and;
iv. where there is prior agreement that gives the creditor the right to call upon the guarantor.

Thus, unless and until the creditor has proven that at least one of the above conditions exists, he cannot go directly to the guarantor without first exhausting all remedies from the principal debtor.

In short, it is suggested therefore that the classical Islamic law of guarantee can be a useful reference for modern setbacks of legal problems. Bearing in mind the importance of the guarantees, this classical Islamic law ought to have a place in modern legal practice.

7.8 Conclusion

The guarantees have been a useful method in obtaining loans from financial institutions. Instead of involving much legal complication, the guarantees provide as a simple mechanism for obtaining loans from financial institutions. In Islamic banking and financial institutions, the guarantee has long been acknowledged as a useful mechanism in loan transactions. However, the need to comply with the Islamic teachings has made the institutions be cautious with the conventional system of the guarantees.
Thus, the Islamic guarantees have been the alternative to the conventional system. From the above, it shows that the practice of modern Islamic guarantees still tie closely with the classical precepts.

The knot of modern Islamic guarantees with classical precepts can clearly be seen through the application of the precept in modern legal practice. In the Ottoman laws, it reveals that the classical Islamic precepts have a great influence in its legal practice. The Majalla al-Ahkam al-‘Adliya, which was the civil laws of the Empire, proves this suggestion. From the above, most of the provisions in the Majalla were the reflection of the classical precepts. At this point, the Hanafis precepts dominated the 'Code'. However, through the method of patching up the most suitable precepts, some of other opinions were also referred to and adopted in the ‘Code’.

This tradition has been adapted in modern Arab legislations after World War II. Beginning with Egypt, the Arab laws have experienced a massive reformation. At this point, classical Islamic precepts, which were suitable to modern needs, were preserved while some Western principles have been adopted in their new codes. The Majalla, which was at one time in force in the region, has been a great contribution to the reformation of the laws. Even after its abolishment, the contribution of the Majalla in the field of civil transactions is still apparent. Judges in modern countries have always referred to the provisions in the Majalla if there are lacunae in their respective legislative texts. This attitude has made the classical precepts continue to exist in modern legal practice.

In the most recent legislation, the UAE Civil Transaction Code 1985 has given a great credence to the classical precepts. The fact that the Code was codified in the middle of the move to the reassertion of the Islamic Shari’a has made the Code to owe much debt to the classical precepts.

Although the application of the classical Islamic law of guarantee was not comprehensive, the above shows that the classical precepts are acceptable as modern
legal rules. The feasible precepts of the Islamic guarantees should not be disregarded. The simplest form of the guarantees should have encouraged lending activities, which in turn is regarded as modern trend of economic development.

The classical opinions on the law could also be considered in tackling modern problems. In this context, the classical precepts on the right of a creditor to choose the recourse for his debt could be the alternative resolution for modern legal setbacks. In Malaysia, for example, there has been a criticism on the 'unfettered discretion' that has been given to a creditor. There has been discontentment among the guarantors; while the principal debtor is available, and even adapts a luxurious live fashion, the creditors still chasing the guarantors to recover their debts. As a result, more and more people are less willing to become a guarantor due to the 'gratuitous' nature of the above law. It seems that there is no solution to the problem. Thus, the Malikis opinion on the issue can be a useful reference for the solution.
CHAPTER EIGHT

CONCLUSION AND SUGGESTIONS

From the above research it can be concluded that the institution of the guarantee has a significant role in securing obligations that are tendered to others. In the primitive ages, the guarantee was widely used to secure peacekeeping and the performance of future obligations. The important role of the guarantee was later recognized as a useful method to secure the repayment of debts. Within this purview, the English law, for example, has taken a practical step to develop the guarantee, which saw a gradual transition from the hostage relationship to a contractual relationship between the parties. At this point, the normal practice of the guarantor's surrender to the creditor has become merely symbolic, while the essence of the relationship has crept from power to consent. Once this concept of consent crept into the guarantee, the transition from *plegiatio* or body-pledge to contract began. Eventually the English law established that the guarantor's liability to pay the debts stemmed from his own promise rather than from outside manifestations such as the *plegiatio*. The guarantee was no longer seen as the substitution of the guarantor for that of the debtor, rather it was regarded as a contractual obligation arises out of contract.

This final development of the law of the guarantee has its diametrical recognition under the Islamic legal tradition. A similar concept of the law has been developed through acceptable principles of the Islamic Shari’a to serve the Muslim milieu. As such, like the English law, the Islamic law perceives the guarantee as having a significant role as a method to secure the loans advanced to a debtor. In the treaties of the Sunnah, i.e. the tradition of the Prophet, there have been numerous recorded cases describing the practice of the guarantee during the period of the prophetic. It is submitted, however, due to the small community and the simple transaction that was involved at the time, the rule that governed the guarantee was not properly developed. It only started to develop when the community became bigger and the relationship became complex. Since then there were
diverse and disparate sources of law that relate to the subject. The treaties of the classical manuals were, since then, regarded as the most valuable contribution to the development of the law and it is not surprising that the authority of such classical rules has been accepted and adopted to modern Islamic legislations.

The present research attempts to investigate the classical rules that pertain to the guarantee, and to explore how the classical jurists reacted to and interpreted the mechanism in the medieval period. An in-depth knowledge about such classical interpretations or rules is useful to form a theoretical basis of the law. Hence, a practical test could be made to understand the impact of such classical rules on the modern decisions of Islamic banking and legal practices. The study on the impact of the classical rules on the modern decisions of Islamic banking and legal practices is important in order to understand the trend of modern Islamic legal development. At this point, it is submitted that upon this understanding that prediction and suggestion could be made for future development of the law.

8.1 Classical Interpretations vis-à-vis the Modern Secular Explanations on the Guarantee

As explained above, the guarantee as an assurance developed in almost every society in this world. In Islam, the mechanism of the guarantee is not a new phenomenon. The origin of it was traced back to the ancient practices. However, in lines with the precept of the Islamic Shari’ah, the ancient practice of the guarantee was refashioned to accommodate the needs of the Muslims. Since then the guarantee was developed as one of the most important mechanism in the banking lending transactions.

In the classical period, the law that regulates the guarantee was developed upon the precepts of the Qur’an and the Sunnah. At this point, a great deal of interpretation has been induced in the process to understand the wills of the Islamic Shari’ah. As the result a
volume of principles was developed, which later became an invaluable source for modern Islamic legislations.

True to its origin, the objective of the guarantee as understood via the classical texts is to provide assistance to the people who are in need. At this point, the important function of the guarantee could be elaborated in two folds; first is to provide assistance and second is to provide an adequate assurance. Thus, in the context of the creditor-debtor relationship, the guarantee will provide assistance to both of them in the sense that for the debtor it helps him to obtain a loan and for the creditor it helps him in facilitating the transaction through the supplementation of a reasonable assurance; the creditor is assured with the guarantee.

At this stage, if a comparison is made between the classical interpretations and the modern secular explanations, it reveals that both civilizations agree that the original function of the guarantee is to provide assurance to others, though the notion of assistance has a greater prominence in the classical Islamic law. A similar attitude could also be found in matters that relate to the effect of the guarantee. Hence, in contract, when the principal debtor fails to perform his promise, both civilizations agree that the guarantor shall be made liable to the obligations. Thus, in lending transactions, including modern banking operations, both civilizations agree that when the principal debtor defaults the creditor shall have the right to call upon the guarantor to settle the debts.

In short, as a general conclusion we could suggest that both civilizations go hand in hand in matters that relate to the general concept of the guarantee. However, if a closer examination is made, we will find that both civilizations have a different approach with regard to the application of the guarantee.

At this point, it seems that the guarantee under the classical interpretations has been classified under the scheme of nominated contracts. This means that a special set of laws
will govern the scheme instead of a general rule of contract as applied under the English common law.

The guarantee under the classical interpretations was formed under the concept of *ta'awun* or mutual assistance, and therefore it was regarded as a gratuitous contract. Hence, it seems that the law that governs the guarantee was developed and formulated upon this concept of *ta'awun* or the gratuitous. The result of such formulation could be enumerated as below. First, the contract is valid even though it was initiated through a unilateral offer or proposal. Second, the contract is valid even though there is a lack of consent on the part of the recipient. Third, the contract is valid even though there is lack of consideration from the recipient. This situation of the classical law on the guarantee is different if a comparison is being made to, for instance, the English common law. Under the English common law an acceptance, consent and consideration are important in order to conclude a valid contract of the guarantee. This is because, as Lord Diplock has held, the guarantee is part of a contract, and therefore general rules of law of contract shall be observed to conclude a valid contract of the guarantee.

From a global perspective, this classical interpretation on the law of guarantee seems inapplicable to the modern practice of the guarantee in common law jurisdictions. This problem prolongs in countries that have Islamic banks but uses the common law traditions as the basis for legal framework. Based upon this reason, it is suggested that the classical Islamic law of guarantee be amended in order to make it applicable in common law jurisdictions.

Thus, some forms of reformation needs to be made in order to make the application of the law possible in the common law jurisdictions. The doctrine of *taqlid*, that is, a strict adherence to a particular teaching of school of laws, which still occupies the mind of the Muslim populace, needs to be re-examined. It is accepted that in the classical period a

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1 See Moschi v Lep Air Services Ltd. [1972] 2 All ER 393 at 400
2 Malaysia is the best scenario for this legal issue.
mere reference to a particular school of laws might work well to the people of that time, but in modern world, with the impact of modern political, social and economic changes, a total reliance on a particular school of laws is not the best decision. At this point, it is submitted that, in the wake of globalisation, especially in the field of economic sector, a strict adherence to the doctrine of taqlid does not have a valid plea; in fact it could impede social development as well as laws and most important thing it might obstruct the goal or the objective of the Islamic Shari’a (maqasid al-Shar’i). Thus, it is suggested that an independent ijtihad needs to be engaged to replace the doctrine of taqlid when the situation needs so to serve the needs of the people.

In the question of the classical guarantee, the Muslim shall be valiant enough to make a thorough revision especially on issues that have been highlighted at above. Indeed, the scheme of nominate contracts that characterizes the classical Islamic guarantee might have circumscribed the application of the law in modern legal practices. It is, therefore, suggested that a review be made on the respective rules so that the classical guarantee could be submerged to modern legal practice such as the common law jurisdictions. Perhaps, the Hanafis approach to the formation of the classical guarantee, which is more akin to the English common law of the guarantee, could be the starting point for the process of reformation of the law. If this was accepted we believe that the Islamic law of guarantee could be developed and applied in those common law jurisdictions such as the Malaysia.

Such process of modernization certainly needs a departure from a strict adherence to a particular teaching of a particular school of laws. Furthermore, it is also possible that the process needs to depart from some rules that were introduced in the medieval period. The exercise is exigent when such rules did not benefit the public interest. The departure from such classical rules however does not mean that a person has abandoned the precepts of the Islamic Shari’a. In fact, the rules, which were developed upon interpretation, are the man-made law, which are alterable to suit current circumstances. In this context, the rules in the classical texts do not have the same authority as the Qur’an and the Sunnah. The
essential characteristic of the rules is that they are merely presumptive and it is open to a judge or jurist not to follow such particular ruling, if in the exercise of his judgment, he holds it to have been based on incorrect deduction.

8.2 The Impact of Classical Rules in Modern Islamic Banking and Legal Practices

From the above analysis, it is admitted that although classical law has some weaknesses in the modern world, it continues to prove that it has a forceful influence on the modern decisions of Islamic banking and legal practices. In fact, the influence of classical Islamic law on modern Islamic banking and legal practices is something that is foreseeable. This is because of two main reasons; the first is the movement for the reinstatement of the classical Islamic law itself, and the second is the fact that the modern law was and is being developed upon the classical rules.

Thus, it seems that the application of classical Islamic law in the modern Muslim’s life is inevitable. Indeed, as stated above, the pressure on the reassertion of the Islamic Shari’a was also meant to reinstate the classical values in modern life. In this context, Hooker said, ‘the essence of the modern revival movements is to regain a primacy for [the classical precepts in] the texts, to inject their contents and reasoning into working legal system’. After decades of abandoning the rules of the classical Islamic law, the reformers felt that it was needed to revive the law in a new form. The fact that they were constructed upon a strict procedure of the Islamic legal method means that the classical doctrines are regarded as the most persuasive sources though perhaps not authoritative in the modern Islamic law formulations. In this regard, the classical texts offer rich information about meanings and objectives of the abstract rules in the Islamic Shari’a. In a similar vein, the classical precepts contain rich legal principles that relate to a specific legal issue. If the English common law refers to the rules of precedent for the understanding of law, the Islamic legal tradition refers to the precepts of the classical jurists for the same. With regard to this, Liebesny has made an explicit remark,

"The judge in Islamic law would base himself on an authoritative text developed by the school of Islamic jurisprudence to which he himself belonged or he would consult a mufti. He would not turn to prior decisions handed down by other judges and then base his decision on these precedents".4

Therefore, classical doctrines have a valid plea for a continuous consideration even in this modern society. In the previous discussions, it has been clearly shown on how these classical doctrines influence the modern Arab Civil Codes. The Jordanian Civil Code 1976 and the UAE Civil Transactions Code 1985 could the best example for this.

In the practice of Islamic banking, the practice of referring to the classical precepts seems to be overwhelming. At this point, it seems that most of the banking products, if not all, are the reflections of the classical precepts. In fact, the emergence of Islamic banks was also meant to reinstate the classical Islamic law in the modern Islamic life. At this point, it was suggested that the function of the banks was not only to provide services that conform to the principle of the Islamic Shari’a but also to promote and develop the classical law that was constructed upon the rules of the Qur’an and the Sunnah. Ahmad Ibrahim remarks,

"The objectives of these Islamic banks in general have been to promote, foster and develop the application of Islamic principles, law and tradition to the transaction of financial, banking and related business affairs".5

As such, it is not an exaggeration to suggest that the application of the classical precepts in the modern banking transactions is inevitable. Indeed, the principles that fashion the modern products of Islamic banks were extracted and originated from the classical formulations. To date it is hard to find a single product that was constructed independently from the classical formulations.

5 Ahmad Ibrahim, 'Legal Framework of Islamic Banking', Jurnal Undang-undang 1
At this point, one could suggest that the classical interpretations have a powerful force in shaping the modern Islamic banking and legal development. Thus, there is no such question about the application of the classical Islamic law in the modern Islamic world. Indeed, the application of the law is there and it has a strong plea to be the basis for modern positive laws including in the field of commercial transactions.

In the field of the law of guarantee, much development has been made upon principles that have been developed during the classical period. In the previous discussions it appears that both the fatwa making and the drafting of the modern Islamic legislations were made with a vast reference to the classical Islamic law. In the context of fatwa, for example before it is issued a mufti will bind himself to refer the issue in question to the legal scriptures of the classical period. It is only when a similar issue is not found in the classical texts then the mufti or another authorized bodies will resort to their own judgments using an appropriate legal method.

Similarly, while drafting a code the Arab legislators will endeavor themselves to put the classical law at a special place. An example of this could be seen through the promulgation of the UAE Civil Transactions Code 1985. Under article 1, the Code provides that in the absence of legal provision a judge shall refer his judgment to the precepts of the four classical schools. Further, the status of the classical Islamic law was also made clear in article 2 of the UAE Civil Transactions Code 1985. The article provides that in order to understand, or to construct, or to interpret the legislative texts of the Code, a judge has to apply a general principle of Islamic legal maxims as well as those established Islamic legal methods. Here, classical Islamic precepts shall be referred to as they are regarded as the most persuasive and reliable rules of the Islamic law after the Qur'an and the Sunnah. In the Explanatory Memorandum, it was stated that this attitude of the Code indicates the uniqueness of the law in the United Arab Emirates, in the sense that while adapting to the modern milieu the Code maintains its content to the classical principles of the Islamic law.
This supports the argument that the classical Islamic law forms the model for the modern Islamic law formulations. Thus, the relevant issue that needs to be considered is to what extent the classical doctrines that relate to the guarantee influence the modern decisions rather than their applicability to the modern Muslim world.

Still, the fact remains, as Anderson remarks,\(^6\) that first the classical Islamic law, whether in its original or a somewhat modified form, still represents the law of commercial transactions in the Muslim world. Second, that it survives, at least in bits and pieces, in the civil codes of a number of Muslim states, and still represent the basic law throughout most of the Arabian peninsula. Third, that it represents a coherent, well-documented and independent system of law, which will amply repay comparative study. Fourth, that it still holds, in somewhat measure at least, the key to the future, for on their attitude to this law the future development of the Muslim countries largely depend in the field of commercial transactions.

8.3 Methods of Application the Classical Islamic Law in Modern Legal Practice

From the above study, it seems that the application of classical Islamic rules in modern Islamic legal practices is considerable. Thus, it is not an exaggeration to predict that in the future such application will have a greater impact on the modern Islamic legal practices. This is obvious from the above pressure and the readiness of the Muslim to reduce disparities from within the opinions of different schools.

With regard to the application of the classical Islamic law in the modern world, credit shall be given to the modernists. These people has spent much of their times (researching, scrutinizing and testing the classical Islamic legal values as) to put the classical rules as working legal norms. A decision to codify the scattered classical legal opinions was the most crucial in the history of Islamic legal development. Thus, it should have a full

support from all Muslims. Indeed, codification has made the classical rules applicable to the modern milieu of the Muslim.

As such, apart from codification, there are at least three other methods that have been used by the modernists to make the classical rules applicable in the modern world. These methods could be enumerated as the method of eclectic choice and the patching up of the most suitable precepts from within the opinions of different schools, the method of incorporating the classical rules into the existing modern legislations, and the method of reinterpreting the classical rules so as to make it applicable to the modern needs of the Muslim.

To describe the methods, below are some examples of the expedients.

i. The method of eclectic choice and the patching up the most suitable precepts

An eclectic choice, or takhayyur, is a method of choosing the best opinions in the classical texts to accommodate the demand of social needs. The opinion that seems most suited to the modern life will be selected as the norm for modern Islamic legislation. Hence, under an eclectic choice, the exercise includes the selection of opinions from within different classical sources to establish a legal principle for the purpose of legislation and enforcement. The method is practical since it allows flexibility and an exchange of views from among different schools of thought.

An example of this could be seen through the drafting process of the first Islamic civil code, i.e., the Majalla circa 1870s. During the process of codifying the classical precepts the drafters have endeavored their best to select the most suitable precepts to the extent that some of the opinions, which are outside the Hanafi pretext have been adopted.

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Hence, under article 621 of the Code, for instance, the opinions of classical jurists other than the Hanafis were selected to be the principle in the Code. At this point, while considering the basic nature of the guarantee, i.e., gratuitous, the drafters have suggested that it suffices for a guarantor to make a unilateral proposal to conclude a valid and enforceable contract. This principle has departed from the Hanafis doctrines where the Hanafis suggested that to conclude a valid contract there should be an offer and an acceptance; and this includes the guarantee.

A similar exercise could also be found in a more modern Islamic legislation. In the UAE Civil Transactions Code 1985, for example, the method of eclectic choice has been adopted to make the classical precepts acceptable in the modern legal practices. Thus, instead of adhering to the dominant school of the Union, the Code endeavors to seek the opinions of other recognized schools, which are deemed suited to the social needs.

As such, the role of the ruler was important in making the classical doctrines applicable in the modern legal practices. In this context, under the doctrine of siyasa shar'iyya, i.e., a policy based on Islamic Shari'a, the ruler is given the power not only to confine, but also to define, the jurisdiction of his courts, and thus to direct them not to follow the dominant opinion in their own school of law in every particular, but to apply, instead, such other reputable opinions as may seem more conducive to public welfare. As a result, classical Islamic law, as it is applied by the courts has been extensively incorporated in a series of legislative enactments based not on the dominant opinion of classical jurists, but on the broad principles of Islamic law as interpreted by the ruler.

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8 A reference has been made to the precepts of the other three schools, i.e. the Malikis, Shafi'is and Hanbalis. See, for example, Shihab al-Deen (al-Ramli), Nihayat al-Muhtaj ila Sharh al-Minhaj, vol. 4, p. 438; and Abi Farraj Abdul Rahman Bin Qudama (Ibn Qudama), al-Mugni, vol. 5, p. 103
9 See, for example, the view of al-Kasani with regard to the unilateral proposal of a guarantor in a contract of a guarantee. `Ala Uddin Abi Bakr Mau'ud Bin Ahmad al-Kasani, Bada'i al-Sana'i fi Tartib al-Shara'i, vol. 4, p. 3404
10 Under article 1 of the Code, it was emphasized that the main aim of the law shall be the appropriateness of the classical precepts to the modern needs. Therefore, instead of adhering to one particular school, the Code encourages the judge to seek from other school the precept, which most suited to the issue.
any single school, but rather on the eclectic choice of such opinions as seem most suited to the modern life.

Indeed, this practice of eclectic choice is important\textsuperscript{12} and it is upon this method that classical rules have been made acceptable and dynamic to modern legal practices.\textsuperscript{13} And the addendum of \textit{talfiq} or the patching up has broadened the application of classical rules in the modern legal practices. In fact, \textit{talfiq} has been perceived as one of the methods that allow classical Islamic law to be developed in parallel to modern needs. At this point, \textit{talfiq} could be defined as the process of assimilating different legal principles from variant sources of the classical texts to form a new formula of Islamic law. The application of \textit{talfiq} would not only result in a new legal principle, which is hoped to accommodate the modern needs, but also retain the classical nature of the rule.\textsuperscript{14}

ii. The method of incorporation of the classical doctrines into the existing modern legislations

The second is the incorporation of the classical rules into the existing modern legislations. The objective of the method is to restore the classical precepts into the modern legal practices. Thus, instead of a total rejection, as some has suggested, the classical precept was fused into the existing modern legislations with some modifications.

\textsuperscript{12} According to Frank E. Vogel, the practice of the eclectic choice is important because it has the advantage of aligning the modern scholar’s view with that of a great scholar of the past, which at a minimum lends assurance that nothing about the opinion fundamentally offends the Shari’a, that no disastrous innovation is afoot. See Frank E. Vogel and Samuel L. Hayes, III, \textit{Islamic Law and Finance}, p. 36 (1998)

\textsuperscript{13} Frank E. Vogel has put three conditions as to the practice of the eclectic choice. The conditions include:

a. To revert to the original teaching of the Qur’an and the Sunnah and to basic \textit{fiqh} principles to decide which view offers the best or strongest interpretation of the revealed texts,

b. To evaluate an opinion by the rules of decision internal to the school which espouses it, such as the degree of support from the school’s founder or its consistency with other school holdings (e.g., there are stronger and weaker Hanafi views),

c. To examine which view best serves the general welfare (\textit{maslaha}, a conception including religious welfare), sometimes because it conforms to prevailing practices or customs.

See Frank E. Vogel and Samuel L. Hayes, \textit{ibid}.

Through this method the exercise will involve the comparison, combination and assimilation of the classical precepts with those of the acceptable foreign legal rules that are embodied in the existing legislation. During the process a great weighting will be given to the pragmatism and the usefulness of the classical rules to the modern commands of social changes. The end result of the method is the unification of the classical rules with that of the modern principles.

An example of this could be seen through the modern Egyptian Civil Code promulgated in 1948. The Code represents the first example of restoring the classical rules into the modern legal practices. It seems that during the process a great effort has been made to assimilate, amalgamate and re-conciliate the classical texts with that of the existing principles. Thus, the best principles in the classical texts were selected and fused into the modern legal principles to form a new model of Islamic law. At this point, the Code owes its rules from a combination of the classical precepts, which were mainly derived from the Hanafi’s doctrine, and the rules that emanated from the European sources. The end result of the promulgation of the Egyptian Civil Code was the restoration of the classical texts in the modern practice, and this was completed through the unification of such classical texts with that of the foreign legal principles.

The method is considered as useful in the sense that the application of the abandoned classical texts was made possible even in the pace of modern challenges. Indeed, the method is helpful to create the equilibrium between the theory of the classical law and the actual practice. In the more modern legislations, the usefulness of the method has been fully utilized, and this can be seen through the promulgation of the UAE Civil Code in 1985.

iii. The method of reinterpretation the classical texts

The third involves the method of reinterpretation the classical rules so as to make it applicable to the modern needs of the Muslim. Apart from the eclectic choice and the
patching up the best opinions of the classical jurists and the incorporation of the classical rules into the existing modern legislations, the application of the classical law has been made possible through the reinterpretation of the rules upon the light of modern legal issues. It should be pointed out however that reinterpretation in this context does not mean that there is a great change in the law involved. What is meant by the reinterpretation is to reject the strict dogma of the law and to select the more flexible principle from another rule to make an irksome prohibition in a particular transaction allowable.

An example of this could be seen through the use of legal artifice or *hila* in the modern Muslim legal practice. As mentioned at above, the objective of legal artifice is to find alternatives for the strict dogma of the classical texts that clash with the current needs of the Muslims. At this point, it should be admitted that some of the classical texts are irreconcilable to the modern commands of commercial transactions, and therefore alternatives have to be found in order to make the continuous application of the Islamic law possible. The process is therefore to abscond this particular strict dogma, and select another rule, which is recognized in the classical texts to form a new principle of law.

In the context of the guarantee, the issue of fees could be the best illustration for this. There was an established rule in the classical texts that fees cannot be charged on a principal debtor for the guarantee given to the creditor. In the modern banking practices, this dogmatic rule however has been quashed through the selection of another rule, which permits the charging of fees upon the guarantee given to the principal debtor. Thus, instead of referring to the irksome prohibition in the rules of the guarantee, modern scholars have departed and sought an alternative solution through the use of allowable principles that are embodied under the rules of contract of *wakala* or agency.

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15 It should be pointed that although there is a call for new interpretation in the Islamic Shari'a, i.e., to open the door of *ijtihad*, it seems however that the attitude of the Muslim scholars is still reluctant to depart from the classical law. The echo of *taqlid* is still prevalent in the Muslim minds.

These are the methods that have been used by the modernists in order to make the classical rules applicable to the modern needs of social and economic life. In modern government, the adaptation of the classical rules was completed through these expedients. This does not mean that the modern Islamic law is no more ‘pure’ in its context. It does however mean that the initial purpose of the law is being interpreted in the context of modern circumstances. Thus, through this compromise approach classical rule has been successfully constructed as a working legal norm to accommodate the needs of modern demands.

In Malaysia, the approach has long been accepted as a successful method to modernize the classical precepts. At this point, the most suitable precepts were selected as practical legal norms to the recipients. This has been done so not as a rejection to the whole classical rules but to accommodate local cultures and languages. There has been an abundance of examples where in Malaysia the rules of the Islamic Shari’a were formed on the basis of local values.

The Malacca Digest or the Risalah Hukum Kanun can serve best illustration for this. It has been suggested that the composition of the laws was made upon selection that reflects local cultures. It is ‘purpose’ that makes the classical precepts acceptable as modern legal rules. The method of eclectic choice should have not been seen as haphazard or incompetent as it is made upon purposeful consideration. The law means not just revelation but also attachment to the interest of the subject. Hence, the law should be at all times coincides with the needs of the people.

It is against the foregoing arguments that we proposed that the Islamic law is susceptible to changes. At this point, the classical precepts of the guarantee are potential to be developed, hence accepted as modern legal rules pertaining to the subject. It is observed that some principles that are embodied in the classical manuals are workable to be accepted as modern legal rules. The opinions of the Malikis, for example, could be developed as modern rules in the banking loan transactions.
8.4 Harmonization the Classical Islamic Law and the Malaysian Common Law

Harmonization is perceived to be one of the practical methods in order to make the classical rules applicable in the modern legal practices. Having seen that the pressure on the reassertion of the Islamic Shari’a could also mean to reinstate the classical rules in the modern life, the call for harmonization is perceived to be the modest approach. The process would involve the submergence of the classical rules into the modern common law practices after an in-depth comparison has been made.

In Malaysia the process of harmonization of the classical rules and the Malaysian common law is perceived to be an urgent appeal. The proposal for remolding the existing legal system, which shall be based upon both local and Islamic values, has made this call as a valid plea. In addition, the setting up of the Islamic banks, which at all times shall abide by the principles of the Islamic Shari’a, also made the call as an urgent appeal. Having aimed to be the leader in the International Islamic Financial Market, Malaysia is expected to have a comprehensive law that is based upon workable Islamic principles. Further, the process is also important if a reference is being made to current legal issues that pertain to commercial transactions of the Islamic banking. At the moment, though the granting of finance is based on the principles of the Islamic Shari’a, the transaction is regarded as one of commercial transactions and therefore it comes within the jurisdiction of the civil courts.


Under List I of Ninth Schedule of the Federal Constitution the federal courts, i.e. the civil courts in Malaysia are given the powers to entertain cases that involve the Islamic commercial transactions.
In the field of the guarantee the process of harmonization however shall be looked not only to win the Muslim hearts but also to bring back the confidence within the general public. As suggested elsewhere, the classical rules of the Malikis that relate to the right of a creditor to call upon a guarantor when a principal debtor defaults is hoped to be able to serve the purpose. It is hoped that the process will not only correct the situation but also provide a legal platform that is based upon acceptable legal values. It is interesting to note at this point that to date the law that governs the guarantee in Islamic banking is still referred to the principles of the English common law.

The Islamic Banking Act 1983 does not have a comprehensive provision on the Islamic business practices. In fact, the Act limits its scope to the manner in which the Islamic bank could be established and managed. It neither provides the details of the commercial transactions that are allowable to the Islamic Shari'a nor the statement of the applicable substantive law for the resolution of disputes. Thus, when an Islamic bank carries out these transactions according to the Islamic Shari'a, problems arise because in the event of a dispute in relation to commercial matters they will be still brought to the civil courts and not to the Shari'a courts. These disputes will continue to be dealt with according to common law principles unless proper amendments are made to the existing laws. Dispute on Islamic financing transactions have to work in the context of English principles, as they are applicable in Malaysia. Thus, contracts like the guarantee have to be viewed in line with the equivalent relevant legislation and those applicable English law principles, to interpret or supplement the legislation. In view of this, the insertion of the classical rules in the existing laws through harmonization seems to be desirable.

20 Bank Islam Malaysia Bhd v Adnan bin Omar & Ors (1994) 3 CLJ 735
On the issue of the right of a creditor to call upon a guarantor when a principal debtor defaults, the researcher strongly feels that the Malikis doctrine on the guarantees can be the alternative solution to the modern legal stumble. It is submitted that when the existing law is not conducive to the public interest then the law should be reviewed in the light of modern circumstances where some modifications might involve. This development is inevitable as to meet the social needs and perhaps to correct the perceived injustice of the law.

At this point, the process could begin with the borrowing of some foreign legal principles and for this purpose the doctrine of the Malikis that is embodied in the classical texts shall be the main reference. It should be pointed out however, that the process does not mean that the existing legal principles will be demolished at all costs. In fact, the principles should be retained through the submergence of new principles, which are perceived to be helpful in meeting the social needs. In connection to this, the researcher would like to quote the words from Glass JA as guidance. In Allen v Snyder the learned judge said;

"It is inevitable that the judge made law will alter to meet the changing conditions of society. That is the way it always evolved. But it is essential that new rules should be related to fundamental doctrine. If the foundations of accepted doctrine be submerged under new principles, without regard to the interaction between the two, there will be high uncertainty as to the state of the law, both old and new".

The existing Malaysian legal rules on the guarantees could be developed through this process. In fact, law should be perceived as a coherent and dynamic whole, which is always alterable to development. The law is always subject to a constant reevaluation and

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23 *Allen v Snyder* [1977] 2 NSWLR 685 at 689
adjustment, sometimes culminating in the birth of new principles and doctrines. Foreign laws including the classical Islamic law could be the subjects for the purpose of legal development. Thus, in the context of Malaysian law of guarantees, it is proposed that classical Islamic law could be a useful contribution for such development. In relation to this, a continuous process of remolding the classical precepts should be seen as an essential part of the overall process of legal development.

It is worth stating at this point that although equity could be perceived as one method of remedy for the extremity of the law, it seems however that there is no sufficient ancestry in the principles and precedents owing to the rules. There have been several attempts to put equity in the place but the effort has not been a great success.24 The strict adherence to the principle of precedent was perhaps the main reason for the difficulty to apply the rules of equity in the transaction of the guarantee.

In fact, it is observed that the flexible nature of equity itself has become rigid in practice. The original creativity of equity to redress hardship in law has become stagnant, as this has been circumscribed through the doctrine of precedent. It is not surprising therefore that almost a century ago the 'new model' of constructive trust that was developed by Lord Denning has been rejected.25

8.5 Field for Harmonization the Classical Islamic law and the Malaysian Common Law

In the previous chapters, there has been a discussion with regard to the right of a creditor to choose a course of action in cases of defaults. The most prevalent rule was that the creditor has an absolute right to choose an action, i.e. to sue the debtor or to sue the

25 The Court of Appeal had rejected the idea on the grounds that it did not have sufficient ancestry in the principles and precedents of equity. See Grant v Edwards [1986] Ch 638, per Nourse LJ., see also National Provincial Bank v Ainsworth [1965] AC 1175
guarantor, even though there is evidence that the debtor is sufficient. This has led to
disgruntlement among the public.

At this point, it seems that the classical precept on the Islamic guarantee can be an
alternative solution to the above problem. The view of the Malikis as discussed in the
previous chapter could be developed and applied in modern situation.

Apart from analogical deduction on the rules of *al-rahn*, the basis the Malikis propounds
this solution was perhaps based upon the notion of *istihsan*, a principle of equity, or
*istislah*, a principle of the general interest. At this point, these two bases of Islamic
Shari'a could be compared with that of the notion of equity in the English common law.
While the English common law inspires equity as a separate system of law, *istihsan* and
*istislah* are the modes to expand the law based upon the general practice of the Islamic
Shari'a. In other words, a new rule that is being constructed should be consonant with
that of the general practice.

*Istihsan* and *istislah* are the modes that can be used to mitigate the hardships of the law. 26
It is observed from the previous that to allow the creditor to call upon the guarantor to
meet the payment with the awareness that the debtor is sufficient is something that is not
fair to the guarantor. Although the contract might suggest that the guarantor shall be
liable, the fact that the debtor is still available has made the enforcement of the contract
lead to unfair results. This is in contrast with the purpose of the Islamic Shari'a, which
aims at justice and fairness.

26 According to Kamali, *istihsan* is a method of exercising personal opinion in order to avoid any rigidity
and unfairness that might result from the literal enforcement of the existing law. See Mohammad Hashim
Kamali, *Principles of Islamic Jurisprudence*, p. 246 (1991). In short *istihsan* is a departure from existing
rules to a more compelling reason. This departure, however, should be made on the basis of the Islamic
Shari'a. Thus, the departure to an alternative ruling may be from an apparent analogy to a hidden analogy,
or to a ruling, which is given in the *nass*, (i.e. the Qur'an or the Sunnah) consensus, custom, or public
interest.
With regard to the beneficence of resorting to istihsan, Kamali said;

“Enforcing existing law may prove to be detrimental in certain situations, and a departure from it may be the only way of attaining a fair solution to a particular problem. The jurist who resorts to istihsan may find the law to be either too general, or too specific and inflexible. In both cases, istihsan may offer a means of avoiding hardship and generating a solution which is harmonious with the higher objectives of the Shari’a.”

Indeed, avoidance of hardships is a cardinal principle of the Islamic Shari’a. In one hadith the Prophet was reported to have said that the best of your religion is that which brings ease to the people. In this context, istihsan could be an exception to the general rule, which aims at alleviating the hardship that poses the people.

It is not surprising therefore that that the Malikis have suggested that there should be an exceptional case in the guarantee. In other words, the application of istihsan is meant to be an exception to the general rule of the guarantee. This is done when one is satisfied that the alternative rule would lead to fairness and justice.

It is submitted therefore that the application of the Malikis doctrine through istihsan in the transactions that involve the guarantee is something that cannot be postponed. It is observed from the previous that the main objective of the guarantee is to help others in mobilizing the surplus funds that are available in financial institutions. In other words, one of the purposes of the guarantee is to help the expansion of economic sector. As such, it also seems that the existing law that regulates the guarantee does not encourage this positive element but induces the public to abandon the institution instead. The law actually obviates the above objective of the guarantee as it was shown that many people are now less willing to become a guarantor because of the current situation of law. At this point, the application of the Malikis doctrine through istihsan is meant to correct the

\(^{27}\) Mohammad Hashim Kamali, Id. at 247
\(^{28}\) The Qur’an; 2: 185
\(^{29}\) The hadith cited in Ahmad ibn Hanbal, Musnad, vol. 5, p. 22 (n.d.)
mischief; to promote fairness and justice, hence to encourage the expansion of economic sector.

It should be pointed out at this point that the law should aim at the public interest, and the objective of the guarantee is to help to mobilize the surplus funds that are available in the financial institutions. This can be seen as having two main objectives; the first is to help the debtor and the second is to help the creditor; both lead to development in the economic sector.

As a conclusion, it is suggested that classical Islamic law of guarantee has a forceful influence to modern Islamic banking and Muslim legal practices. This is inevitable since the movement for the reassertion of the Islamic Shari'a could also mean the reinstatement of the classical law in the modern milieu. Moreover, the sentiment of national feeling towards liberalization has also contributed to this development. The emergence of the Islamic bank is another factor that supports the continuous reference to the classical rules. Therefore, it is predictable that classical rules will be of great concern in the modern Islamic banking and Muslim legal practices.

8.6 An Agenda for Future Research

The thesis suggests that classical Islamic law of guarantee has a forceful influence to modern Islamic banking and Muslim legal practices. However, it was not within the scope of the thesis to discuss the actual practice of the classical law in modern world. Therefore, it is suggested that a future research be made to investigate the actual practice of the classical law in modern world. It would perhaps be an interesting investigation to go through all the decided and published cases, say, in the United Arab Emirates and other Middle Eastern countries. Malaysia whose aim to be the leader in the International Islamic Financial Market could also be the focus for future research. At this point, issues on the legal practice of the classical Islamic law in the field of commercial transactions including Islamic banking could be an interesting subject of investigation. With the
English common law background, Malaysia can provide a worthwhile dimension for the research that relates to legal practice of classical Islamic law in the country. Another issue that is worth for investigation is perhaps the role of each Islamic bank’s Shari’a Supervisory Boards. At this point, it is submitted that the role of the Boards is unclear, and therefore a thorough investigation on the matter could be a precious contribution to the development of Islamic legal practice.
Appendix 1

Example of Fatwas Issued on the Question of the Islamic Guarantee


**Subject:** Letter of Guarantee

**Fatwa:** The Council of Islamic Fiqh Academy, constituted by the Islamic Conference, in its second meeting in Jeddah, Saudi Arabia on 10th-16th Rabi’al Thani, 1406H corresponding to 22nd-28th December, 1985.

Having considered the issue of Letter of Guarantee and reviewed the research papers and studies, as well as having conducted elaborate deliberations and discussions on them, the Council has resolved that:

**First:**

Any letter of guarantee, whether initial or final, is either with or without cover. Should it be without cover then the guarantor is regarded as having jointly pledged along with the third party, both the performance and finance. This is the type of pledge that is referred to as “guarantee or collateral” (al-daman or al-kafalah) in Islamic Fiqh.

If, however, the letter of guarantee has a cover, the relationship between the applicant of the guarantee and its issuer, is that of an agency (wakalah); and an agency may exist with or without fee, tied-in with the link of surety (kafalah) in favour of the beneficiary, in whose benefit the guarantee is issued.
Second:

The guarantee (al-kafalah) is a benevolent contract, motivated by grace and mercy. The jurists have decided against taking a fee for issuing guarantees; the reason being that, in the event of the guarantor’s payment of the guaranteed sum, the fee will resemble a loan with ensuing profit the lender, and that is forbidden by the Shara’.

Thus, the Council has resolved that:

First:

It is not permitted to charge a fee for issuing a letter of guarantee (in which, customarily, the amount and the period of guarantee are considered), whether it is with cover or without cover.

Second:

The administrative expenses for issuing a letter of guarantee of both kinds are permissible by Shara’, provided they do not exceed the actual expenses. In the event that a partial or total cover is presented, it is permissible to take into account, when expenses are determined, the possible effort required in providing the cover.

Source: Resolution and Recommendation No. 12 (12/2) Concerning Letter of Guarantee by the Council of Islamic Fiqh Academy, Second Conference, Jeddah, Saudi Arabia (10th-16th Rabi’al Thani, 1406H/22nd-28th December, 1985).
2. Fatawa by the Shari'ah Supervisory Board (SSB) of the Islamic Banks

i. Subject: Asking for a Guarantee

Question: Please give us the Islamic legal opinion on these issues;

a. Bank A finances Zayd from the fund that accumulated from a general Mudharaba account (a general fund held by the bank) on the basis of a contract of Murabaha;

b. Amr comes along and applies for deposit of some money under a special account to be invested in any project that deems fit to the bank;

c. The bank suggests that the deposit to be used as a financial instrument for the contract of Murabaha that has been agreed between the bank and Zayd;

d. Amr requests the bank to obtain a valid guarantee from Zayd for the debt given; is this lawful?

Fatwa: There is nothing wrong with the seeking of such guarantee.

Source: Qatar Islamic Bank, Shari’ah Supervisory Board, Fatwa No. 60.

ii. Subject: An Agent as a Guarantor

Question: We understand that it is lawful for the Islamic bank to request its customer who has a contract of Murabaha with the bank, to provide a guarantee to secure the payment of the loan that has been advanced.

a. In the event a person invests in a special account, is it lawful for him (by analogy to the above situation) to request the bank, as his agent, to ask the contractor involved to provide a guarantee to secure the payment of the
loan that has been advanced from the special account in favor of the investor;
b. If it is lawful for the bank to request the contractor involved to provide a guarantee, as the case stated at the above (paragraph a), is it lawful on the other side of the coin that the contractor involved ask the bank to be his guarantor;
c. In the case if the customer for a special account is the Kuwait Finance House, and the operation bank is the Qatar Islamic Bank while the customer who has a contract of Murabaha is the individual person;
i. Is it lawful for the Kuwait Finance House itself to ask for a guarantee, and;
ii. Is it lawful for the Qatar Islamic Bank to become a guarantor together with another?

The issue shall be clearer in the following illustration;

The Kuwait Finance House has a fund from which the House would like to invest in a special account. An arrangement has been made between the House and the Malik Faisal Bank of Egypt whereupon a certain amount of money has been deposited in the bank under a current account. The House advised the Malik Faisal Bank that in the event the bank finds a suitable project, the money shall be invested as the bank deems fit. Later the bank learned that the government of Egypt is interested in importing wheat grain from the United States. The bank informed the House on the matter, and advised that it would invest the money on this project. The House asked for a guarantee, and the government has requested the bank to become its guarantor.

The question is, is it lawful for an agent as illustrated at the above to become a guarantor?
Fatwa: The response for these issues was made by the Shari'ah Supervisory Board of the Qatar Islamic Bank, through a memo faxed to us by the Director of the bank. The answer is;

"It is lawful if Bank A stipulated that a bank guarantee must be provided for its contract of Murabaha, but it should not be specified to Bank B. In this context, it should be pointed out that at the start, Bank B shall look for a third party to be the guarantor to secure the rights of Bank A. In other words, Bank B should not be a guarantor for Bank A. However, Bank B shall resume the suretyship if the bank were in breach of stipulations. The Bank B shall also resume the suretyship if the bank has gratuitously to be come a guarantor".

According to the Shari’ah Supervisory Board of the Kuwait Finance House;

"It seems to us that this operation involves the principle of agency, al-wakalah. In this particular case an intermediary bank acts as an agent for a special account holder (the investor) for the purpose to invest the deposit with another customer (the contractor). It appears that the investment has been made on the basis of contract of Murabaha.

Now, with regard to the fee, it is totally based upon the principle of al-wakalah. It could be of either an agreed lump sum or it could also be a percentage from the sum total of the deposit. The profits that have been made from the project, i.e. the Murabaha will go to the special account holder after the agent's fee has been deducted. If a loss occurs, it will be borne by the special account holder. It appears, therefore, that the operation is based upon the principle of al-wakalah, and an agent cannot become a guarantor unless there is a case of negligence or fraud.
To further elaborate, it is worth mentioning at this point that for an intermediary bank, there are two different functions in relation to *al-wakalah;*

a. As an agent on behalf of the investors for any arrangement occurs between the investors and the contractors
b. As an agent on behalf on the investors to recover whatever sum available from the contractors

However, it should bear in mind that not every agent for arrangement acts as agent for recovery. The merger of the power could only be attained if there is an express stipulation with regard to the matter. This is what has been fixed in the compendium of the Islamic law. It follows that when there is evidence shows that the power has been merged, then an agent could become as a guarantor.

The reason the jurists are reluctant to allow an agent to become a guarantor is if it were to be allowed there might be a conflict between the objective of *al-wakalah* and *al-kafalah.* In this context, the objective of *al-wakalah* is trustworthiness, *amanah,* whilst the objective of *al-kafalah* is guarantee, *dhaman.* However, in a collection of Fatawa Qadhi Khan (published in the margin of the Fatawa Hindiyah vol. 4, p. 24), the Hanafis has ruled out that, "When an agent for sale have sold something and became a guarantor for the price, such undertaking is not valid. However, if an agent for recovery became a guarantor for the price, such undertaking is valid". This classical text shows that an agent could become a guarantor when there is evidence that he is acting not only as agent for arrangement (sale) but also as agent for recovery.

In the present issues, it appears that the intermediary bank acts as an agent for its customers. Therefore, as far as the fee is concerned, it could only be recovered from the principle of *al-wakalah.* In other words, it cannot be

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recovered from the principle of al-kafalah. We should also add that the bank could not increase the fee for al-wakalah simply to top up the fee of al-kafala. Such a practice, if it were to be allowed, is just like to gain some profits from al-kafalah, which is prohibited under the Islamic law.

At this point, we should acknowledge that our view is the same as the fatwa that has been given by the Shari'ah Supervisory Board of the Qatar Islamic Bank. Apart from that we shall stress that in such situation an agent could not straight away be a guarantor unless there is a breach of stipulations. This principle should be extended to modern Islamic banking practices. However, owing to both religious and professional considerations, an Islamic bank must never put itself in such a position.

Source: Kuwait Finance House, Fatawa Shar’iyah, Question 281, pp. 267-271

iii. Subject: An Agent as a Guarantor

Question: Could you give the Islamic point of view with regard to the matters below;

a. Bank A prepares to deposit a certain amount of money in a special account with Bank B;

b. A government has made an arrangement with Bank B on the basis of a contract of Murabahah to import wheat grain from the United States. At this point, Bank B did not ask any guarantee from the government on the basis that they have a mutual respect with each other. However, an agreement has been made that the government has to pay on demand;

c. Bank B informed Bank A and advised that the capital be invested in this project;
d. Bank A agreed but further requests a guarantee be provided in this transaction. The request has been made due to the reason that Bank A is a foreign bank, and it has no previous dealing with the Egyptian government before;

e. Bank B informed the matter to the government, and the government agreed to provide a guarantee;

f. The government asked Bank C to be its guarantor in favor of Bank A. However, Bank C refused on the basis that the facilities granted to the government are completely exhausted;

g. As a result, the government asked Bank B to be its guarantor in favor of Bank A.

Our question is, is it lawful for Bank B to become a guarantor in favor of Bank A upon the request from the government.

**Fatwa:** Bank A stipulated that a bank guarantee must be provided for its contract of *Murabahah*, but it should not be specified to Bank B. In this context, it should be pointed out that at the start, Bank B shall look for a third party to be the guarantor to secure the rights of Bank A. In other words, Bank B should not be a guarantor for Bank A. However, Bank B shall resume the suretyship if the bank were in breach of stipulations. The Bank B shall also resume the suretyship if the bank has gratuitously to be come a guarantor.

**Source:** Qatar Islamic Bank, Shari’ah Supervisory Board, Fatwa No. 61

iv. **Subject:** An Agent as a Guarantor

**Question:** The Department of Credit (Kuwait Finance House) involves in the business of co-operative marketing. The business involves the purchase of goods from traders and the selling of the same to the co-operative societies. In
the future, it is planned that the business be expanded to involve selling in other major markets.

Is it lawful for the traders to become guarantors to the purchasers/customers of the Kuwait Finance House (the marketing headquarters) in a way that when the purchasers fail to meet the payment schedule, the traders will pay it. For your information, at the present the traders are our agent for the purpose of the collection of payments for the goods sold to the co-operative.

Fatwa: There is no impediment, so far as the Islamic law is concerned, for the Kuwait Finance House's agents to become guarantors, as they are both agents for possession as well as agents for delivery.

Source: Kuwait Finance House, Fatawa Shar'iyah, Question 284, p. 274

v. Subject: An Agent as a Guarantor

Question: Is it lawful for the agent to become a guarantor?

Fatwa: If the contract of agency involves both an agent for arrangement and an agent for recovery, i.e. delivering goods and collecting the price, then it is lawful for the agent to become a guarantor. However, if the contract restricted to the agent for arrangement only, we resolve that it is not lawful for the agent to become a guarantor.

Source: Kuwait Finance House, Fatawa Shar'iyah, Question 381, pp. 365-366

vi. Subject: Insurance Companies as a Guarantor
Question: Is it lawful to accept insurance companies as guarantors for the loans advanced as securities for the risk of defaults. In other words, is it lawful to have the insurance companies to make compensation as a result of the failure of the customers to meet their obligations?

Fatwa: This arrangement involves the principle of the Islamic guarantee, al-kafala. In this context, the insurance companies are the guarantors who undertake to perform the obligations of the customers. Further, this guarantee is regarded as a guarantee given in return of premiums. At this point, it seems to us that such guarantee is not valid and therefore it is not lawful. It is settle principle in law that to conclude a contract of guarantee, the parties should not involve with any fee because guarantee is actually a gratuitous contract. Accordingly, this kind of arrangement (insurance) should not be permitted.

As such, if a customer appointed an insurance company as his guarantor, and he pays the premium, it is for him to bear the sin (al-Ithm) with Allah. From the religious point of view, this kind of relationship exists only between him and the insurance company. However, for the party the guarantee is given, he can benefit from such a guarantee. Even so, we must deplore ourselves from such an arrangement if it comes to our knowledge of such circumstances as if it were to be allowed it could mean that we agree with such a prohibited transaction (haram).

Source: Kuwait Finance House, Fatawa Shar‘iyah, Question 267, p. 251

vii. Subject: Insurance as a Method to Secure the Risk of Default

Question: Is it lawful for the Islamic bank to cover its credits with insurance, be that provided by the Islamic insurance companies or by the Islamic bank
that runs a business of co-operative insurance. The purpose of this insurance is
to cover the risk of late payment by the customers.

Fatwa: It is lawful for the Islamic bank to cover its credits with insurance
from the risk of late payment. This insurance may come from the Islamic bank
that runs a business of co-operative insurance. This is what has appeared in
the discussion of the Shari’ah Supervisory Board.

In the case of insurance that is provided by other Islamic insurance
companies, it is also acceptable (by the majority of the members) provided
that a clear procedure has been provided for the Board to endorse before it is
put in practice.

Source: Majmu‘at al-Barakah, Fatwa no. 9, p. 35; see also Jordan Islamic
Bank, al-Fatawa al-Shar‘iyah, vol. 2, p. 39

viii. Subject: Insurance Companies as a Guarantor

Question: What is the Islamic point of view with regard to the following
transaction? An insurance company promises to collect debts from debtors. In
the event the debtors fail to make payment the company will stand as a
guarantor. In this regard, the company undertakes to make a follow up with
the debtors for the repayment of the debts either on installment or otherwise.

For the debts that have been collected a certain amount of fee will be charged.
What is your opinion with regard to dealing with such a company?

Fatwa: The company, in relation to the Kuwait Finance House, will be
regarded as a n agent in respect to it effort to collect the debts. At the same
time, the company is regarded as a guarantor for the customers in respect to the credits that have been extended to them.

In respect to the first category, it is permissible for the company to charge a certain amount of fee upon the bank. However, for the second category, we hold the opinion that it is not permissible to charge any fee due to the fact that a guarantee is a gratuitous contract. The charge of fees in this case would breach the legal principle of the Islamic guarantee, al-kafalah.

As such, there is no impediment in dealing with such a company.

**Source:** Kuwait Finance House, Fatawa Shar’iyah, Question 259, pp. 244-245

ix. **Subject:** A Guarantee from a Person Who Promises to Purchase Goods

**Question:** What is the Islamic view of point with regard to obtaining a guarantee from a person who promises to purchase goods on the basis of contract of Murabahah. This guarantee is purported to secure the arrival of the goods to Kuwait without damage and in good condition.

**Fatwa:** This is lawful from the Islamic viewpoint because a guarantee is a gratuitous contract. It is worth mentioning at this point that the guarantee could be given before a right has been established. In the present case, the guarantee is classified as Dhaman al-Dark.

**Source:** Kuwait Finance House, Fatawa Shar’iyah, Question 202, p. 214

x. **Subject:** The Nature of the Islamic Guarantees
**Question:** Could you explain the Islamic legal view pertaining to a guarantee given to perform a legal contract?

**Fatwa:** *al-Kafalah* or the Islamic guarantee is defined under Article 950 of the Jordanian Civil Code as the amalgamation of one's obligation with that of another in respect to perform that obligation when a demand has been made. In one hadith, Abu Dawud and al-Tirmidhi reported that the Prophet (peace be upon him) said; “The guarantor is responsible”. This hadith shows that, having agreed to be a guarantor, the person will be held responsible to the extent of what he has undertaken. At this point, it should be pointed out that under a contract of guarantee, a guarantor is regarded as a personal security, stands to satisfy the rights of another. Therefore, in the event the person who has the rights is unable to pursue it from its original source, recourse could be made from the guarantor. Since the question is asking the Islamic legal view pertaining to a guarantee given to perform a legal contract, we resolve that it is valid to the extent the obligation that is stated in the original contract.

**Source:** Jordan Islamic Bank, al-Fatawa al-Shar’iyah, vol.1, p.83

**Subject:** The Nature of the Islamic Guarantees

**Question:** A letter of guarantee is a form of agreement whereby a bank agrees to undertake the obligation of its customer in favor of third party in cases the customers fail to fulfill their promise. Hence, when default occurs, the bank will make payment, on demand, within the validity period of the letter of guarantee.

An example for this involves a situation where a bank has been asked to provide a letter of guarantee. In the event, the bank agreed, it will be regarded as a guarantor. At this point, the bank undertakes to perform the principal
obligation of its customer. Here, the principal obligation might involve a
promise to render a service or a promise to import goods. In cases, if the
customer fails to fulfill its promise, upon demand, the bank will perform on
behalf of the customer. This undertaking of the government will take effect
within the limit of a specified amount as well as the time agreed.

In practice, under such a transaction, the bank will not only be regarded as a
guarantor but also as an agent for the customers. Moreover, regardless or
whether the transaction has been concluded on the basis of a contract of
guarantee or on the basis of a contract of agency, or any other names, the
charge will be rendered on the part of the customers.

The question is, whether such an arrangement is valid (lawful) under the
Islamic legal point of view. Do you think that there is an element of
uncertainty under such a transaction?

Fatwa: It seems that, based upon the above definition and the practice of the
bank, the above arrangement involves a contract of Islamic guarantee, al-
kafalah. In this situation, the bank is the guarantor, whereas the customers are
the principal debtors, and the third parties are the creditors.

Under the Islamic law, al-kafalah is defined as the amalgamation of one's
obligation to another in respect of demand, be it in the case of individuals, or
properties, or debts. The obligation that has been undertaken through the letter
of guarantee is the liability of the bank (the guarantor). The principal
obligation for this transaction is the obligation of the customers (the principal
debtors). In fact, under this arrangement, the customers are the persons who
initiate the transaction through applications forwarded to the bank. Hence, the
bank is liable under the letter of guarantee towards third parties (creditors). In
this regard, the bank undertakes to perform the obligation of the customers in cases of defaults.

The legal effect of a guarantee is the establishment of right upon the creditor to recourse payment from the guarantor. It should be noted at this point that this right arises when the contract has been concluded. In this context, the classical jurists have not stipulated that the impossibility to make recovery from the principal debtor is a pre-condition to recourse payment from the guarantor. In fact, as far as the Islamic law is concerned, the creditor has the right to choose either to take action against the guarantor, or against the principal debtor, or against both of them at the same time.

As such, the apparent opinion of the Malikis suggests that the right only arises if it is evidenced that it is impossible for the creditor to make recovery from the principal debtor. In this regard, when proof shows that it is infeasible for the creditor to make recovery from the principal debtor, then he is allowed by law to go for the guarantor.

To us, this opinion of the Malikis could be applied in the present case. This is because the recourse to the bank could only be made if there is a proof shows that the customers have failed to perform their obligations. Further, the validity of the Islamic guarantee, al-kafala, as assented in the classical legal texts, indicates that a letter of guarantee is also acceptable. This is, however, restricted to the principles that relate to the uncover letter of guarantee.

As such, for the cover letter of guarantee, be it full or partial, it involves both the principles of agency, al-wakalah and guarantee, al-kafalah. It is possible to assume at this point that the bank undertakes to be an agent for the customers to perform their obligations in favor of third parties when a demand has been made. It is also possible to assume that the bank undertakes to be a
guarantor for the customers because under a normal practice the third parties will look for the bank to perform the obligations on the basis of al-kafalah but not al-wakalah. At this point, it is not an important issue for the third parties as to whether the sources being used for the performance come from the bank or the customers. To this end, it is suggested that as far as the Islamic law is concerned this kind of arrangement is valid and enforceable because a contract of al-wakalah is acceptable by all the classical jurists.

Fess for a Letter of Guarantee

We have concluded that a letter of guarantee is valid in both of its forms;

a. The uncover letter of guarantee, which we presume that the arrangement is of a contract of Islamic guarantee, al-kafalah;

b. The cover letter of guarantee, be it full or partial, which we presume that the arrangement involves both a contract of Islamic guarantee and a contract of agency. Under a guarantee the relationship exists between the bank and third parties. Whereas under an agency the relationship exists between the bank and its customers.

Now, we shall consider the Islamic viewpoint with regard to the fees charged from the customers.

As for the first type of letter of guarantee, i.e. the uncover letter of guarantee, we suggest that it is not legal to charge a fee on the part of the customers. This is because, as far as the first type is concerned, the arrangement is equated with that of the guarantee, al-kafalah. Hence, if the practice is allowed, i.e. to put some charges, it means that we have broken the rules that relate to the Islamic law of guarantee. It is settle law that under the Islamic law of
guarantee, a charge cannot be imposed on the part of a principal debtor. Indeed, *al-kafala* is regarded as one of gratuitous contracts.

With regard to this al-Khattabi said, "The classical jurists have unanimously agreed that a charge on a guarantee should not be imposed upon the principal debtor. This is because the law has made it clear that an arrangement that involves guarantees, or loans, or anything that involves reputation is not for monetary purposes but for Allah, i.e. to help another person. Therefore, a charge cannot be imposed. Accordingly, any charges imposed from these arrangements are regarded as an abominable gain". According to Ibn ‘Abidin, "A guarantor is like a creditor. He advances his obligations to a principal debtor in favor third parties. Therefore, if he specifies that a fee should be given in return of the guarantee, this means that he has insisted something more than he has advanced. This is *riba*, which is prohibited under the Islamic legal practice".

However, if a fee is taken in return for the services rendered to the customers, we are of the opinion that it is permissible.

With regard to the second type of letter of guarantee, i.e. the cover letter of guarantee, it appears to us that the charge for a fee is permissible. The charge can be made on the basis of a contract of agency. It is settle law under a contract of agency that one will have a choice of either to impose a fee or otherwise not to impose.

To submit our fatwa, the Shari‘ah Supervisory Board concluded that it is permissible to be involved in a letter of guarantee. The Board also resolved that a charge might be imposed upon the customers based on services rendered to them. However, we shall stress that any charge cannot be made upon the basis of *al-kafala*. 
xii. **Subject:** The Nature of the Islamic Guarantees

**Question:** Is it true that the existence of a guarantee repudiates the deferral nature of a principal debtor? Accordingly, is it true that the existence of a guarantee relinquishes the right of a creditor for a direct compensation from a principal debtor as a result of his deferral attitude?

**Fatwa:** There is nothing to justify the statement that the reluctant of a creditor to enforce a contract of guarantee relinquishes his right from a direct compensation. If it were to be allowed, it means that the existence of a guarantee would relinquish the deferral nature of a principal debtor, which would result to a compensation for a creditor. In fact, nobody has made any statement in favor of such notion. It should be mentioned at this point that the objective of a guarantee is to secure the principal debt but not compensation. Therefore the statement that suggests that the existence of a guarantee repudiates the right of a creditor from compensation has bearing neither the Islamic law nor the Civil Code.

**Source:** Dar al-Mal al-Islami, Fatwa no. 46, November 1990

xiii. **Subject:** The Liability of a Guarantor

**Question:** An arrangement has been made with a customer whereupon a financial facility has been approved to import goods (sugar). At this point, when we opened the line of credit, some papers arrived at the Finance House.
The customer informed us, with reference to the papers that the goods have been shipped, and that he is available to come and sign the contract and to take delivery of the goods. Thereafter, it was discovered that the papers were forgeries.

We requested, upon promise and guarantee that the customer should compensate the loss. However, the customer refused and argued that we had no basis since we had acknowledged the taking of the delivery.

Fatwa: There is no relationship between the request to pay compensation and the arrangement as well as the delivery. The issue here is the guarantee. In this case, the customer has agreed to guarantee the performance of the contract. The customer also agreed to guarantee and to ensure that the contract will be performed; to bear any expenses arises from defaults on the part of the exporter. Therefore the liability of the customer arises from the guarantee but not from the arrangement or any other understanding including the invitation to come and sign the contract.

Source: Kuwait Finance House, Fatawa Shar‘iyah, Question 299, pp. 291-292

xiv. Subject: The Extent of a Guarantor’s Liability

Question: It is permissible to hold shares in a local project that is being guaranteed by the government to offer a minimum return of at least 6% on the capital invested even though the profits are far lower than that. (The government also guarantees the return of the principal invested). In the event the profits exceed the percentage, the government promises that it will go to the shareholders regardless of how high it might be.
Fatwa: After studying this question and reviewing the available *fiqh* literatures on the subject, I hold the opinion that it is permissible to invest in this project. My opinion is based on these reasons. The government's guarantee of a minimum level of 6% for the profits, even though the profit is far below to this percentage, is the extent to which the government undertakes to fulfill its promise towards investors. In fact, in this context, we should look the government's undertaking as an incentive to boost investment in projects that benefit not only for others but also for the investors themselves. Therefore, the commitment that has been given by the government, to my view, is valid and lawful. The lack of knowledge on the part of the government with regard to persons, i.e. investors that the guarantee is given does affect the validity of the contract. This is because under the Islamic law, the present of knowledge with regard to whom the guarantee is given is not a precondition to conclude a valid contract of guarantee.

It should also be pointed out at this point that the present of knowledge with regard to the principal obligation is also not a precondition to conclude a valid contract of guarantee. The basis of this point could be referred to the Qur'anic legal text, where in *Surah Yusuf*, Allah the Almighty says; “He who produces it shall receive a camel's load. I pledge myself to this [The Qur'an; 12:17]. In this legal text, the camel's load is an unknown quantity. Moreover, in this legal text, the person to whom the guarantee is given is the person who could bring the king's goblet, and at the time the guarantee was given that person was unknown to the guarantor. This legal text indicates the validity of a contract of guarantee even though at the time it was concluded, the knowledge with regard to the person to whom the guarantee is given as well as the principal obligation of that person was not present.

In the Sunnah of the Prophet (peace be upon him), it was reported that the Prophet said; “Whoever kills an enemy [in a war] will assume ownership of
his battle gear [horse, saddle, bridle, armor and weapons]. In the hadith, the Prophet has given his commitment towards a person who kills an enemy in a war, and at the time the promise has been made the person to whom the guarantee is given is unknown. This hadith too indicates the validity of a contract of guarantee even though at the time it was concluded, the knowledge with regard to the person to whom the guarantee is given was unknown.

Moreover, the undertaking is valid based on the contract of Ju’alah. In this regard, the government’s offer a minimum return of at least 6% on the capital invested even though the profits are far lower than that is, to me, a contract of Ju’alah. At this point, it should be noted that a contract of Ju’ala is acceptable and lawful according to the four schools of law [the Hanafis, Malikis, Shafi’is and Hanbalis], and they have not stipulated that a prior knowledge with regard to the person to whom the promise is given should present at the time the contract is concluded. Therefore, the government’s undertaking is valid and lawful as referred to the principle of al-Ju’alah.

The second issue is about the guarantee that has been given by the government on the capital invested. At this point, I also hold the opinion that the guarantee is valid and lawful even though the nature of the principal obligation or the capital invested is unknown. Having reviewed the classical opinions, I found that the classical jurists did not stipulate that under a contract of guarantee, the knowledge with regard to the nature of the principal obligation should present at the time the contract is concluded. In fact, there was a general concurrence which indicates that the contract is valid be it on the basis of the present of knowledge with regard to the principal obligation or without the present of such knowledge. Under the Hanafis legal thought, for example, we found that the jurists suggest that a contract of guarantee is valid even though it was concluded without the present of knowledge about the principal obligation. The reason behind this was to make the arrangement
simple. Therefore, when a person says; "I will stand as a guarantor for whatever you sell to such a person", the contract is valid. At this point of time, the guarantor will be rendered responsible even though the price is higher than what he was expected. In other words, a person is liable to what he has promised. With regard to this, Ashhab, a Malikis' jurist, said; "I have heard that one time Imam Malik [the founder of the Malikis school of thought] was asked about a person who said to his agent, 'Sell and you will not suffer loss from it', where Imam Malik replied that under such an arrangement, the person cannot retract his statement because it is his promise, and when a person has made an unequivocal promise, he cannot withdraw it. To me such a promise is a binding contract".

This is my opinion on the subject, and I should stress that if it is correct, hence it is from Allah, but if it is otherwise incorrect, then it is from me and from the incitement of the Satan. Allah and His Prophet have nothing to do with it.

Source: Kuwait House Finance, Fatawa Shar'iyah, Question 280, p. 265-266

xv. Subject: Information about Principal Obligation

Question: What is the Islamic viewpoint with regard to the following illustration; A customer comes to the bank for the opening of a documentary credit. This documentary credit will be used as security to import certain goods from the exporter. At this point, however, the customer did not reveal the whole thing about the goods (such as specification, amount, weight and price) but described it in a general (such as sugar or rice). Is it appropriate for the bank to accept such application even though there might an element of uncertainty?
Fatwa: A documentary credit is in fact a contract of guarantee, *al-kafalah*. Under a contract of guarantee, it is valid even though the details of the goods (that might have given rise to obligations) have not been revealed. In this context, a guarantor shall be liable for what he has undertaken. However, it should be stressed that a guarantor may have the right to ask for details in order to clarify his real obligation. As such, as mentioned at the above there is an element of uncertainty under such an arrangement. Therefore, it is suggested that it is not appropriate to deal with such situation because when there is uncertainty there will be some kinds of disagreements.

*Source: Kuwait Finance House, Fatawa Shar’iyah, Question 289, p. 281*

xvi. **Subject: Collateral as an Additional Security Beside Guarantee**

**Question**: A customer has come to us applying for the purchase of goods, or a vehicle, or any other items in the Department of Local Murabahah. After reviewing the application, we have decided that a reliable guarantee should be presented before the application is processed. Therefore, we requested a cheque from a guarantor.

Is it lawful to request such a cheque from a guarantor?

**Fatwa**: Upon the receipt of the cheque, the bank should provide a clear unambiguous letter to the guarantor. The letter, *inter alia*, should state that the cheque would not be cashed unless there is a default in the payment. In this regard, the bank could also state that in the event one of the installments has been defaulted, it could affect the rest of the installments. This is to protect the rights of both the bank and the guarantor. In other words, the letter could stand as a promise from the bank that the guarantor will not be liable unless there is
Subject: The Right of a Creditor

Question: As all of you are aware, among the guarantees, the banks usually accept personal guarantees as security for the loan advanced to its customer. Normally, these personal guarantees will be taken within the ambit of standard forms (that have been provided by the bank). In most cases, these personal guarantees are accepted from institutions or individuals such as the bank's customers. In connection to this, it is worth mentioning that the bank will not approve any loan unless and until such arrangement (the production of the guarantee) has been completed and satisfied.

Fatwa: When a default occurs a guarantor is liable to make it good. In this context, the guarantor is responsible to perform the obligation of a principal debtor in favor of a creditor. As such, it is worth mentioning at this point that in case the principal debtor fails to meet the schedule, in which case late payment often occurs. Besides, the banks also find that some of its principal debtors (customers) fail to perform their obligations.

The question is, what is available for the guarantors, be they individuals or institutions. At this point, we should stress that the main objective of an institution is to run its own business, to gain profit, to possess assets and properties, whereas at the same time the principal debtor defaults and fails to perform his obligations.
when a default occurs a creditor has the right of either to enforce against the guarantor or against the principal debtor. In other words, at this point of time the guarantor has the right to choose either to seek the recourse from the guarantor or from the principal debtor. This does not mean that the right of the creditor as against the principal debtor is relinquished when he has enforced his right as against the guarantor.

The problems that faced by a principal debtor such as cash flow problems should not be a valid reason for default. Likewise, the difficulties that faced by the principal debtor shall not relinquish the right of the creditor to have recourse from the guarantor unless he has difficulties too. In the Qur'an, Allah says, "If the debtor is in straightened circumstances, grant him a delay until a time of ease [The Qur'an; 2:280] The Prophet (peace be upon him) said, "A delay by a person of means is injustice". He also said, "Mine is the one who can find the means to repay but chooses not to. His reputation and his punishment are mine to deal with".

Source: Faysal Islamic Bank of Bahrain, al-Fatawa, Fatwa no. 4, pp. 38-39

xviii. Subject: A Fee For the Renewal of a Bank Guarantee

Question: Is it lawful, from the Islamic point of view, to take fees (five Dinars, for example) for the renewal of a bank guarantee, at the request of the client, when the original bank guarantee has lapsed.

Fatwa: It is lawful, from the Islamic point of view, to take fees for the renewal of a bank guarantee. This has been based upon the fact that the renewal of a bank guarantee is like any other services that has been given by the bank for which a fee may be charged. Moreover, the renewal of a bank guarantee is the same as the original issue of the bank.
Subject: A Fee For a Guarantee

Question: We own a heavy land transport company that registers cargo trucks and its owners in their own name with the government authorities. Besides, we also guarantee the cargo trucks and its owners against future consequences. In this regard, we normally charge a small amount of yearly fee that is within the ability of the small trucking companies to pay. This company and the owners of the trucks complement one each other, thus if either of the two parties withdraws [from this arrangement] it will negate the work of another. What is the Islamic legal view on the business of this company? Moreover, if this arrangement is not in compliance with the Islamic legal principles, then what in your opinion is the correct solution?

Fatwa: If the company that registers the cargo trucks and its owners acts as a guarantor, then it is not lawful to accept a fee for the guarantee it offers. If, however, it acts within the ambit to render a service, engages representatives or employees to perform the tasks on behalf of the owners of the cargo trucks with the concerned government agencies, then it will be lawful to charge a fee (comparable to the fees charged by similar companies) for the job it has done.

If the company acts as an agent, in the sense that it ensures and transports the cargo trucks, then it is lawful for them to charge a fee for this function on the basis of the Islamic legal principle of agency, al-wakalah.
xx. **Subject:** A Guarantee Given By a Person Who Has a Direct Interest

**Question:** Is it lawful for us (Kuwait Finance House) to accept the guarantee given by a person who has a direct interest in a project conducted by a contractor on behalf of Kuwait Finance House.

**Fatwa:** It is lawful because the guarantor acts as a personal security in relation to the project, which is taking place between the contractor and Kuwait Finance House. The fact that the project is being undertaken in his (the guarantor's) direct interest has no bearing on the matter.

**Source:** Kuwait Finance House, Fatawa Shar'iyyah, Question 277, p. 264

xxi. **Subject:** The Guarantees in the Transactions Using a Visa Card Provided by the Kuwait Finance House

**Question:** Who is the guarantor for a customer who uses a Visa Card provided by the Kuwait Finance House if the customer is declared bankrupt? Further, is there any interest accrues from the nonpayment? Who will have to pay the fees to the House? What makes the fees to be paid? On what basis these fees have to be paid?

**Fatwa:** After having a thorough discussion on the matter, it appears that the guarantor for the customer is the Kuwait Finance House. The card is not a credit in nature but a debit. Accordingly, interest is not being charged.

On the issue of the fees, it appears that the company of the Cards will have to pay to the Kuwait Finance House. In this context, indeed the company gains some profits accumulated from transactions between the customers and traders. Therefore, it seems that the reason the fees have to be paid is because
of the use of the cards by the customers. Furthermore, the basis the fees to be
paid, is made upon the collection of debts that arises from the transactions.

Source: Kuwait Finance House, Fatawa Shar'iyah, Question 479, p. 463

xxii. Subject: Different Concept of al-Wakalah and al-Kafalah

Question: Some of our customers apply for a documentary credit. In practice,
in return of the instrument we request the customers to deposit certain amount
of money in our account. The deposit will be held with us and freeze under
their current accounts. Accordingly, we will undertake the obligation of the
customers as a guarantor in favor of third party. At this point no charge will
incur. However, the charge will be made on the basis of a contract of agency.
What is the Islamic legal opinion with regard to this?

Fatwa: It appears that this transaction, between the Kuwait Finance House
and its customers, involves the principle of agency, al-wakalah. In this regard,
the House is regarded as an agent for the customers. Therefore, it seems to me
that the House has the right to freeze the deposit because the House not only
acts as an agent for arrangements but also as an agent for payments. The
deposit that has been held by the House stands as reserved fund to pay the
House for the service rendered. The customers (principals) have no right to
complain such a practice.

With regard to the guarantee the House should not charge anything from it.
The scope of the guarantor's obligation, in this case, is the remaining portion
of the principal obligation after the sum has been paid.

Source: Kuwait Finance House, Fatawa Shar'iyah, Question 306, p. 298
Question: At the request of our customers, the bank provides a letter of guarantee, be it official or unofficial, to secure the performance of obligations of our customers. This letter of guarantee is provided in return of certain amount of fees and other collaterals.

What is the Islamic viewpoint with regard to this letter? How about the fees that have been charged on the production of the letter?

Fatwa: The Conference concluded that this letter of guarantee involves a contract of agency as well as a contract of guarantee. At this point, it is inappropriate to charge a fee on the guarantee but it can be done on the agency.

The fee for agency should be based upon services rendered by the bank in relation to the production of the letter of guarantee, which the bank deems fit. These services include the gathering of information, the study on the projects involved, and other services that relate to the projects, which the customers have agreed with the bank. The amount of the fee is left to the bank to be determined, according to the normal banking practices.

BIBLIOGRAPHY

A. The Qur'an

B. Books

i. Classical Manuals


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ii. Modern Literatures


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C. Journal Articles


Buang, Ahmad Hidayat. “Credit in Islamic Law”. Monograf Syariah. 4.


D. Unpublished Materials


E. Articles from the Internet


F. Articles from Newspapers


Penggunaan Undang-Undang British Disemak. (2003). *Berita Harian*. Aug. 4


Regulations To Be Amended To Allow Flexibility To Guarantors. (2000). (News Straits Times). Apr. 18.


LISTS OF CASES

A. Middle Eastern Countries

Egyptian Cassation Court, Case No. 294/35 (27th May 1969)
Egyptian Cassation Court, Case No. 698/48 (12th April 1982)
Dubai Cassation Court, Case No. 24 (14th June 1997)
Dubai Cassation Court, Case No. 301 (21st December 1997)
Dubai Cassation Court, Case No. 322 (1st November 1998)
Dubai Cassation Court, Case No. 343 (1st November 1998)
Dubai Cassation Court, Case No. 417 (30th May 1998)
Dubai Cassation Court, Case No. 275 (17th October 1999)
Dubai Cassation Court, Case No. 29 (7th May 2000)

B. Common Law Countries

Abdul Rahim bin Haji Bahaudin v Chief Kadi, Kedah. [1983] 2 MLJ 370
Allen v Synder [1977] 2 NSWLR 689
Bank Bumiputra Malaysia Bhd. v Doric Development [1988] 1 MLJ 462
Bank Bumiputra Malaysia Bhd. v Esah binti AbdulGhani [1986] 1 MLJ 16
Bank Islam Malaysia Bhd v Adnan bin Omar & Ors (1994) 3 CLJ 735
Belfast Banking v Stanley (1867) 15 WR 989
Carlsberg Brewery Malaysia Bhd v Soon Heng Aw & Sons & Ors (1989) 1 MLJ 104
Chappel v Cooper (1844) 13 M & W 252
Chung Khiaw Bank v. Soi Huan (1986). 1 MLJ 188
Coulthart v. Clementson (1879) 5 QBD 42
Dato’ Haji Nik Mahmud bin Daud v Bank Islam Malaysia Bhd (1996)1 CLJ 576
Dalip Kaur v Pegawai Polis Daerah Bukit Mertajam & Ors.[1992] 1 MLJ 1
Dixon v Steel [1901] 2 Ch 602

Edward Owen Engineering Ltd. v Barclays Bank International Ltd. and Umma Bank [1978] 1 Lloyd's Rep 166

Esso Petroleum Co. Ltd. v. Alstonbridge Properties Ltd. [1975] 1 WLR 1474

Ewvart v Latta (1865) 4 Macq 989

Exall v Partridge (1799) 8 Term Rep. 308; 101 ER 1405

Fraser v Pape (1904) 91 LT 340, CA

General Produce Co. v. United Bank Ltd. [1979] 2 Lloyd's Rep. 255

Gibson v Holland (1865) LR 1 CP 1

Government of Malaysia v Gurcharan Singh [1971] 1 MLJ 211

Grant v Edwards [1986] Ch 638

Halimatussaadiah v Public Service Commission, Malaysia & Anor. [1992] 1MLJ 513

Hitchcock v Humfrey (1843) 5 Man & G 559

Howe Richardson Scale Co. Ltd. v Polimex-Cekop and National Westminster Bank Ltd. [1978] 1 Lloyd's Rep 161

Isa Abdul Rahman & Ors. v Majlis Ugama Islam Pulae Pinang [1975] MLJ 125

Jowitt v Callaghan (1938) 38 SR (NSW) 512

Keene v Devine [1986] WAR 217

Kelappan Nambiar v Kunchi Raman (1957) AIR Mad. 164

Kwong Yik Bank v Transbuilder [1989] 2 MLJ 301

Kwong Yik Finance v. Chan Siok Lie & Ors. [1989] 2 MLJ 305

Kwong Yik Finance v Mutual Endeavour [1988] 1 MLJ 135

Lakeman v. Mountstephen (1874) 7 HL 17

Lucas v Dixon (1889) 22 QBD 357, CA.

Maddison v Alderson (1883) 8 App Cas 467, HL.

Malayan Banking Bhd. v Kim Produce Pte. Ltd. & Ors [1991] 2 MLJ 448


Moshi v. Lep Air Services Ltd. (1972) 2 All ER 393

Moule v Garret (1872) LR 5 Ex. 132; 7 Ex. 101
Muthu Raman v. Chinna Vellayan (1917) AM 83
Nash v Inman [1908] KB 1
National Provincial Bank v Ainsworth [1965] AC 1175
Ng Yik Seng & Anor v Perwira Habib Bank Malaysia Bhd [1980] 2 MLJ 83
Nicholson v Paget (1832) 1 C&M 52
Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri Bin Wan Rashid v Kwong Yik Bank Bhd. [1989] 3 MLJ 155
Oriental Bank v Subramaniam [1958] MLJ 35
Owen v Tate [1976] QB 402; [1975] 2 All ER 129
Pattison v Belford Union Guardians (1856) 1 H & N 523; 156 ER 1309
Payne v Cave (1789) 3 Term Rep 148
Pledge v Buss (1860) John 663
Public Bank v. Chan (1989) 2 MLJ 305
Re Anderton-Berry [1928] 1 Ch. 290
Re Dato' Bentara Luar, Si Mati, Haji Yahya bin Yusoff & Ors. v Hassan bin Othman & Ors. [1981] 2 MLJ 352
Re Conley, Exparte The Trustee v Barclay’s Bank Ltd [1938] 2 All ER 138
Re Conley (1938) All ER 127
Re Hong Huat Reality (M) Sdn Bhd United Asian Bank Bhd v Re Hong Huat Reality (M) Sdn Bhd [1987] 2 MLJ 502
Re Hoyle, Hoyle v Hoyle [1893] 1 Ch 84 at 97, CA
Re Hudson (1885) 54 LJ Ch 811
Re Lockey (1845) 1 Ph 509
Re Sherry (1884) 25 Ch D 692
Re Tosrin ex parte Equity Finance [1989] 3 MLJ 428
Rickaby v Lewis (1905) 22 TLR 130
Rouse v Bradford Banking [1894] 2 Ch 32, 75
Swan v. Bank of Scotland (1836) 10 Bligh NS 627
Tengku Farid bin Tengku Hussain & Ors v United Asian Bank Berhad [1985] 2 MLJ 200
Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd (1984) 2 MLJ 192
Tongiah Jumali & Anor. v Kerajaan Negari Johor & Ors. [2004] 5 MLJ 40
Universiti Kebangsaan Malaysia v. Zainal Abidin Bin Ahmad & Anor (1988) 2 MLJ 303
Western Credit Ltd. v. Alberry [1964] 1 WLR 945
Wright v Simpson (1802) 6 Ves 714
Wshelby v. Federated Eropean Bank Ltd. [1932] 1 KB 423
LISTS OF STATUTES

Bahrain Contract Law Regulation 1961
Egyptian Civil Code 1948
Iraqi Civil Code 1951
Jordanian Civil Code 1976
Libyan Civil Code 1953
Kuwaiti Civil Code 1980
Kuwaiti Commercial Code 1980
Majalla al-Ahkam al-'Adliya 1869-1876
Malaysian Banking and Financial Institution Act 1989
Malaysian Civil Law Act 1956 (Revised 1972)
Malaysian Contract Act 1950
Malaysian Federal Constitution 1957
Malaysian Islamic Banking Act 1983
Syrian Civil Code 1949
Qatari Civil and Commercial Code 1971
United Arab Emirates Civil Transactions Code 1985
United Arab Emirates Commercial Transactions Code 1993
United Kingdom Bankruptcy Act 1914
United Kingdom Insolvency Act 1986
United Kingdom Statute of Frauds 1677
United Kingdom Unfair Contract Terms Act 1977