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THE CONCEPT OF SURETYSHIP IN ISLAMIC LAW AND ITS TYPES

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Abstract:

This article discusses the legal foundations of suretyship in Islamic law as a means of ensuring the performance of obligations in civil law. It examines the permissibility of suretyship, its conditions, the legal status of a legally responsible person, and the types of suretyship such as personal surety and financial surety, as well as their specific characteristics. The article also describes the forms in which suretyship is applied in modern banking.

Keywords: Suretyship, the principal debtor, the guaranteed obligation, the creditor (beneficiary), legally responsible person, personal surety, financial surety

INTRODUCTION

Today, regulating civil-law relations and improving legislation in this sphere requires studying our rich historical and legal heritage and conducting research. As emphasized in the work *"The Present Era and the New Uzbekistan"* by the President of the Republic of Uzbekistan, Sh.Mirziyoyev: "...it is necessary to intensify measures aimed at creating the legal basis for the operation of Islamic products, services, and banks in our country, determining the specific features of taxation for organizations specialized in this field, and protecting deposits attracted on the basis of Islamic finance [1:275]."

In property relations, suretyship (guarantee) is of great importance, as it mainly serves as a means of securing the performance of obligations. In other words, suretyship is a legal mechanism whereby, if the debtor fails to fulfill an obligation, a third party (the guarantor) is held liable in their place. In this way, the creditor's interests are protected. In Islamic law, suretyship has served to safeguard people's rights and to develop mutual cooperation between them. Since risk management and guaranteeing obligations are of key importance in the modern Islamic financial system, suretyship is widely used in contemporary banking practice. Therefore, studying how suretyship is regulated in Islamic law and how it is applied in banking practice is of significant importance.

METHODS

In this article, methods of systematic, historical, comparative-analytical and logical analysis style were used. The information was taken from articles and books of the laws of the Republic of Uzbekistan, Uzbek, Russian, English scientists.

RESULTS

The word "kafolat" in Arabic literally means "to add". In Sharia terminology, it means adding one liability to another when a right is being claimed [2:307]. Suretyship serves to make people's rights more secure and to develop mutual cooperation among them. It facilitates matters such as taking loans or borrowing items for use. It also helps ensure that the holder of the right feels reassured and confident [3:263].

According to Burhonuddin Marg'inoniy's *"Hidoya sharh bidoyatil-mubtadi"*, the following terms are used in suretyship:

1. Kāfil — the liable person who accepts the suretyship obligation;
2. Makful 'anhu — the person on whose behalf the suretyship is accepted (i.e., the debtor for whom someone becomes a guarantor);
3. Makful bihi — the matter/object for which the guarantee is accepted (the subject of the guarantee);
4. Makful lahu — the holder of the right (the creditor), for whom the guarantor collects/ensures the right.

The pillar (rukn) of suretyship is offer and acceptance (ijab and qabul); that is, in a situation where the *makful 'anhu* is not present, the contract is not concluded by the guarantor alone.

In Islamic law, free (ḥurr) and mukallaf persons may be eligible to act as guarantors. By "mukallaf" is meant a person of sound mind who has reached puberty. Sources also explain that a "mukallaf" is someone to whom Sharia rulings are addressed—i.e., a person upon whom obligations (such as mandatory duties) are imposed. Here, the key conditions are puberty and sanity.

In Islamic law, there are two types of suretyship:

1) Suretyship for the person (kafalat al-nafs)

Under this guarantee, one person undertakes to produce another person at a specified place when required. Guaranteeing the person is commonly expressed through phrases in customary usage such as:

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"I am his guarantor," "hand him over to me," or "I guarantee him personally."

If the guarantor knows where the guaranteed person is but fails to produce him at the appointed time, the judge (qaḍi) has the right to imprison the guarantor. If the guarantor does not know the person's whereabouts, the judge has no right to imprison him.

If the guarantor brings the guaranteed person to a place where a dispute can be pursued, or if the makful bihi (i.e., the guaranteed person) comes to such a place on his own, then the guarantor is considered to have fulfilled his responsibility.

Likewise, if the guaranteed person dies, the guarantor is released from responsibility. However, if the makful lahu (the claimant/creditor) dies, the creditor's heirs may demand that the guarantor fulfill his duty.

If the guarantor says, "If I do not produce the person I guaranteed tomorrow, I will pay his debt," the guarantee contract is valid. In such a contract, guarantee of the person and guarantee of property/financial liability are combined. If the guarantor cannot produce him the next day, he pays the debt. Even then, however, he is not freed from the obligation of personal suretyship.

Whether the guarantor is released from suretyship by handing the defendant over to the claimant in the marketplace is a disputed issue. But if the handover is done in the desert or in a village, the guarantor is not released from the suretyship.

2) Suretyship for property (kafalat al-mal)

In this type of guarantee, one person undertakes to pay—at a specified time—the property/amount that is being claimed from another person.

Here, the guarantor assumes responsibility for the financial obligation that the guaranteed person is required to pay. This form of suretyship is established through expressions such as: "I am responsible for his debt" or "his payment is on my shoulders." In such a guarantee, it is not required that the guarantor know precisely the amount or exact nature of the debt being assumed. If the guaranteed person's debt amount is proven by documentation, the guarantor pays that amount. If there is no evidence establishing the exact amount of the debt, payment is made according to the guarantor's statement.

For example, if the guarantor says, "I thought this person's debt was one hundred thousand so'm," or "I guaranteed one hundred thousand so'm," then after swearing an oath as to the truth of his statement, he pays that stated amount. If, in this situation, the debtor (the guaranteed person) says, "No, my debt was two hundred thousand so'm," then the debtor himself pays the amount exceeding what the guarantor stated (beyond one hundred thousand so'm). This is because the debtor's acknowledgment applies only to himself.

The right-holder (creditor) has the right to demand payment either from the debtor or from the guarantor. Taking on suretyship may occur either at the debtor's request or at the guarantor's own initiative. If it was done at the debtor's request, the guarantor may recover from the debtor what he paid to the creditor. If it was done on the guarantor's own initiative, he cannot recover what he paid from the debtor, because this act—done voluntarily—is considered charitable assistance.

If the creditor demands his right from the guarantor, the guarantor likewise demands that the debtor settle the debt. If the creditor forgives the debt owed by the debtor, or postpones the payment deadline, these actions also apply to the guarantor. That is, what is forgiven for the debtor is also forgiven for the guarantor, and the extension granted to the debtor is also an extension for the guarantor. However, an additional extension granted to the guarantor is not considered an additional extension granted to the debtor. Likewise, the creditor's decision to stop demanding payment from the guarantor is not considered a waiver of the claim against the debtor.

If the guarantor agrees with the creditor—regarding a 1,000 so'm debt—to pay 100 so'm (i.e., persuades the creditor to accept that), then he recovers 100 so'm from the debtor. If the guarantor gives the creditor something saying, "Take this and don't keep bothering me," and the creditor accepts, the debtor is still not considered released from his debt.

As stated above, the creditor's consent is required for a guarantee agreement to be valid. However, if a sick person who is leaving behind property tells his heirs, "Be a guarantor for paying my debts," and the heir agrees, then this agreement has legal force under Sharia even without the creditors' consent. This is because, although it resembles a guarantee, in essence it is a bequest (waṣiyyah). Therefore, in this case it is not necessary to mention the creditors by name.

It is valid to attach a suretyship contract to a condition that is compatible with suretyship. For example, suretyship is permissible in the sense of: "If someone turns out to have a right to the sold goods, I am the guarantor," or "If the debtor is not in the city, I am the guarantor for paying his debt."

A person who is authorized as an agent to purchase goods on someone else's behalf may demand the money from the principal before paying the seller, because, in legal terms, a contract of exchange/sale is considered to have been established between the agent and the principal.

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After a suretyship is concluded, the guarantor cannot renounce it. However, in a conditional or time-bound guarantee, the guarantor may withdraw from the guarantee before the debt becomes binding on the debtor (the one who requested the loan). A person who guarantees the return of property that was seized or given for temporary use (ʿariyah) will, when delivering the item back to its owner, recover the travel expenses from the person who seized it or borrowed it for use (the user).

Once the debt is delivered and paid to the makful lahu (the creditor), whether by the debtor himself or by the guarantor, the guarantor is released from the guarantee. If the creditor says, "I have released the guarantor from the guarantee," or "I have no claim against the guarantor," then the guarantor is considered discharged [4:65].

In modern Islamic banks, the application of suretyship (kafala) is regulated on the basis of Sharia sources, the resolutions of international fiqh academies, and the standards of AAOIFI (Accounting and Auditing Organization for Islamic Financial Institutions).

In today's practice, suretyship is widely used when a bank provides a guarantee to a third party on behalf of its client, as well as in murabaḥah contracts, sukuk, and investment projects.

The main aspects of suretyship in murabaḥah are as follows:

If the buyer (client) is unable to fulfill the obligation to pay in installments for the goods purchased by the bank, the payment obligation transfers to the guarantor. The suretyship is formalized through a separate contract (or as a special clause within the main contract) and ensures the fulfillment of obligations. Under the terms of such a contract, the guarantor assumes liability before the bank for the timely payment of installments by the client.

DEBATE

In conclusion, it can be said that in fiqh, a guarantee is considered an act carried out as **benevolence**, since no fee is taken for suretyship. In modern Islamic banks as well, earning income through suretyship is prohibited; however, it is permissible to charge fees to cover service and documentation expenses. The use of suretyship in Islamic transactions, including murābaḥah contracts, is regarded as compliant with Sharia rules aimed at ensuring the security of transactions.

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