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## A Comparative Study of Guaranty Contracts in General Jurisprudence, Islamic Jurisprudence, and Contemporary Laws

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### **Abstract**

*Guaranty contracts are entered into to facilitate and ensure the collection of creditors' claims. This type of contract is considered a derivative contract, meaning that the debt must have already fully materialized and been established as valid without a doubt. However, the question arises whether the underlying debt must be established in the possession of the debtor, or if it is sufficient for the debt to have arisen as a result. Legal scholars hold differing opinions on this matter, leading to uncertainty regarding whether the underlying debt should be established or if the creation of the debt is sufficient for a derivative guaranty contract. In Sunni jurisprudence, a secured debt in the possession of the debtor is considered sufficient, similar to the deferred price in a sale contract even if the goods have not yet been delivered to the buyer. Nevertheless, legislators have explicitly recognized the existence of a cause for the creation of debt in certain instances of these guaranty contracts, while remaining silent on others. This has led to disagreements among jurists and legal scholars. This article delves into the theological and legal aspects of this subject to explore whether the establishment of the underlying debt or the mere creation of the debt cause is sufficient for guaranty contracts, shedding light on the diverse perspectives within the field.*

**Keywords:** *Established debt, cause of debt, derivative guaranty contracts, guarantor, debtor, surety.*

### **1. Introduction**

Given that legal and natural persons in life require the establishment of social and legal relationships among themselves, these relationships may take the form of contractual or non-contractual agreements. The outcome of such relationships may result in one party becoming a debtor (creditor, dayn), seeking contractual and guaranteed means (either financial or personal) to fulfill their claim.

Financial surety contracts, such as mortgages or personal guarantee contracts, involve the summoning of the guaranteed party by the guarantor to the debtor.

In Article 691, the legislator explicitly states that, in a guarantee contract, it is sufficient for the cause of debt to have been created. However, such explicit clarity is not present in the context of mortgages. Surety contracts are identified specifically as derivative contracts based on a fundamental and primary relationship (Hasanzadehfar,2019)..

Some jurists consider the establishment of the underlying debt as a crucial condition for the

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debtor, while others find the cause of debt to be sufficient. Legal scholars have not expressed a general rule regarding the necessity of establishing the primary debt in surety contracts. For instance, there is agreement on the sufficiency of realizing the cause in a guarantee contract, but opinions differ when it comes to mortgage contracts, where proving the debt on the debtor is considered a condition (Hasanzadehfar,2023).

Therefore, it is necessary to examine each separately to resolve the differences among jurists. In situations of established debt, there is no doubt regarding the validity of a surety contract. Disagreements arise in cases where the cause of the debt is the basis. This article aims to explore the common principles within the shared provisions of general jurisprudence, Islamic jurisprudence, and current laws.

## **2. Surety Contract in Islamic Jurisprudence**

The concept of a surety contract in Islamic jurisprudence refers to a contract through which a debt continues to be held by the debtor, and alongside this, a new commitment is established for either the debtor or a third party. A surety contract is distinct from a transferable surety contract, where the debt is transferred from the debtor.

In a surety contract, the underlying debt must be established. There are uncertainties regarding whether the presence of the cause of debt is sufficient for a surety contract. This article discusses mortgage and guarantee contracts as examples of surety contracts, aiming to extract a general rule from the common provisions of general jurisprudence, Islamic jurisprudence, and current laws.

## **3. Definition of Mortgage Contract in Islamic Jurisprudence**

In linguistic terms, "Rahn" (mortgage) is an Arabic word, and its plural form is "Wathā'iq." It refers to financial collateral placed by the accused before a court for their release. It can also mean a covenant or agreement, or money deposited with a lender in exchange for receiving a loan. In a broader sense, it signifies confinement and holding, as Allah Almighty states, "Every soul, for what it has earned, will be retained [as a pledge]." (Quran 74:38).

The definition of mortgage in Islamic jurisprudence is: "It is the collateral for a debt." In other words, it is a collateral placed to secure a debt owed by the debtor. The one providing the collateral is called the mortgagor, the one accepting it is the mortgagee, and the property placed as collateral is referred to as "Ayn Murhunah" (specific pledged property).

## **4. Definition of Mortgage in Shafi'i Jurisprudence**

In the religious terminology of the Shafi'i school, the term "Rahn" is applied to mortgage transactions, and jurists use it in this sense. While their primary and intended meaning of mortgage is a mortgage transaction, sometimes it refers to the "pledged property." Allah Almighty says: "And if you are on a journey and cannot find a scribe, then a security deposit [Rahan] should be taken." (Quran 2:283).

Mortgage, in the sense of a transaction, means placing something of value as collateral for a debt, so that in case of non-payment by the debtor, it can be obtained from the collateral.

Therefore, the meaning of "Ayn" (specific pledged property) is anything of economic value

recognized as property in customary practice. The purpose of placing this property as collateral is to ensure the confidence of the mortgagee (creditor) in obtaining their claim. In other words, the mortgagee can easily obtain their claim by selling the specific pledged property.

## **5. Legal Definition of Mortgage Contract in Civil Law**

A mortgage contract, in which the debtor's property is pledged as security for the debt, is defined in Article 771 of the Civil Code:

"It is a contract by which the debtor provides a property as security to the creditor. Therefore, the result of a mortgage contract is that the creditor obtains a tangible security, and it acquires a subordinate tangible right. The debtor does not have the right of possession over it, resulting in a disadvantage to the mortgagor. The creditor, concerning the realization of their right from the reality of the mortgage, has a priority over other creditors".

## **6. Characteristics of the Mortgage Contract**

### **6.1. Subsidiary Contract**

- It is a subsidiary contract, meaning that there must already be an existing debt for which property is provided as collateral to the mortgagee. In Iranian law, pledging property for future debts is not possible. The cause of the debt must exist at a minimum, and the right of the creditor disappears with the payment by the mortgagor or the collapse of the mortgage for various reasons.

### **6.2. Tangible Contract**

- The mortgage contract is tangible. According to Article 772 of the Civil Code, "The pledged property must be given to the possession of the mortgagee or someone specified between the parties. However, the continued possession is not a condition for the validity of the transaction. Therefore, the mortgage contract is valid after coming into possession of the creditor.

### **6.3. Permissible from both Parties**

- Mortgage is permissible from both the mortgagor and mortgagee sides (Article 787 of the Civil Code).

- The permissibility of the mortgage contract from the mortgagor's side has been strongly questioned in light of the wording of Article 34 of the amending law passed in 1941, as it implies that there is no way for the creditor to recover other than by taking possession of the specific pledged property. However, with the provision in the sixth clause of the amending law of 1972, this doubt has been resolved. The mentioned provision allows the debtor to dispose of the pledged property in the case of mortgage transactions, and the release of the mortgage will be based on the relevant documents in the event of execution (there is consensus in Imamia jurisprudence).

## **7. Characteristics of Mortgage in Shafi'i Jurisprudence**

### **7.1 Permissibility of Practical Mortgage**

- Practical mortgage is permissible and legitimate according to Shafi'i jurisprudence. The reasons for its permissibility are mentioned in the Quran and the traditions of the

Prophet.

## **7.2 Quranic Reference**

The Quranic verse states, "If you are on a journey and do not find a writer, then something should be taken as a security held in possession." (Quran 2:283) Subsequently, Allah says, "O you who have believed, when you contract a debt for a specified term, write it down." This verse implies that in the absence of a scribe, a tangible item can be placed as collateral to signify the existence of a debt on the debtor. It is appointed as security for the debt and serves as a legitimate basis for mortgaging.

## **7.3 Sunnah (Tradition)**

Numerous traditions support this concept. For instance, in a narration by Imam Bukhari (Hadith 2759) from Aisha (may Allah be pleased with her), she mentioned that at the time of the Prophet's (peace be upon him) demise, his armor was in the possession of a Jew as collateral for a thirty-pint barley loan.

This tradition highlights the practice of using tangible items as security for debts and reinforces the legitimacy of the mortgage concept within the framework of Islamic teachings.

## **7.4 Legal Status of Mortgage**

According to the apparent meaning of the Quranic verse, mortgage is considered lawful and obligatory, as the phrase "you should leave something as security" is framed as a command, implying its obligation. However, scholars unanimously agree that mortgage is not obligatory but rather permissible and optional. The individual is free to decide whether to engage in mortgage transactions or not. This is because mortgage is legislatively instituted to encourage and assure creditors in reclaiming their rights, allowing individuals the flexibility to either enforce or waive their rights.

In another verse, "So if some of you entrust others, the one who is trusted should deliver his trust," the permissibility of mortgage is emphasized. This verse suggests that if a debtor is entrusted with money without any formal collateral and is deemed trustworthy, returning the trust and debt without engaging in any improper behavior is obligatory. Additionally, scholars argue that mortgage is an alternative to written documentation, as contemplating the transaction suffices, and since writing is not obligatory, mortgage is not considered obligatory either. The reason for the non-obligatory nature of writing (loan documentation) is derived from the following verse: "Do not be averse to writing down be it small or large, to its term. Doing that is more just with Allah, more solid as evidence, and more likely to prevent doubt" (Quran 2:282). Writing down the loan documentation, whether the amount is small or large, until its maturity is more just in the eyes of Allah, provides more robust evidence, and minimizes the likelihood of doubt and uncertainty.

## **7.5 Scholarly Views on the Obligation of Writing Loan Documents**

Scholars contend that the meaning of the mentioned verse suggests guidance and justification for writing (loan documentation) rather than a strict and obligatory command. Therefore, the verse does not indicate the obligation of writing loan documents.

While writing loan documents or providing collateral is not obligatory, it is essential not to be lenient regarding these practices. This is to prevent potential disputes between parties, ensuring that individuals do not bring each other to court. Scholars emphasize that even though these

practices are not obligatory, individuals should not neglect them. Consequently, engaging in good practices, such as documenting loans or providing collateral, is recommended to avoid potential conflicts. However, scholars stress that if there is trust and piety in the debtor, providing collateral is not necessary and is considered preferable.

### **7.6 Elements of a Mortgage Contract**

1. The parties involved: The mortgagor (the one providing collateral) and the mortgagee (the recipient of collateral) are the parties creating the mortgage contract.
2. The wording of the mortgage contract: The formal language issued by both parties involved in the mortgage contract.
3. The debt: The amount owed by the mortgagor to the mortgagee, indicating the reason for entering into the transaction.
4. Collateral: The tangible asset placed under the control and authority of the mortgagee, serving as documentation for the mortgagor's right.

### **7.7 Parties in the Mortgage Contract**

- The mortgagor is the debtor, and the debt owed by the mortgagor is under the control of the mortgagee.
- The mortgagee is the creditor who has a claim against the mortgagor.
- The collateral, as a tangible asset, is placed under the authority of the mortgagee.

### **7.8 Formulation of the Mortgage Contract**

The formulation of the mortgage contract, like other contracts, is based on mutual consent. The offer and acceptance are typically expressed, with the offer coming from the debtor and the acceptance from the creditor. However, the reverse can also be true, as there are no strict rules governing this aspect.

In summary, while the Quranic verse emphasizes the advisability of writing loan documents, scholars maintain that it does not impose a strict obligation. The mortgage contract involves essential elements and parties, and its formulation follows the principles of mutual consent. The recommendation for good practices in financial transactions, such as documenting loans, is highlighted for the avoidance of potential disputes.

## **8 Effect of Possession (Qabd) in Mortgage Contracts**

In Islamic jurisprudence (Fiqh), three theories regarding the effect of possession (Qabd) in mortgage contracts are presented:

- A. The mortgage contract is formed through mutual offer and acceptance, and its implementation is contingent upon the possession by the mortgagee. In other words, possession does not play a role in the validity of the contract.
- B. The actual possession of the mortgaged property is a condition for the validity of the mortgage contract, and mere offer and acceptance are not sufficient.
- C. The mortgage contract is realized through offer and acceptance, and although the mortgagee is not compelled to take possession, they are obligated to abide by the terms of the contract.

The Civil Code of Iran, in Article 772, stipulates, "The mortgaged property must be delivered to the possession of the mortgagee or to someone specifically designated between the parties. However, the continued possession is not a condition for the validity of the transaction."

The first part of this article aligns with the views of Islamic jurists who consider the delivery of possession in mortgage as one of its consequences, falling within the realm of obligations on the part of the mortgagee. They assert that the mortgage is contracted through offer and acceptance, and possession has no role in its enforcement. However, the second part of the article, stating that "the continued possession is not a condition for the validity of the transaction," implies that possession in mortgage transactions contributes to the completion of the contract.

It is emphasized that possession must be done with the consent of the mortgagee. Offer and acceptance alone do not actualize the mortgage contract; it lacks legal consequences. Since possession is an essential element of the mortgage contract, it only becomes effective when performed consensually through mutual agreement. The mortgagor is not compelled to deliver possession, so possession must be done with the permission of the mortgagee.

If the mortgage contract is fully executed through offer and acceptance, the possession would fall within its consequences, and there would be no need for the consent of the mortgagor, similar to a sales contract where delivery to the buyer is essential, and the seller's consent is not required. The buyer can take possession of the property wherever found (Article 374 of the Civil Code). In accordance with a prophetic tradition stating, "Whoever finds his property, he is more entitled to it," if someone discovers his property among the assets of an insolvent, he has more rightful and priority claim over it than other creditors.

#### -Necessity of the Presence and Competence of the Parties at the Time of Possession:

Possession is one of the essential elements of a mortgage contract; hence, both parties must be present and competent at the time of its occurrence, meaning they must be adults, sane, and mature (Article 211 of the Civil Code).

## **9 Necessity of the Specificity of the Mortgaged Object**

The subject of a mortgage contract must be a specified tangible object (Article 774 of the Civil Code). As the mortgage contract is completed through the possession of the mortgaged property, it necessitates the existence of a tangible external entity, which is only considered in terms of its value and not its utility. Consequently, a general claim in a specific matter is included in the category of debts. Therefore, selling it is valid, but mortgaging it is void. The general in the specific (a specific quantity generally equivalent to a divisible object) is also valid concerning the specific (a certain quantity of a divisible object). The possession of such an item is either achieved through delivering the entire pledged property or by selecting a specific quantity and delivering it to the mortgagee. It is not obligatory for the specified item to be indebted; even a jointly owned property can be subject to a mortgage. The possession can either be accomplished by delivering the entire specified item or by releasing the mortgagee and lifting the prohibition on the mortgagee's control. The stipulation of Article 774 emphasizes that the subject of the mortgage must be a specific tangible object, and intangible properties, such as copyright and claims, cannot be mortgaged.

## **10 Nullity of Debt Mortgage**

In Imami jurisprudence, many scholars have accepted debt mortgage. Those who reject debt mortgage do not consider possession as a condition for its validity. Another group of scholars

considers the acceptance of debt possession to be valid. Thus, debt mortgage has been deemed valid in recognizing the nullity of debt. The purpose of mortgage is to ensure the creditor's ability to collect their right, and if they cannot collect it from the debtor, they can recover it from the pledged property. Therefore, questioning how one can mortgage a debt when the collection of that debt is doubtful and another debt mortgage has been arranged.

### **10.1 The Pledged Property must be Tangible and Saleable**

The purpose of mortgage is to allow the creditor to sell the pledged property if necessary and recover their claim from its proceeds. For this reason, it is stipulated in the Civil Code that if it is specified that the mortgagor does not have the right to sell the pledged property, the mortgage is void (Article 778 of the Civil Code). Property that has not yet come into ownership, such as vacant land or lawful water, or property that has been removed from ownership, such as endowment assets or intellectual rights, cannot be the subject of a mortgage since it lacks the ability to be sold. For instance, substances like drugs, which do not have the legal capacity for sale, cannot be the subject of a mortgage.

### **10.2 Pledged Property (Shafi'i Jurisprudence)**

Pledged property, according to Shafi'i jurisprudence, refers to an item placed in the possession of the mortgagor and held by them as evidence for their claim. To ensure the validity of the mortgage, jurists have established certain conditions, including:

- A- Tangibility: The pledged property must be tangible. Therefore, pledging intangible benefits, such as the right of residence in a house, is not valid. This is because such benefits diminish over time, losing the qualification of being a valid document and lacking the ability to be detained.
- B- Saleability: The pledged property should meet the conditions similar to those in a sales contract. It should exist, have real value, and the mortgagor should be capable of delivering it. The mortgaged item should be under the ownership control of the mortgagor. Therefore, conditions that involve pledging offspring, such as lambs that will be born from the mortgagor's sheep, are not valid. This is because pledged property lacks external existence at the time of the mortgage transaction.

Pledging dogs and pigs is not valid, as they are considered without financial value from a Sharia perspective. Pledging birds in the sky or claims held by others is also invalid since the mortgagor is incapable of delivering them.

### **10.3 Is Ownership of the Pledged Property Necessary, or is having Control over it Sufficient?**

Ownership of the pledged property is not necessary; rather, the pledgor can take possession of something as collateral, subject to certain conditions and regulations, referred to as pledging an item under specific terms, in the possession of the mortgagor.

It is also not required that the owner be the owner of the entire property; instead, partial ownership of items such as a car, house, or land allows them to pledge their share against their debts. Jurists refer to this action as "Joint Pledging," where the property is not divided among the owners.

Because undivided property can be pledged, the purpose of the mortgage, placing the document for the mortgagor's claim and the possibility of recovering the debt from the pledged property in case of non-payment, is still fulfilled. This form of joint pledging arises when the mortgagor sells the pledged property and collects the mortgagor's claim from its proceeds upon

maturity.

Some Hanafi jurists argue against the permissibility of pledging undivided property, distinguishing it from a valid sale. However, in civil law, the possession of the pledged undivided property is not possible without the consent of other partners. The relevant section of the Civil Code (Article 475) asserts, "Leasing joint property is permissible, but the delivery of the item is contingent upon the consent of the partners".

## **11 Pledged Debt (Opposite Pledge) in Shafi'i Jurisprudence**

The right that the mortgagor holds against the mortgaged property, while pledging something in return, should meet the following conditions:

- a) It should be a debt, meaning it should be in the form of commonly used currency notes today, such as dinars and dirhams, or things that serve as a medium for pricing and are fixed in value when pledged. This is because the purpose of pledging is to recover the mortgagor's claim from the proceeds of the pledged property in case of non-payment, and this can only occur with a debt.

The absence of a standard or legal validity for the creation of debt, whether it be money borrowed from the mortgagor, a loan, or damages to the property of the mortgagor that has not been compensated, renders the notion of the mortgaged right being an exact equivalent invalid. For example, if someone forcefully takes another person's property and the owner, upset by this act, demands that until the property is returned, the wrongdoer should pledge something like cash against it, it is not valid. Similarly, if someone takes something for free, the owner requests that until the item is returned, for instance, a commodity, the person should pledge cash against it; this is also not valid. The reason for the invalidity of pledging against the exact item is that, in the event of the mortgagor's inability to return the exact item and sell the pledged property, obtaining the exact item from the proceeds is not feasible. For instance, it is not possible to reclaim a watch from lira, or similar situations, as experts may differ in pricing, leading to disputes and discrepancies.

### **b) The Mortgagor Should have a Fixed Debt in Hand**

Similar to the price agreed upon in a sales contract after the contract is finalized, even if the sold item has not been delivered to the customer or resembles past alimony payments to a spouse, or money borrowed by the mortgagor and documented in their records, or even if they have not yet received it, in such cases, pledging is considered valid. This is because the right is established, and there is a need to provide collateral. In this situation, the pledge serves as a guarantee for the debt, and it is permissible to collect and receive the debt from its price.

### **c) The Amount and Nature of the Debt Should be known to Both Parties**

If a fixed debt is established for the mortgagor in the hands of the mortgaged item, but the mortgagor is unaware of whether it is in Syrian lira or another country's currency, or if the amount is unknown (e.g., whether it is a thousand or two thousand lira), and the mortgagor pledges something against it, the pledge is not valid. This is the case even if the second party is aware of the amount and nature of the debt because if the mortgagor does not repay, recovering this debt, which is unknown, from the exact price of the pledged item is



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challenging.

## **12 Regulations Regarding the Rights and Responsibilities of the Mortgagor in Shafi'i Jurisprudence**

After the actual possession of the mortgaged item by the mortgagor, the elements and conditions of the contract are considered complete in Shafi'i jurisprudence, leading to various effects and regulations.

### **12.1 Retaining the Mortgaged Item**

The mortgage transaction, with the actual possession of the mortgaged item, becomes complete, obligatory, and enforceable. Unlike other forms of pledge, the mortgagor does not have the right to annul the mortgage or reclaim the mortgaged item without fully settling the debt to the mortgagee.

The initial possession is sufficient for the completion of the mortgage, and there is no need for the continuous possession of the mortgaged item by the mortgagor for the transaction to continue. Therefore, the mortgagor can willingly transfer the mortgaged item to the mortgagee without rendering the mortgage void or terminated. In doing so, the mortgagor retains the right over the remaining mortgaged item, and they can choose to reclaim it at any time.

### **12.2 Preservation of the Mortgage and its Expenses**

Preserving and taking care of the actual mortgaged item, preventing any damage or loss, is in the interest of the mortgagor. It serves their interest to ensure the mortgaged item remains intact so that, if the mortgagor fails to fulfill their obligation, the mortgagee can recover their right from the mortgaged item. Therefore, it is incumbent upon the mortgagor to personally and in accordance with customary practices maintain the mortgaged item.

The term "expenses of the mortgaged item" refers to all the costs necessary to keep the mortgaged item intact, such as providing animal feed, watering trees, etc. The responsibility for paying these expenses lies with the mortgagor. The justification for this ruling is a narration from Imam Shafi'i in the book "Al-Um" (3/147) and Dar Qat'i 133, where the Prophet Muhammad (PBUH) said, "The mortgage should not be closed from its owner, the one who mortgaged it; it is his profit and on him is his loss." Paying the expenses related to the mortgaged item is considered among the losses incurred on it.

## **13 Possession of the Mortgaged Item**

If the conditions of the mortgage are fully met (offer, acceptance, and possession), the mortgagor can take the actual mortgaged item out of the hands of the mortgagee until the mortgagor repays their debt. This is the meaning of "possession" (Yad); that is, the actual mortgaged item is under the control of the mortgagor. The question arises: Is the possession of the mortgagor a trust possession or a guarantor possession?

### **13.1 Meaning of "Yad Amanati" and "Yad Zamani"**

-Yad Amanati (Trust Possession): This means that the possessor of the item only holds it in their possession in case of negligence or a deficiency in fulfilling the assigned responsibilities. It's a trust where the owner of the possession only acts as a guardian for the lost or damaged goods in their possession if they fall short in fulfilling their

duties.

-Yad Zamani (Guarantor Possession): This means that the possessor, regardless of whether they fall short or not in the assigned responsibilities, will act as a guarantor for the lost or damaged property in their possession. In this case, the possessor takes responsibility for the lost or damaged item.

In the context of mortgage, the "Yad Murtahin" (Possession of the Mortgaged Item) is considered "Yad Amanati" (Trust Possession). The mortgagor is a trustee for the lost or damaged property, and if some of the mortgaged items are lost, the mortgagor is not relieved from their obligation unless the mortgagor commits a breach. The justification for this is based on the saying of the Prophet Muhammad (PBUH): "He has his profit, and upon him is his loss".

### **13.2 Benefiting from the Mortgaged Item**

With the permission of the mortgagor, the mortgagee can take the mortgaged item out of the possession of the mortgagor. The benefits of the mortgaged item belong to its owner, i.e., the mortgagor. While the ownership of the benefits is separate from the ownership of the mortgaged item itself, as long as the mortgaged item is in the possession of the mortgagor, the mortgagee has no right to utilize it. However, if the mortgagor allows this, it is permissible for the mortgagee.

The Prophet Muhammad (PBUH) said in a narration reported by Imam al-Bukhari: "One who rides an animal that has been mortgaged or drinks its milk while it is mortgaged, must pay the price of the animal to its owner and also pay for (the milk) that he has drunk." This indicates that benefiting from the mortgaged item is permissible with the permission of the mortgagor, and the expenses associated with it are the responsibility of the mortgagee. However, using the mortgaged item comes with conditions, such as ensuring it does not lead to harm, damage, or loss, and the mortgagee should not take it on a journey where there is a risk, unless necessary.

### **13.3 Benefiting from the Mortgaged Item**

In a mortgage contract, the mortgagee does not become the owner of the mortgaged item, and utilizing it by the mortgagee is not permissible. The ownership and benefits of the mortgaged item belong to its owner, namely the mortgagor. Therefore, without the permission of the mortgagor, the mortgagee has no right to use it. If the mortgagee uses it without permission, their actions are considered a violation, and the mortgagee becomes responsible for any damages incurred. The mortgagor acts as a guarantor for the mortgaged item.

### **13.4 Releasing the Mortgaged Item after Debt Payment by the Mortgagee**

If the mortgagee fully pays the debt, the mortgaged item is released, and the mortgage comes to an end. It is obligatory for the mortgagor to surrender the mortgaged item to the mortgagee. Whether the debt is paid on or before the maturity date, if the mortgagor falls short in returning the mortgaged item or refrains from returning it without a valid excuse, the guarantor of the mortgaged item will be liable. In this case, the guarantor is considered a usurper and loses the right to retain the item. If the non-return is due to a valid excuse, the guarantor is not liable.

### **13.5 Selling the Mortgaged Item**

If, at the maturity date of the debt, the mortgagor is unable to pay the debt to the mortgagee, the mortgagee requests payment. The mortgaged item is sold to satisfy the mortgagee's debt

from the proceeds. The question arises as to who has the right to sell the mortgaged item.

The mortgagor or their representative (wakil) will have the right because the mortgagor is the owner of the mortgaged item, and the representative acts on their behalf. However, the sale of the mortgaged item requires the permission of the mortgagor since they have the right to the proceeds to satisfy their debt. If the mortgagor does not grant permission, the matter is referred to a judge, and the judge may order the mortgaged item to be sold or released from the debt. If the mortgagor fails to comply, the judge may, without the mortgagor's permission, sell the mortgaged item to satisfy the mortgagee's debt.

### **13.6 Kafalah (Guarantee)**

Kafalah is a contract in which one party commits to being responsible for the well-being of another person's body. Essentially, it involves a commitment to provide assistance whenever the guaranteed individual requests it.

The contract of guarantee (kafalah) occurs between the guarantor (kafil) and the guaranteed person (makful). The consent of the guaranteed person is not a condition since the guarantor is obligated to be present whenever the rightful owner of the guarantee demands it. The guaranteed person cannot refuse the presence of the guarantor, regardless of any claims made against them. The rightful owner of the guarantee can either request the guaranteed person directly or appoint someone as a representative to ensure the presence of the guaranteed person. The guarantor acts as the representative of the guaranteed person and must make them available whenever the guaranteed person is summoned.

The contract of guarantee is considered established without the need for an offer from the guarantor. However, the acceptance of the guaranteed person is required, and the acceptance has a specific formula.

### **13.7 Contract of Guarantee (Kafalah) according to Shaykh Oul**

The guarantee contract is valid both as a present commitment (without a specific duration) and with a duration. In the first case, the guarantor undertakes to make the guaranteed person available whenever requested, without a specific time frame. In the second case, the guarantee with a duration means that the guarantor commits to making the guaranteed person available after a specified period but is not obligated to do so before that period. The second form, without a specific duration, is considered more valid by scholars. The reason for the validity of a guarantee without a duration is that the presence of the guaranteed person aligns with their legal rights, and there is no contradiction with that right without specifying a duration.

### **13.8 Contract of Guarantee according to Some Jurists**

According to some jurists, a guarantee contract is valid only if it has a specified duration, and this duration should be known in a way that does not allow for much or little doubt. This perspective contrasts with other contracts where conditions are stipulated differently.

### **13.9 Three Methods of Discharging the Liability for the Guarantor**

- 1 .Complete Delivery: This involves the complete transfer of the guaranteed person to the guarantor without any hindrance from the guaranteed person.
- 2 .The Guaranteed Person Delivers Themselves Completely: Even though it is considered more valid if the guarantor does not intervene in this process, the guaranteed person may

hand themselves over entirely.

Please note that the content is a summarization and may not cover all nuances. Consultation with a qualified religious scholar or jurist is recommended for specific cases.

### **13.10 When the Guarantor Refrains from Delivering the Guaranteed Person**

a) According to the Opinion of Shaykh Oul:

According to Shaykh Oul, the religious authority can compel the guarantor to deliver the guaranteed person. If the guarantor continues to refuse, the rightful owner (the guaranteed person) can request the religious authority to imprison the guarantor until either:

1. The guarantor fulfills the right on behalf of the guaranteed person if it's a financial obligation.
2. If fulfilling the right on behalf of the guaranteed person is not possible, for example, in cases involving punishment or retaliation for a criminal offense. In such situations, if summoning the guarantor is possible, the guaranteed person must enforce the summoning. If summoning is not possible, and the right has a substitute (blood money, for instance), the guarantor must pay the substitute.

b) According to Some Jurists:

Some jurists believe that when the guaranteed person demands the summoning of the guarantor, it is sufficient to obligate the guarantor to make the guaranteed person available. This is because the general understanding of guarantees is not limited to the fulfillment of a financial right.

c) According to the Opinion of Shaykh Sani:

Shaykh Sani supports the perspective that obligating the guarantor to make the guaranteed person available is a strong opinion among some scholars.

Please note that interpretations may vary, and consulting with a qualified religious scholar or jurist is advised for specific cases.

### **13.11 Kafalat in Iranian Civil Law**

According to Article 734 of the Civil Code of Iran, "Kafalat" is a contractual commitment through which one of the parties undertakes to summon a third person in front of the other party. The one making the commitment is called the "Kafil" (guarantor), the summoned person is referred to as the "Makful," and the other party is the "Makful Lah" (the one for whom the guarantee is made).

### **13.12 Characteristics of the Kafalat Contract**

1. **Gratis Nature:** Kafalat is a gratuitous contract, meaning there is no reward or compensation for the guarantor's commitment to summon the guaranteed person. The guaranteed person does not incur any obligation. However, it is permissible to include a condition that benefits the guarantor, and financial gain may result from it.
2. **Subsidiary Nature:** Kafalat is subsidiary, contingent on the existence of a right or claim against the guaranteed person. If this right or claim ceases to exist, the guarantee becomes void.
3. **Unilateral Contract:** The contract is unilateral because the guarantor does not have the power to annul it unilaterally. However, the guaranteed person has the right to pass over a

collateral created for his claim.

4. Related to Human Life and Property: The contract is related to the person's life and property since the guarantor commits to summoning the guaranteed person and not paying their debt. The commitment to repay the debt is a new obligation resulting from the guarantor's breach of the agreement, and it is not a direct effect of the contract.
5. Personal Guaratee: Kafalat is tied to the person of the guarantor, and it ceases to exist upon their death.

It's important to note that legal interpretations may change, and consulting with a legal professional familiar with Iranian civil law is advisable for accurate information.

### **13.13 Distinction between Kafalat and Zeman (Guarantee)**

Despite the interchangeability of the terms "Zeman" (guarantee) and "Kafalat" (surety), where "Zeman" is more specific and "Kafalat" has a broader meaning, a crucial distinction exists between the two. In the context of guaranteeing a debt, in "Zeman," the debtor's obligation is transferred from the debtor to the guarantor, thereby absolving the debtor of responsibility towards the creditor. Conversely, in "Kafalat," the debtor's liability remains with the debtor, and the surety, or "Kafil," undertakes the responsibility of ensuring the debtor's presence when required.

Moreover, the impact of "Zeman" involves the transfer of the debt to the guarantor, resulting in the debtor's exoneration. This, however, leads to the annulment of guarantees and documentation related to the debt. In contrast, in "Kafalat," where the debtor remains accountable, all the consequences, characteristics, and guarantees of the debt persist despite the involvement of the surety.

### **13.14 Self-Surety (Kafalat Nafs) and Its Jurisprudence in Shafi'i Law**

Self-surety, known as "Kafalat Nafs," is a specific type of surety where the surety commits to delivering the debtor to the creditor. The commencement of this form of suretyship is justified by general legal principles, and the endorsement of its legitimacy is found in the narrations attributed to the companions (may Allah be pleased with them), affirming its validity. In Kafalat Nafs, the surety pledges to ensure the debtor's presence when required by the creditor, emphasizing the responsibility for the debtor's presentation without directly assuming the financial obligations. This type of suretyship holds legal implications within Shafi'i jurisprudence, and a nuanced understanding of these implications is essential for those engaged in legal or financial matters governed by Shafi'i principles. As always, seeking guidance from knowledgeable scholars or legal professionals well-versed in Islamic jurisprudence is recommended for accurate and context-specific advice.

In a narration reported by Bihāqī (8/206) and al-Bukhārī in his teachings, Abu Ishāq Sabī'ī recounted an incident involving Ibn Mas'ūd (may Allah be pleased with him). He stated, "One morning, after performing Fajr prayer with Abdullah bin Mas'ūd (may Allah be pleased with him), I recited the Salam. A man stood up, and after praising and glorifying Allah, he said to me: 'In the darkness of the night, I found myself free from any resentment or animosity towards anyone. One of the people of the Banī Hanīfah tribe had told me that he was with me in the late hours of the night. Intrigued, I visited him at night, and when I arrived at the mosque of the Banī Hanīfah, known as the Abdullah bin Nawāhah Mosque, I heard their Mu'adhin proclaiming the Adhan, stating: 'I bear witness that there is no god but Allah, and Muhammad is the Messenger

of Allah.' Initially, I thought I had misheard, and to confirm, I held back my horse. However, I observed that all individuals present in the mosque were repeating his words".

Abdullah bin Mas'ūd (may Allah be pleased with him) then instructed, "Bring Abdullah bin Nawāhah to me." Abdullah bin Nawāhah arrived, and he confessed to his actions. Abdullah bin Mas'ūd inquired about his recitation of the Qur'an, and Abdullah bin Nawāhah explained that he intended to conceal his true beliefs through this action. Abdullah bin Mas'ūd advised him to repent, but he refused. Consequently, Abdullah bin Mas'ūd issued the order for his execution, and he was publicly executed.

Subsequently, Abdullah bin Mas'ūd sought counsel from the companions of the Prophet (peace be upon him) regarding the others present in the mosque. 'Adī bin Hātim suggested, "Thawlūl, meaning the Zagiyl grains, the pimple-like lesions that appear on the skin, are indicative of disbelief. Cut them off from the tribe, as they have openly declared their disbelief." However, Jarīr bin Abdullah and Ash'ath bin Qaisi (may Allah be pleased with them) proposed, "Ask them to repent, and if they repent, make their tribes responsible for them." When approached for repentance, they indeed repented, and their tribes became their guarantors and took responsibility for them.

Additionally, guidance can be drawn from the verse revealed in the language of Jacob (peace be upon him):

"He said, 'I will not send him with you until you give me a firm pledge by Allah that you will bring him back to me unless you are yourselves surrounded.'" (Quran, 12:66)

## **14 Types of Bodily Surety in Shafi'i Jurisprudence**

Bodily surety falls into two categories: 1- Surety for a debtor. 2- Surety for someone subjected to punishment.

- 1 -If the surety is for delivering a debtor, it is valid whether the surety (kafil) is aware of the exact amount of the debt or has no knowledge of it. This is because the surety is responsible for the delivery of the debtor, not the repayment of the debt.
- 2 -However, if the surety is for delivering a person subjected to punishment, and if their punishment includes a right of people (haq al-nas) – such as legal retribution (qisas) for murder or corporal punishment (hadd) for false accusation – in such cases, bodily surety is valid. This is because it relates to an obligatory and enforceable right, similar to financial surety.

## **15 Regulations Regarding Bodily Surety in Shafi'i Jurisprudence**

### **15.1 Place and Time of Delivering the Guaranteed Person**

If the surety (kafil) specifies a certain time for delivering the guaranteed person and the guaranteed person requests delivery at that time, the surety is obligated to deliver the person at that time. If the surety fulfills this obligation, they have honored their commitment; if not, the authorities can imprison them. However, if the guaranteed person is absent and the surety is unaware of their location due to a valid excuse, the surety is not obliged to deliver the person, and their claim of not knowing the person's whereabouts is accepted if confirmed by an oath.

### **15.2 Place of Delivering the Guaranteed Person**

If the surety has specified a location for delivering the guaranteed person and that location is suitable for the delivery, the surety must fulfill their commitment by delivering the person at that location. However, if the location is unsuitable or involves additional costs, the surety should deliver the person to the nearest suitable location. This, however, requires the consent of the guaranteed person, and if not obtained, the delivery is considered void.

## 16 Conclusion

One of the prominent issues in transactions, especially in the banking sector, is the acquisition of banking documents to ensure the collection of claims from customers. A notable example of guarantee contracts is the mortgage and surety contracts. Both contracts fall under the category of subsidiary contracts, meaning that it is sufficient for the underlying debt to be established or caused by the debtor. However, opinions vary among legal scholars, including general and Imami jurists, as well as the Iranian Civil Code.

In the Iranian Civil Code and most Imami jurists, it is believed that the underlying debt must be established, or if it is caused, it is sufficient. However, many general legal scholars believe that the mortgagor (*rahn*) must have an established debt on the debtor, such as the price of a sale after the contract has been concluded, even if it has not yet been delivered to the customer. According to the Civil Code, surety implies a commitment to summon the guaranteed person, and the surety's obligation to pay the debt results from the surety's failure to fulfill the commitment. General jurists argue that in the bodily surety contract, the delivery of the guaranteed person is essential. If a condition is set that if the surety is unable to deliver the guaranteed person, the guarantor assumes the rights of the guaranteed person, according to the majority opinion, the surety contract is void. This is because this condition contradicts the nature of bodily surety since it is not a financial guarantee.

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