
SECURE TRANSACTIONS IN ISLAMIC AND CONVENTIONAL LEGAL FRAMEWORKS: A COMPARATIVE ANALYSIS

Dr. Tahira Ifraq

Lecturer in *Shari'ah*, Department of *Shari'ah*,

Allama Iqbal Open University, Islamabad.

tahira.ifraq@aiou.edu.pk, tahiraifraq@gmail.com

Abstract

The concept of security in financial transactions is not new and exists across various financial systems to safeguard financial obligations. Security provides trust and confidence to creditors, thereby facilitating the fulfillment of contracts. Islamic law addresses security in financial transactions through the concept of rahn, which encompasses conventional ideas of pledge, mortgage, lien, and other forms of security. Rahn serves as a mechanism to secure debts or advances, minimizing the risk of default and encouraging the wealthy to provide interest-free loans, which contributes to social welfare. In the conventional legal framework, the concept of secure transactions aims to protect the rights of both creditors and debtors. However, there are notable differences between the conventional and Islamic systems in their approach and underlying principles.

The research addresses key questions, such as: What are the general principles and concepts of secure transactions within Islamic and conventional legal frameworks; how do these systems operate, and in what ways are they similar or different. Descriptive and comparative research methodologies, along with Islamic research methods, have been employed to explore and explain the issues effectively. This research examines the overall concept of secure transactions under both Islamic and conventional legal frameworks. It further delves into the rules and principles of Rahn as outlined in Islamic jurisprudence, while also exploring the foundations of mortgages and pledges in conventional law.

Key Words: Conventional, financial, transactions, Security, *Rahn*, Mortgage, Pledge, Lien, *Shari'ah*, *Ribā*

1. CONCEPT OF SECURITY IN ISLAMIC LAW

The financial transactions where money is involved, the concept of taking guarantees to secure obligations and protecting amount of debts from default is prevailing in conventional as well as in Islamic law. It serves in two ways by fulfilling the need of debtor in one way and secures the amount of creditor on the other way. Such guarantees may take the form of personal guarantees, pledges, cheques, written documents, promissory notes etc.

The term *Rahn* is used for security, mortgage, pledge, pawn etc, under Islamic commercial law. *Rahn* is a moral obligation in Islamic society on the basis of its fundamental principles of brother-hood, kindness, need fulfillment etc, if a person is not ready to give debt he may give it with security, otherwise it is not obligatory to give *rahn* or security for debts under Islamic law. But *rahn* or security encourages wealthy to give debts with trust and confidence without any fear of default or breach on part of borrower.

1.1 PRINCIPLES GOVERNING *RAHN* (MORTGAGES/PLEDGES) IN ISLAMIC JURISPRUDENCE

Al-RAHN

- **Literal meaning**

Al-Rahn means a thing which is continued, settled, established, constant and attached or permanently fixed or placed with its belongings.¹ As mentioned in Holly *Qur'ān*:

كُلُّ نَفْسٍ بِمَا كَسَبَتْ رَهِينَةٌ

“Every soul will be (held) in pledge for its deeds”²

- **Terminological meaning**

In the language of law it means to “place or deposit a property of material value as security for the amount of debt or performance of promise or obligation”³, and it also means the detention of a thing to satisfy the payment of a debt or performance of a promise in case of default⁴.

According to the definition of *Ibn Qudāmah*⁵ it is an asset which is given as guarantee for repayment of debt and satisfies amount of debt on default of borrower. *Rahn* is a security for the payment of debt or performance of a promise and security may be used to recover full payment of debt.⁶ The person who gives *rahn* is called “*rāhin*” or pledger or mortgagor or debtor and who receives *rahn* for debt is called “*murtahin*” or pledgee or mortgagee or lender.

Rahn property may be entrusted to any third upright person called an “*‘adl*”⁷. ‘*Adl*’ will act as trustee for both *rāhin* and *murtahin*.

1.2 *RAHN* IN PRE-ISLAMIC ARAB SOCIETY

Al-Rahn or security is not a new concept. It was prevailing among Arabs even before Islam but Islam has changed its original meanings and gave it an entirely different shape under the rules and principles of Islamic law. Before Islam *rahn* was given as earnest money⁸ to guarantee the transaction and used as a proof of it in cases where no scribe was available to put it into writing. The *murtahin* had right and power to forfeit *rahn* in pre-Islamic concept.

¹ E. W. Lane, *Arabic-English Lexicon*, S.V, “*Rahn*” (Lahore: Islamic Book Centre, 1982), vol.3, pp.1172-73; Al-Zubaydī, *Tāj al-‘Arūs* (Beirut: Dār al-Ihyā al-turāth al-‘Arabī, 1966), vol.11, p.221

² Al-Qur’ān 74: 38

³ E. W. Lane, *Arabic-English Lexicon*, s.v, “*Rahn*” (Lahore: Islamic Book Centre, 1982), vol.3, p.1172

⁴ Charles Hamilton, *The Hedaya* (Lahore: Premier Book House, 1982), p.630

⁵ Ibn Qudāmah, *Al-Mughnī* (Riyādh: Maktabah Riyādh Al-Ḥadīthah, 1347/1928), p.361

⁶ *The Mejelle*, Art.701 (Lahore: Law Publishing Company, 1980), p.107

⁷ Ibid, Art.705, p.109

⁸ Joseph Schacht, *Origin Of Muhammadin Jurisprudence* (Oxford: Clarendon Press, 1967), p.92

Under Islamic commercial law earnest money is forbidden and *rahn* is recognized only as a security for the repayment of a debt or other financial obligation.⁹

1.3 EVIDENCE FOR THE LEGALITY OF *RAHN*

Qur'ān, *Sunnah* and Consensus proved the legitimacy of *rahn*.

- **QUR'ĀN**

Allah says in Holly *Qur'ān*:

وَإِنْ كُنْتُمْ عَلَى سَفَرٍ وَلَمْ تَجِدُوا كَاتِبًا فَرِهَانٌ مَّقْبُوضَةٌ فَإِنْ أَمِنَ بَعْضُكُم بَعْضًا فَلْيُؤَدِّ الَّذِي اؤْتُمِنَ أَمَانَتَهُ وَلْيَتَّقِ اللَّهَ رَبَّهُ وَلَا تَكُونُوا الشَّاهِدَةَ وَمَنْ يَكْتُمْهَا فَإِنَّهُ آتِمٌ قَلْبُهُ وَاللَّهُ بِمَا تَعْمَلُونَ عَلِيمٌ

“And if you are on a journey and cannot find a scribe, a pledge with possession (may serve the purpose). And if one of you deposits a thing on trust with another let the trustee (faithfully) discharge his trust, and let him fear his Lord. And do not conceal what you have witnessed for, verify, he who conceals it is sinful at heart; and God has full knowledge of all that you do”¹⁰

According to this verse *rahn* is permitted and word “journey” is used because such needs usually arise in journey and it is not the condition for entering into the contract of *rahn*. Therefore, *rahn* is lawful not only in journey but in stay as well.

- **SUNNAH**

Aḥādīth of Prophet (P.B.U.H) prove the legitimacy of *rahn*.

عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ اشْتَرَى طَعَامًا مِنْ يَهُودِيٍّ إِلَى أَجَلٍ وَرَهْنَهُ دِرْعًا مِنْ حَدِيدٍ

1. “From ‘Ā’ishah that Allah’s Apostle bought some foodstuff from a Jew and mortgaged his armor to him”¹¹
رَهْنَ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ دِرْعًا لَهُ بِالْمَدِينَةِ عِنْدَ يَهُودِيٍّ وَأَخَذَ مِنْهُ شَعِيرًا لِأَهْلِهِ
2. “From Anas that Allah’s Apostle mortgaged his armor to a Jew in *Madīnah* and bought bread from the Jew for his family”¹²
3. The prophet is reported to have said: “He who has a pledge let him who entrusted him with it”¹³

⁹ Ibid.

¹⁰ Al-Qur’ān 2: 283

¹¹ Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, trans. Muhammad Muhsin Khan, No.2509, *Kitāb al-Rahn* (Riyādh: Dār al-Salām, 1997), vol.3, p.398; Abū Hanīfah, *Jāmi’ Masānīd al-Imām al-A’zam* (Hyderabad: Dār al-Ma’ārif), vol.2, p.38; Al-Shafī’ī, *Kitāb al-Umm* (Beirut: Dār al-Ma’rifah), vol.3, pp.139-42

¹² Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, trans. Muhammad Muhsin Khan, No.2508, *Kitāb al-Rahn* (Riyādh: Dār al-Salām, 1997), vol.3, p.398

¹³ Ibn-Hishām, *Al-Sīrah al-Nabawiyyah* (Beirut: Dār al-Ma’rifah, 1975), vol.4, p.185

These traditions show that Prophet made *rahn* to fulfill his needs and also prove the legitimacy of *rahn* during stay because Prophet was staying at *Madīnah* while making *rahn*. Third tradition makes it obligatory to return object of *rahn* or *marhūn* to the owner because it is given as security.

1.4 NATURE OF THE CONTRACT

Rahn contract is not an exchange contract because commodity or property under this contract is given without any compensation. So it's purely a voluntary charitable contract (*tabarru'*)¹⁴. It is also one of the contracts involving non-fungibles that are not considered totally binding until the object of contract is delivered like gift, loan, deposit etc. Delivery of possession is necessary, to make them binding contract due to their voluntary charitable nature. This ruling is based on a Shari'ah maxim:

لا يتم التبرع إلا بالقبض

"Voluntary charitable transaction is not fully concluded before delivery of possession"¹⁵ Such contracts have no legal effect before possession and possession is obligatory to make them binding. Contract of *rahn* is permissible but not obligatory. Objective of *rahn* is to facilitate recovery of debt and protect it from default or breach. Allah has ordered to use *rahn* in the absence of scribes and documentation¹⁶ of debt is not obligatory itself therefore, its alternative is not obligatory or required as well.

The *rahn* or security is made to secure or guarantee the performance of contract or amount of debt from default, it is not a profitable contract and any profit earning from such contract is considered usury and hence, illegal.

1.5 INGREDIENTS OF A RAHN CONTRACT

Like any other contract it is also concluded by the offer and acceptance of the parties (*rāhin* and *murtahin*), but possession makes the contract complete and binding, otherwise parties may revoke the contract. According to Joseph Schacht¹⁷ *rahn* contract requires offer and acceptance of the parties and it becomes binding or *lāzim* when possession of *marhūn* (mortgage) is delivered to the mortgagee or lender.

The terms (*ṣīghah*) of contract must fulfill all the general conditions that are required in other contracts.¹⁸ Therefore, terms of the contract must not be inconsistent with the general objectives of *rahn*. Mutual consent of parties is very important and they may

¹⁴ Wahbah Al-Zuhaylī, *Al-Fiqh Al-Islamī wa Adillatohū* (Damascus: Dār al-Fikr, 1985), vol.5, p.181

¹⁵ Muhammad Sidqī, *Al-Wajīz Fī dāh Qawā'id al-Fiqh al-Kullīyyah* (Riyādh: Maktabah Al-Ma'ārif, 1989), p.322

¹⁶ Ibn Qudāmah, *Al-Mughnī* (Riyādh: Maktabah Riyādh al-Ḥadīthah, 1928), vol.4, p.327; Al-Bahūtī, *Kashshāf al-Qinā'* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997), vol.3, p.307

¹⁷ Joseph Schacht, *An Introduction To Islamic Law* (New Delhi: Universal Law Publishing Co. Pvt. Ltd, 1997), p.139

¹⁸ Al-Shirbīnī, *Mughnī al-Muhtāj* (Brirut: Dār al-Ma'rifah, 1997), vol.2, p.160; Al-Kāsānī, *Badā'i' al-Sanā'i' fī Tartīb al-Sharā'i'* (Beirut: Dār al-Kutub al-'Ilmiyyah), vol.6, p.135; Al-Bahūtī, *Kashshāf al-Qinā'* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997), vol.3, p.376

stipulate in order to strengthen the transaction that it should be concluded in presence of witnesses etc. But a stipulation in contract that prevents the lender from using his rights will render the contract invalid.¹⁹

1.6 CONDITIONS FOR CONTRACT OF RAHN

Conditions for contract of *rahn* are given below:

- i. The parties to the contract must be competent to enter into a contract of *rahn*. They must be of sound mind and attained the age of prudence so that they could bear all the risks involved in such transaction. It is not required that they must be of certain age. It is lawful even for a child (*mumayyaz*); who can differentiate, to become a *rāhin* (mortgagor) or *murtahin* (mortgagee).²⁰
- ii. *Rahn* property or *marhūn* must satisfy all the conditions that are required for the subject matter of sale.²¹ Any thing that can be sold can become subject matter of *rahn* because it is security and purpose of security is to recover amount of debt at the event of default or breach. So it must be *māl mutaqaawwim* and existent and must be capable of sale and delivery.²² Any thing which cannot be delivered or deposited cannot become the subject matter of *rahn* like usufructs. Value of security (*marhūn*) may be less, equal or higher than the value of debt. It is not required that the worth of security must be equal or higher than the amount of debt, for the validity of *rahn*.²³
- iii. The *rāhin* or mortgagor must be the owner of property mortgaged or pledged. But this condition is not the condition for the validity of *rahn* contract. According to the *Hanaftīs* and *Mālikīs* it is condition for the execution of *rahn*.²⁴ Therefore, Muslim jurists unanimously agreed²⁵ that a borrowed article can be pledged because borrower gets benefit from the thing borrowed and it is permissible to use or get benefit from it and hence, borrower may validly *rahn* it as well.
- iv. The underlying debt or credit transaction must be based on the principles of *Sharī'ah*. Debt must be existent, established, fixed and binding immediately or in near future.²⁶
- v. All jurists agreed that the delivery of possession of *marhūn* or security to the mortgagee is a valid condition for *rahn* contract. Possession or control over the property gives a confidence and security to the mortgagee that he could easily exercise his power

¹⁹ Muḥiyyuddīn Abū Zakariyyā, *Minhāj-al-Tālibīn*, trans. E.C Howard (Lahore: Law Publishing Company, 1977), p.152

²⁰ *The Mejelle*, Art.708 (Lahore: Law publishing Company, 1980), p.107

²¹ Al-Kāsānī, *Badā'i' al-Sanā'i' fī Tartīb al-Sharā'i'* (Beirut: Dār al-Kutub al-'Ilmiyyah), vol.6, p.135

²² Dr. Abbās Aḥmed Al-Baz, *Ahkām al-Māl al-Ḥarām* ('Ammān: Dār al-Nafā'is, 1998), pp.28-32; Al-Sheikh 'Alī al-Khafīf, *Ahkām al-Mu'āmilāt al-Sharī'ah* (Cairo: Dar al-Fikr al-'Arabi, 1996), p.28; *The Mejelle* (Lahore: Law Publishing Company, 1980), Art.709, p.108

²³ Wahbah al-Zuhaylī, *Al-Fiqh al-Islamī Wa Adillatohū* (Damascus: Dār al-Fikr, 1989), vol.5, p.268

²⁴ Wahbah al-Zuhaylī, *Financial Transactions in Islamic Jurisprudence*, trans. Mahmoud A. El Gamal (Damascus: Dar al-Fikr, 2002), vol.2, p.104

²⁵ Ibn Rushd, *Bidāyah al-Mujtahid* (Lahore: Maktabah al-'Ilmiyyah), vol.2, p.271

²⁶ Al-Dusūqī, *Hashiyah al-Dusūqī* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1996), vol.4, p.375; Abū Yahyā Zakariyyā, *Fath al-Wahhāb bi Sharḥ Minhāj al-Tullāb* (Beirut: Dār al-Fikr, 1994), vol.1, p.228

of sale on default of debtor. As Allah says: “pledge with possession” but jurists have a difference of opinion regarding classification of condition.

According to majority of jurists possession is a condition to make the contract binding, *rahn* is not binding without possession and creditor is permitted to revoke the contract before delivery of possession of *marhūn* or pledge.²⁷

In the opinion of *Mālikīs*²⁸ contract of *rahn* is not completed without possession, although it become valid and binding by offer and acceptance of the parties, then debtor may be forced to deliver possession of pledged property to the creditor under contract obligation. If creditor is not demanding possession or agree to keep it in the possession of debtor then it will invalidate the contract because delivery of possession is the essence of contract and it is useless without it. Their opinion is based on this verse:

أَوْفُوا بِالْعُقُودِ

“Fulfill your contracts”²⁹

Imām Mālik said that the contract of *rahn* becomes valid and binding when parties enter into it because it is similar to sale and property of both sides is involved.³⁰

1.7 RIGHTS AND OBLIGATIONS OF *RĀHIN* (MORTGAGOR) AND *MURTAHIN* (MORTGAGEE)

- The property under *rahn* contract is belonged to the debtor and possessed by the creditor as a security for debt or performance of an obligation. *Rahn* property will be kept safe, only at the event of default creditor may rightfully use it as a remedy. It is transfer of possession to the lender and title of the property belongs to the debtor. If the property and underlying debt or obligation are of the same genus then creditor may recover or extract his amount from the *marhūn* in case of default³¹ and if their natures are different then option of sale will be applicable and creditor may recover his amount from sale proceeds.
- Actual or constructive delivery of possession of pledged property to the creditor by the debtor because without possession of property creditor may not able to exercise his power of sale etc, at the event of default. This security actually provides security to the creditor and protects him from loss etc, and before getting possession he has right to revoke the contract. The *rāhin* or mortgagor on the other hand, cannot revoke the contract unilaterally, but with mutual consent they may cancel the contract.³²
- The mortgagor may grant more than one mortgages on his property to different creditors.³³

²⁷ Ibn Qudāmah, *Al-Mughnī* (Riyādh: Maktabah Riyādh al-Ḥadīthah, 1928), vol.3, p.328; Shīrīnī, *Mughnī al-Muhtāj* (Cairo: Mustafa al-Bābī al-Halabī, 1933) vol.2, p.128

²⁸ Ibn Rushd, *Bidāyah al-Mujtahid* (Lahore: Maktabah al-‘Ilmiyyah), vol.2, p.271

²⁹ Al-Qur’ān 5: 1

³⁰ Charles Hamilton, trans., *The Hedaya* (Lahore: Premier Book House, 1982), vol.4, p.630

³¹ Wahbah al-Zuhaylī, *Al-Fiqh al-Islamī Wa Adillatohū* (Damacus: Dār al-Fikr, 1985), vol.5, p.201

³² *The Mejelle* (Lahore: Law Publishing Company, 1980), Art.716-718

³³ *Ibid*, Art. 720

- The mortgagee or *murtahin* or '*Adl* is responsible to keep and secure the things mortgaged when possession is being delivered to him.³⁴ He must take all necessary measures to make sure its safety. Mortgage property is security or guarantee and returned back to the owner or debtor on repayment of debt so it must be protected and preserved by the possessor.
- The mortgagor being the owner of the *rahn* property is responsible³⁵ for all its expenses including the cost of its maintenance, return etc, and its beneficial use is also returned to him. All jurists agreed that mortgagor or debtor is responsible for the expenses of *rahn* commodity as Prophet (P.B.U.H) is reported to have said:

الرهن من رهنه له غنمه وعليه غرمه

“To the mortgagor (*rāhin*) return his profit and he is responsible for his loss”³⁶.

- Any growth or accession (increase) like offspring, wool, fruit etc, will not become a part of security and not included in it.³⁷ According to *Imām Mālik*³⁸ if an orchard is mortgaged and fruits of that orchard are ripen before the end of term of *rahn*, they will not be considered as part of *rahn* or security with the real estate, unless it is previously stipulated by the debtor in his contract.
- *Marhūn* or *rahn* property is trust in the hands of mortgagee or *murtahin* and if it is destroyed or damaged in his possession, he will not be responsible for it still debtor has to repay his whole debt. Debtor or mortgagor being the real owner of the property is entitled for all the rewards and risks belong to the property. *Rahn* property is trust or *amānah*, therefore, mortgagee or lender is liable for damage or destruction if it is occurred due to his negligence or misconduct. In case of misconduct or negligence on part of lender or mortgagee then liability is upon him and he has to compensate the owner for it. Although, there is a difference of opinion among jurists on this issue but majority of them considered *rahn* a trust in the hands of mortgagee or lender.³⁹
- Debtor being owner of the property has right to cause the property to sale in case of default and he may also delegate his authority to any third person, who will act as his agent. Mortgagee or lender may also sell the *rahn* property with the consent of the owner or debtor.⁴⁰ If debtor or owner refused to sell the property then

³⁴ Al-Kāsānī, *Badā'i' al-Sanā'i' fī Tartīb al-Sharā'i'* (Beirut: Dār al-Kutub al-'Ilmiyyah), vol.6, p.148; Ibn-Qudāmah, *Al-Mughnī* (Riyādh: Maktabah Riyādh al-Ḥadīthah, 1928), vol.4, p.353

³⁵ Al-Kāsānī, *Badā'i' al-Sanā'i' fī Tartīb al-Sharā'i'* (Beirut: Dār al-Kutub al-'Ilmiyyah), vol.6, p.151

³⁶ Ibn-Qudāmah, *Al-Mughnī* (Riyādh: Maktabah Riyādh al-Ḥadīthah, 1928), vol.5, p.326; Jaṣṣāṣ, *Aḥkām al-Qur'ān*, trans. Abd al-Qayyūm (Islamabad: Sharī'ah Academy IIUI, 1999), vol.2, pp.562-65; Shāfi'ī, *Kitāb al-Umm* (Beirut: Dār al-Ma'rifah), vol.3, p.147

³⁷ Shāfi'ī, *Kitāb al-Umm* (Beirut: Dār al-Ma'rifah), vol.3, pp.167-68; Sayyid Sābiq, *Fiqh al-Sunnah* (Beirut: Dār al-Kutub al-'Arabī, 1985), vol.3, pp.156-58

³⁸ Mālik Ibn Anas, *Al-Muwattā* (version of Yahyā Ibn Yahyā) (Beirut: Dār al-Ma'rifah, 1983), p.625

³⁹ Ibn Rushd, *Bidāyah al-Mujtahid* (Lahore: Maktaba al-'Ilmiyyah), vol.2, p.273; Al-Bahūtī, *Kashshāf al-Qinā'* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997), vol.3, p.228

⁴⁰ Al-Sharbūnī, *Mughnī al-Muhtāj* (Beirut: Dār al-Ma'rifah, 1997), vol.2, p.176

creditor may asked the court for sale.⁴¹ Creditor will recover his amount of debt from sale proceeds and any extra amount over and above the amount of debt will be returned back to the owner.

1.8 KINDS OF RAHN

A *rahn* or security may be given in three agreed forms⁴².

- i. A *rahn* may be given in credit sale contract, where a buyer with the consent of the seller deposits an article as a collateral or security of price, which is established as a debt. All schools of thought declared it valid because it fulfills the economical and financial need of people.
- ii. A *rahn* may also be created after payment of debt to the debtor. It is lawful to give security or *rahn* after establishment of right or debt because it secures the amount of debt from default and used as an alternative for written documentation as mentioned in Quran, so it must be after the establishment of right.
- iii. A *rahn* may also be created before the debt or right has been established in the eye of law. *Hanafīs* and *Mālikīs* declared⁴³ it valid because it secures or guarantees the right or debt like *Kafālah* (surety ship) and it is based on logic. According to *Shāfi'īs* and *Hanbalīs* it is invalid because legal right cannot be secured or guaranteed before its establishment.

1.9 USE OR BENEFITS FROM RAHN PROPERTY

Rahn property (*marhūn*) is security to secure the amount of debt or financial obligation. It has to return back to the owner after the term of contract or repayment of debt. According to majority of jurists creditor or mortgagee is not permitted to get benefit or use security because it will be without any replacement and hence, amount to *ribā* according to the *ḥadīth* of Prophet (P.B.U.H):

وَأَنْ كُلَّ قَرْضٍ جَرَّ نَفْعًا فَهُوَ رِبَا

“Any benefit that is generated from debt is *ribā*”⁴⁴

Taking benefit from mortgaged property is similar to take benefit from debt and function of *rahn* is to secure the amount of debt, it is not a profitable contract from where a mortgagee or creditor can earn profit. *Marhūn* is ownership of debtor or mortgagor and benefit from mortgagor's property by the mortgagee is amount to taking benefit from other's property, which is illegal in *Sharī'ah*. Mortgagee has no right to take benefit from *marhūn* but there is a difference of opinion among jurists over this issue on the basis of

⁴¹ Al-Kāsānī, *Badā'i' al-Sanā'i' fī Tartīb al-Sharā'i'*, vol.6, p.148; Al-Sharbūnī, *Mughnī al-Muhtāj*, vol.2, p.176

⁴² Ibn Qudāmah, *Al-Mughnī*, vol.4, pp.363-67; Al-Sharbūnī, *Mughnī al-Muhtāj*, vol.2, p.127; Al-Bahūtī, *Kashshāf al-Qinā'*, vol.3, pp.320-34

⁴³ Ibid.

⁴⁴ Ibn-Rajab al-Hanbalī, *Fath al-Bārī* (Al-Dammam: Dār Ibn al-Jawzī), vol.6, p.533

possession and ownership of *rahn* property and when the *marhūn* is riding or milk animal.

In the opinion of majority of *Hanaftis*⁴⁵ jurists benefit from *rahn* property may be derived by the mortgagee but with the permission of mortgagor and it must not be stipulated at the time of contract. It is based on this *ḥadīth*:

“From *Ibn ‘Umar* that Allah’s Apostle said that an animal must not be milked without the permission of its owner”⁴⁶.

They also opined that *murtahin* or creditor takes benefit from property and he is obliged to pay expenses at the same time because property is in his possession, this opinion is based on the *āḥādīth*:

عَنْ أَبِي صَالِحٍ عَنْ أَبِي هُرَيْرَةَ عَنِ النَّبِيِّ -صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ- قَالَ « الرَّهْنُ مَرْكُوبٌ وَمَحْلُوبٌ وَعَلَى الَّذِي يَخْلِبُ وَيَرْكَبُ النَّفَقَةُ

“From *Abū Ṣāliḥ* from *Abū Hurayrah* that Allah’s Apostle said, ‘the *rahn* animal may be used for riding and milking in accordance with its expenditures and person riding or milking the animal is responsible to pay its expenses’⁴⁷.

الظهر يركب بنفقته إذا كان مرهوناً، ولين الدر يشرب بنفقته إذا كان مرهوناً، وعلى الذي يركب ويشرب النفقة

“The *rahn* animal may be used for riding and milking and person riding or using milk is responsible to spend on it equal to the benefit of riding and milking”⁴⁸.

Rahn property is in the possession of *murtahin* and it requires maintenance as well, so utilization of property at extend of its expenditures is logical because if *rahn* object is an animal then its benefit in the shape of milk or riding would be lost without use and expenses of feeding or maintenance is also upon mortgagor. Therefore, utilization of *rahn* to the extent of its expenditures by the creditor is valid if the subject matter of *rahn* is an animal.

Some of the *Hanafti* jurists considered it unlawful to use or get benefit from *rahn* whether it is with permission or without permission of owner.

According to *Imām Shāfi‘ī*⁴⁹ only debtor or mortgagor have right to use or get benefit from property and mortgagee is only having possession and not entitled to get benefit from it. *Shāfi‘ī* based their opinion on the *ḥadīth*:

⁴⁵ Al Jazīrī, *Kitāb al-Fiqh ‘alā ‘al-Madhāhib al-Arba‘ah*, trans. Munzur Ahsan Abbasi (Lahore: ‘Ulmā Academy, 1973), vol.2, pp.672-75; Zuhaylī, *Al-Fiqh al-Islāmī Wa Adillatohū*, p.256; Jassās, *Ahkām al-Qur‘ān* (Islamabad: Sharī‘ah Academy IIU, 1999), pp.563-67

⁴⁶ Al-Kaḥlanī, *Subul al-Salām* (Damascus: Dār al-Fikr), vol.3, pp.51-52

⁴⁷ Al-Bukhārī, *Saḥīḥ al-Bukhārī*, trans. Muhammad Muhsin Khan, No.2511, *Kitāb al-Rahn* (Riyādh: Dār al-Salām, 1997), vol.3, p.399

⁴⁸ Ibid, No.2512

⁴⁹ Imām Shāfi‘ī, *kitab al-Umm* (Beirut: Dār al-Ma‘rifah), vol.3, p.155

لا يغلق الرهن من صاحبه الذي رهنه وله غنمه وعليه غرمه

“Allah’s Apostle said that the mortgage is for the owner who has mortgaged it, it cannot be forfeited and he is entitled for its benefits and responsible for every risk”.⁵⁰

In the opinion of *Mālikīs*⁵¹ mortgagor or debtor have right to use or get benefit from the property and mortgagee creditor may also get benefit from it if underlying debt is resulted from a sale transaction not from lending-borrowing transaction and if such benefit and its term is pre-determined, specified and stipulated at the time of contract.

According to *Imām Ahmed Ibn Hanbal*⁵² nature of subject-matter of *rahn* is very important to determine whether it can be utilized or not and if *rahn* object is a riding or milk animal then mortgagee creditor is permitted to use or get benefit from it equal to the expenses incurred by him on it for its feed or maintenance not more than that and permission of owner is not required in this case. His opinion is based on the *ḥadīth*:

“If a sheep is subject-matter of *rahn* then mortgagee will be permitted to drink its milk appropriate with its feed and any extra quantity of milk taken by him, over and above the value of feed, will be considered *ribā*”.⁵³

If *rahn* object is other than milking or riding animal then mortgagee creditor is not permitted to get benefit from it.⁵⁴ If the underlying debt is resulted from lending-borrowing (*Qard*) transaction then creditor is not permitted to get benefit from the property in any way because it will amount to *ribā* and permission⁵⁵ of debtor cannot make it lawful and if debt is out come of sale transaction then with the permission of owner mortgagee can use property.

If *rahn* object is income producing then it is obligatory upon lender to keep the proper account of such profit or income and return it to the debtor or deduct it from the *rahn* price because such profit is interest for lender.⁵⁶

Therefore, it may be concluded that the mortgagee creditor is permitted to get benefit from *rahn* object appropriate with the expenditures incurred by him, not more than that because any extra amount over and above the expenditure will amount to *ribā*. If underlying debt is resulted from sale transaction then permission of owner is important for utilization of *rahn* by the mortgagee. If underlying debt is resulted from lending-borrowing transaction then mere permission of debtor will not legalize the benefits for creditor from *rahn*, although benefits to the extent of expenditures are allowed. It is very logical because

⁵⁰ Ibid, p.167

⁵¹ Al-Jazūrī, *Kitāb al-Fiqh ‘alā’al-Madhāhib al-Arba’ah*, trans. Munzar Ahsan Abbasi (Lahore: ‘Ulmā Academy, 1973), vol.2, pp.667-668

⁵² Al-Jazūrī, *Kitāb al-Fiqh ‘alā’al-Madhāhib al-Arba’ah* (Beirut: Dār al-Fikr, 1970), vol.2, p.337

⁵³ Al-Shawkānī, *Nayl al-Awtār* (Beirut: Dār al-Fikr, 1938), vol.4, p.264

⁵⁴ Ibn Qudāmāh, *Al-Mughnī* (Riyādh: Maktabah Riyādh al-Ḥadīthah, 1928), vol.5, p.436

⁵⁵ Ibid, pp.427-28

⁵⁶ Abū al-A‘lā Mawdūdī, *Tafhīm al-Qur’ān* (Lahore: Maktabah Ta‘mī‘-e-Insāniyyat, 1983), vol.1, note.331

mortgagor or debtor is responsible for the maintenance or up keeping of *rahn* property and property is under the possession of creditor, it would be costly and burdensome for him to maintain the property, so mortgagee may maintain the property and benefit from it in proportion to his cost of expenditures.

1.10 TERMINATION OF *RAHN* CONTRACT

The contract of *rahn* may be terminated in different ways.

- By way of returning⁵⁷ mortgage (*marhūn*) to the debtor because it is subject matter of contract and security or guarantee against debt.
- On repayment of full amount of debt to the lender.
- By sale of *rahn* property under court orders where lender recovers his amount from sale proceeds.⁵⁸
- Willful sale⁵⁹ of *rahn* property by the debtor or owner before the term of contract, with the permission of creditor rendered the *rahn* invalid and underlying debt will remain intact without security.
- Complete destruction of mortgage property terminates *rahn* contract.
- By way of leasing, selling or gifting of *rahn* property to any third person with mutual consent of both debtor and creditor.⁶⁰
- According to the opinion of *Mālikīs* and *Hanaftīs* contract of *rahn* will be considered invalid if debtor dies or declare insolvent or bankrupt, before making delivery of possession to the creditor.
- *Rahn* contract may be terminated by the lender unilaterally because it is made to protect the rights of creditor and he is free to leave his rights. Debtor or *rāhin* on the other hand, cannot terminate the contract unilaterally because rights of lender are involved in it.
- By absolving⁶¹ underlying debt or financial liability in any way. Debtor may transfer his financial obligation to any third person or lender takes any other property not the *rahn* property for the repayment of debt these things terminate the *rahn* contract.

2. GENERAL CONCEPT OF SECURITY IN CONVENTIONAL LAW

According to a statutory definition:

Security is an interest or instrument relating to finance, including a note, stock, treasury stock, bond, debenture, evidence, evidence of indebtedness, certificate of interest or participation in a profit-sharing agreement, collateral trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting trust certificate, certificate

⁵⁷ Wahbah al-Zuhaylī, *Al-Fiqh al-Islamī Wa adillahtohū* (Damascus: Dār al-Fikr, 1985), vol.5, p. 288

⁵⁸ Ibid.

⁵⁹ Ibn Qudāmah, *Al-Mughnī* (Riyādh: Maktabah Riyādh Al-Ḥadīthah, 1347/1928), vol. 2, p. 141

⁶⁰ Ibn Qudāmah, *Al-Sharḥ al-Kabīr* (Beirut: Dār al-Fikr, 1984), vol.3, p. 242

⁶¹ Ibid, p.241

of deposit for a security, or participation in, temporary or interim certificate for, receipt for guarantee of, or warrant or right to subscribe to or purchase any of these things.⁶²

Therefore, security is a financial instrument which is used to secure or guarantee the financial transaction from breach or default.

2.1 PURPOSE OF SECURITY

A security is something belongs to the borrower, who deposits it, and to the creditor in case of default or non-performance of legal obligation.

Security encourages creditors to give loans without any fear of loss or breach of contract because lender is now, at safe position he may sell the collaterals if debtor fails to repay loan and debtor on the other hand, is also motivated to pay back the amount of debt or price for redemption of his property. Secure creditors are having more rights than unsecured creditors. At the event of bankruptcy, secured creditor can realize his security and recover or reduce his amount from sale proceeds.⁶³ If value of security is more than the amount of debt due, then secured creditor recovers full amount from it and transfers remaining balance to ordinary or unsecured creditors and if the worth of security is less than the cost of debt then he reduce the cost from it and joins other unsecured creditors for remaining balance.

2.2 SECURITY INTEREST

It is an interest in property that is created by agreement or by operation of law to secure performance of a promise or amount of debt.⁶⁴

Security interest gives some preferential rights to the holder over the other unsecured creditors, such as foreclosure and sale of property in case of insolvency, default and bankruptcy to satisfy the debt obligation.

2.3 TYPES OF SECURITY INTEREST

- Mortgage
- Charge
- Pledge or pawn
- Lien

3. MORTGAGE

⁶² *Black's Law Dictionary* 6th Ed., Bryan A.Gamer and Henry Campbell Black Eds, S.V, "Security" (west Publishing Co, 1990),

⁶³ Bryn Perrins, *Introduction To Land law* (London: Cavendish Publishing Limited, 1995), p.137-138.

⁶⁴ *Black's Law Dictionary* 6th Ed., Bryn A.Gamer and Henry Campbell Black Eds, S.V, "Security Interest"

Definition of Mortgage

A mortgage is an interest or a conveyance in property which is created by contract to secure the payment of debt or performance of an obligation.⁶⁵

Any kind of property, real or personal can become the subject matter of mortgage. The objective of mortgage is to secure the amount of debt from default and guarantee the performance of contract. It is a transfer of possession not ownership, to the creditor or mortgagee.

3.1 HISTORY OF MORTGAGE

The term “mortgage” has been derived from the old French words mort, dead, and gage, pledge.⁶⁶ History shows that mortgage was a pledge initially, in common law that works either in a way of “living pledge” or “dead pledge”.⁶⁷ In “living pledge” lender possessed the property and recovered his whole amount from rent and profit of property and in “dead pledge” lender could receive rents and profits to satisfy his amount of interest⁶⁸ only and debt remained unpaid. In Anglo-Saxon times⁶⁹, both movables and immovable were subject of pledge and kind of pledge in which, property could not recover or reduce the amount of debt, was called mortgage. In Roman law it developed gradually, from the stage of conditional conveyance to the pledge without possession with a power of sale.⁷⁰ A mortgage by conditional sale was the initial form of mortgage among Hindus.⁷¹

Rahn or security or pledge (with possession), was the original form of security among Muslims and later on it developed into *rahn* or pledge (without possession) with power of sale.⁷²

3.2 KINDS OF MORTGAGES

There are many kinds of mortgages in the world but most common forms are as under:

- Simple mortgage
- Legal mortgage
- Equitable mortgage
- Mortgage by conditional sale
- Usufructuary mortgage

⁶⁵ Cheshire and Burn, *Modern Law Of Real Property* (London: Butterworth and Co. Ltd, 1982), p.615

⁶⁶ Sir Edward Coke, who was a famous Jurist had explained mortgage as a debt instrument that is used as a security for debt repayment. In 1930, mortgage loans were introduced by insurance companies to get the ownership of the properties, in case of borrower’s default in payment of debt. In 1934, present form of mortgage was originated due to the exploiting terms and conditions of mortgages existing at that time. For more details visit mortgagezing.com, “History of mortgages” at <http://www.mortgagezing.com/overview/history>

⁶⁷ Cheshire and Burn, *Modern Law Of Real Property*, op.cit., p.617

⁶⁸ Ibid.

⁶⁹ Fisher and Lightwood, *Law Of Property* (London: Butterworth and Co. Ltd, 1977), pp.5-6

⁷⁰ D.F Mulla, *Transfer Of Property Act (IV Of 1882)*, Commentary by Iqbal Mokal (Lahore: Law publishing company, 1981), pp.486-487

⁷¹ Ibid.

⁷² Charles Hamilton, trans., *The Hedaya* (Lahore: Premier Book House, 1982), vol.4, p.203.

- English mortgage
- Mortgage by deposit of title-deed
- Conventional home mortgage

- **SIMPLE MORTGAGE**

Simple mortgage is a mortgage without possession of property to the mortgagee and mortgagor has personal obligation to pay the mortgage-money.⁷³ Power of sale is given to the mortgagee which is an important right. In simple mortgage, mortgagor transfers the right of sale of property to the mortgagee, so that at the event of mortgagor's failure to pay the amount of contract, he may recover it from sale proceeds. The mortgagor has personal obligation to pay back the amount of debt and no possession of property is delivered to the mortgagee.

- **LEGAL MORTGAGE**

Legal mortgage is a transfer of real or personal property of debtor by way of mortgage and debtor must be the legal owner or having some legal interest in property.⁷⁴ Giving possession of property to the mortgagee is necessary ingredient in legal mortgage. A legal mortgage can effect in two ways.⁷⁵

- By a charge by deed expressed to be by way of legal mortgage
- By granting a lease of the land for a term of years absolute, subject to the proviso that upon repayment the terms cease ("cesser on redemption").

Legal mortgagee has right to sale the property without going to the court of law, if mortgagee has properly demanded for repayment and all other necessary requirement have been fulfilled by him.⁷⁶ But in case of an equitable mortgage, mortgagee would have to go to the court to cause the property to sale. Legal mortgages give more security, even mortgage property once considered ownership of mortgagee until redemption was made by the mortgagor. But now law has been amended and ownership in legal fee simple remains with the borrower and mortgagee gets a lease of three thousand years.⁷⁷ The purpose behind making these amendments was to make the Mortgage law more close to Equity because Equity treats mortgagor as real owner of the property and mortgagee is entitled for the possession only.

⁷³ D.F Mulla, *Transfer Of Property Act(IV Of 1882)*, Section.58(b) (Lahore: Law Publishing Company, 1981), p. 483

⁷⁴ Fisher and Lightwood, *Law Of Mortgage* (London: Butterworth and Co. Ltd, 1977), p.5; Black Law Dictionary

⁷⁵ Cheshire and Burn, *Modern Law Of Real Property* (London: Butterworth and Co. Ltd, 1982), p.621

⁷⁶ Derek Hyde ACIB, Cert Ed (FE), *Branch banking-Law and practice Bankers workbook series* (England: Sheffield Hall am university, 1993), pp181-182.

⁷⁷ Bryn Perrins, *Introduction To Land Law* (London: Cavendish Publishing Limited, 1995), 139-140.

- **EQUITABLE MORTGAGE**

Equitable mortgage may be created to secure the amount of debt or performance of an obligation.⁷⁸ It is recognized and enforceable under the equitable jurisdiction of court. Mortgages can be created in Equity and Law. Debtor may create equitable mortgage if he has an equitable interest or right in the property. It is created over land by the deposit of deeds or a land certificate and these mortgages are generally, used to secure short-term loans.⁷⁹

- **MORTGAGE BY CONDITIONAL SALE**

It is a sale of property by way of mortgage, by the mortgagor on condition that sale become binding or absolute on default of payment of mortgage money by the mortgagor and become void, if money is paid on certain date.⁸⁰

This mortgage is actually, a conditional sale of property and sale becomes absolute on default of debtor and becomes void on payment of mortgage money by the mortgagor. In case of payment of mortgage money by the mortgagor on certain date, property would be re-transferred to him. Such mortgage contract must contain this condition of sale.

- **USUFRUCTUARY MORTGAGE**

In Usufructuary mortgage possession of mortgage property is given to the mortgagee and he is permitted to remain in possession until the mortgage price is fully paid by the mortgagor. Mortgagee is entitled to recover mortgage-price from rents and profits of property.⁸¹ Benefits coming out of the mortgage property in shape of rent or profit will be used for recovering or reducing the mortgage-money by the creditor or mortgagee.

- **ENGLISH MORTGAGE**

Under this concept of mortgage, debtor or mortgagor transfers mortgage property to the mortgagee but he is entitled to redeem-back the property on payment of mortgage money.⁸² Time for the repayment of mortgage money is fixed by the parties. It is very simple form of security no other formalities are required in it.

- **MORTGAGE BY DEPOSIT OF TITLE-DEEDS**

⁷⁸ Fisher and Lightwood, *Law Of Mortgage* (London: Butterworth and Co. Ltd, 1977), p.11

⁷⁹ Derek Hyde ACIB, Cert Ed (FE), *Branch Banking-Law and Practice Bankers Workbook Series* (England) p.182.

⁸⁰ D.F Mulla, *Transfer Of Property Act(IV Of 1882)*, Section. 58(c) (Lahore: Law publishing company, 1981), p. 483

⁸¹ Ibid, Section.58(d), p.484

⁸² Ibid, Section.58(e)

A mortgage may be created by depositing the title-deed of immovable property, as a security for debt or financial obligation by the mortgagor or owner of such property.⁸³ Deposit of title-deed by the owner with the intention to create a security for amount of debt or performance of an obligation is main ingredient to create this mortgage.

• CONVENTIONAL HOME MORTGAGE

It is a loan or advance⁸⁴, which is given by a bank or mortgage-broker to finance the purchase of house and the borrower, transfers a lien or defensible legal title as a security for the amount of loan. In the event of default or non-payment of mortgage-money by the home-buyer or mortgagor, bank or financial institutions usually, sell the mortgaged house and recover their cost from the sale proceeds. This concept is getting popular these days although mortgage price includes a high rate of interest as well.

3.3 CREATION OF MORTGAGE

Mortgages can be created by way of transferring debtor's rights to the creditor⁸⁵ and by way of encumbrance. Borrower gives his property as security to the creditor for the debt or advance and entitled to redeem back the property on repayment of debt.

The person having legal or equitable rights or interests in property may create mortgage by conveying those rights or interests to the mortgagee.⁸⁶

Mortgagor or borrower has a right of redemption on repayment of mortgage-money, which implies that mortgagor is real owner of property and transferring his rights or interests only as a security. It's not a transfer of title or ownership on part of borrower. It's a mere encumbrance on the title of mortgagor or borrower and mortgagee's power of sale arises on default of mortgagor then he may recover his cost from sale-proceeds or use other remedies.

3.4 RIGHTS AND LIABILITIES OF MORTGAGOR AND MORTGAGE

Mortgage deed define the rights and obligation of the parties at the first stage and it is a lengthy document but now the things have changed modern mortgage deeds are not very lengthy. The main purpose of the mortgage clauses mentioned in the deed is to preserve the value of the mortgage property. The mortgagor is under obligation to take the best care of the property in case the property is not in the possession of the mortgagee and not to make structural changes without the consent of the mortgagee.

⁸³ K.J Gray and P.D. Symes, *Real Property And Real People, Principles Of Land Law* (London: Butterworth and Co. Ltd, 1981), p.520

⁸⁴ Atif R.Khan, "Riba and Mortgages, 21 commonly asked questions" *Islamic Magazine*, issue15(2006): 107-111

⁸⁵ Fitzgerald, *Salmond On Jurisprudence* (Lahore: Mansoor Book House, 2004), p.214.

⁸⁶ K. J and P. D, *Real Property And Real People, Principles Of Land Law* (London: Butterworth and Co. Ltd, 1981), p.519

▪ EQUITY OF REDEMPTION

The right of the mortgagor to redeem (recover the property) back after the date fixed for the repayment of the money is called equity of redemption in English law. This right was created by Equity because it treats mortgagor as a real owner of property and mortgaging means transferring of some interests or rights associated with property, it does not entitle mortgagee to become owner of mortgage property. Mortgagor right of redemption shows that he is owner of property and passing of legal date of redemption does not mean that property belongs to the mortgagee. Date of redemption is an indication for the mortgagee that after its expiry, he may exercise his remedies if mortgagor could not fulfill his obligations as specified in deed.

Mortgage property is belonged to the mortgagee in law and mortgagor has only right to redeem backs his assets but in equity property belongs to the mortgagor and mortgagee has a right to take it in case mortgagor fails to repay. Therefore, right of redemption is a legal right as stated by the judicial committee.⁸⁷

▪ CLOGS ON EQUITY

Clog on equity means that the mortgagor's right of redemption must be given to him. It should work smoothly without any hurdle and impediment because property belongs to the mortgagor and not to the mortgagee so, it should be given back to him. Purpose of mortgage was to secure the amount of debt from default and after the term of contract, it must be given back to the real owner in its original condition.

▪ IRREDEEMABILITY

There is no concept of irredeemable mortgage in law now but once mortgages were irredeemable and equity solved this problem. Any term of contract that makes the mortgage irredeemable is declared void and unenforceable in the court of law. Some limited companies may legally create irredeemable debentures.⁸⁸

▪ IMPROVEMENT AND ACCESSION TO THE MORTGAGED PROPERTY

When the property is in the possession of the mortgagee and some improvements are made then the mortgagor is entitled for these improvements by paying the cost of these improvements, upon redemption. If improvements were necessary to preserve the property and mortgagee had no other option to save the property from damage etc or done in fulfilling the order of public⁸⁹ authority. Parties to the mortgage contract may with mutual consent make contractual arrangements in this regard.

⁸⁷ D.F Mulla, *Transfer Of Property Act(IV Of 1882)*, Commentary by Iqbal Mokal (Lahore: Law publishing company, 1981), p.557.

⁸⁸ Bryn Perrins, *Introduction To Land Law* (Lahore: Cavendish Publishing Limited, 1995), 147

⁸⁹ D.F Mulla, *Transfer Of Property Act (IV Of 1882)*, op.cit., pp.624-625.

The property can receive accession⁹⁰ or increase due to natural or unnatural reasons. Any increase or accession is treated as an accession to the mortgaged property. Natural accessions are included in the mortgage property and redeemed by the mortgagor and acquired accession which is separable, mortgagor is entitled to take it by paying its cost to the mortgagee. Inseparable accession is also subject to redemption if it was acquired under necessity to preserve or protect the property from destruction or damage then mortgagor is obliged to pay its cost to the mortgagee.

▪ SALE

The most important right of the mortgagee is to cause the mortgage property to sale. The mortgage property is security for the amount of debt or other financial obligation and breach or default on part of borrower or mortgagor in repayment entitles him to recover his cost from sale proceeds. Security satisfies the claim of mortgagee. The mortgagee's statutory power of sale is implied in every mortgage deed. But mortgagee has to fulfill certain conditions before exercising his power of sale. Power of sale arises after passing the legal date of redemption and if power of sale is exercisable⁹¹ out of court then no need to go to court for it. If property is not vacant then he may seek the help of court to get vacant possession of property.

▪ FORECLOSURE

Foreclosure is a remedy for mortgagee against the default of mortgagor. It's a court order by which mortgagee acquires ownership of mortgage asset.⁹² When the legal date of repayment comes mortgagee cannot ask for foreclosure even after the expiry of legal date, mortgagor equitable right of redemption arises and continues until the order of foreclosure comes. Foreclosure is an expensive remedy than sale because mortgagee has to go to the court for it and it may be delayed or mortgagor may ask the court for restoration of property etc.

▪ RECEIVERSHIP

The mortgage contract may consist of any term related to the appointment of receiver⁹³. The mortgagee has also, legal right to appoint a receiver if mortgage is mortgage by deed.⁹⁴ Mortgagee can appoint receiver only, when his statutory power of sale has become exercisable and appointment must be in writing. Appointment of receiver is best

⁹⁰ Accession is an increase to the property. It can be natural or acquired and it may further divided into separable and inseparable accession.

⁹¹ Bryn Perrins, *Introduction To Land Law* (London: Cavendish Publishing Limited, 1995), pp.148-149

⁹² Cheshire and Burn, *Modern Law Of Real Property* (London: Butterworth and Co. Ltd, 1982), p.653

⁹³ Receiver receives income in the form of rents or profits etc, from the mortgage property and acts as an agent.

⁹⁴ Cheshire and Burn, *Modern Law Of Real Property*, op.cit.,p.649

option than sale, because it enables him to recover mortgage price from income of property. Any extra amount over and above the mortgage-cost will go to the borrower.

▪ POSSESSION

Possession is to have control over the object this can be actual or constructive. The mortgagee can take possession of land and he may appoint receiver to get the income of the property.

The primary function of possession in mortgage is to exercise power of sale and in some cases; possession is given to the mortgagee to recover his amount of debt or mortgage-money from rents and profits of property. In legal mortgage, mortgagee has a legal right of possession; he has no need to go to court for it. In equitable mortgages on the other hand, mortgagee has no legal right of possession but court may grant him possession in some circumstances.

If mortgage property is residential or dwelling house then right of mortgagee to possession is restricted by law because it may involve the interests of other people as well.

4. PLEDGE

Pledge or *pawn* is the simplest form of security. In pledge the borrower gives possession of the things pledged to the creditor and the ownership remains with the borrower and the purpose is to secure the repayment of loan.

Under a contract of pledge, pledger delivers goods to the pledgee as a security, for the payment of debt and when the debt is paid back to the pledgee by the pledger the goods pledged will be returned to the pledger.⁹⁵ Pledge property will serve as security for the payment of debt and security is used at the time of default otherwise it will be given back to the real owner. Delivery of possession is very important for a valid pledge and there must be a valid contract among the parties. Pledge property must be identified in accordance with the contract. In pledge delivery of possession is made but the title remains with the pledger and it is different from mortgage and lien.⁹⁶ Pledgee retains the things pledged till the repayment; he can sell the goods in case of default to recover his money.

The person who delivers, property (goods or articles) as security for payment of a debt or performance of a promise is called pawner or pledgor and the person who receives, the delivery is called Pawnee or pledgee.

Pledge property is security for the payment of advance or debt, so the general property in the goods pledged remains in the pledgor, but a special property in them deliver to the pledgee so that he may recover his money in case of default.⁹⁷ Actual or constructive delivery of the pledged property is one of the essential ingredient of pledge contract, only

⁹⁵ Shaukat Mahmood, *The Contract Act (IX Of 1872)* (Lahore: Legal Research Centre, 1981), pp.653-654.

⁹⁶ Ibid.

⁹⁷ Barry Chedlow, ed. *Chitty's Mercantile Contracts* (Delhi: Universal Law Publishing Co. Pvt .Ltd, 2001), pp.294-295.

possession is transferred not the title. In constructive delivery of possession things are not actually passing from the hand of the pledger to the pledgee but constructively, considered as delivery of possession and hence, recognized under law. Constructive delivery is allowed when actual delivery of possession is not possible by the party or there can be situations where property remains in the possession of the pledger for a special purpose.⁹⁸ Delivery of a key of a warehouse in which pledge articles are stored or delivery order directing a warehouse to deliver articles to the pledgee are the examples of constructive delivery. Time for the delivery of possession of pledge property is not fixed in law, it can be any time, not necessarily at the time of debt but delivery of possession must be made within the reasonable time after entering into the contract.

4.1 KINDS OF PLEDGE

Two kinds of pledge are recognized in law the “**pignus**”(pawn) and “**hypotheca**”(hypothecation) in the first kind of pledge, possession of pledged property is actually delivered to the Pawnee.⁹⁹ In hypothecation¹⁰⁰ the possession remained with the pawnor, it is a kind of right that a Pawnee has over a thing belonging to another. This right gives him a power to cause the pledge property to sale in order to satisfy his claim. The property remains in the possession of the debtor, but he cannot transfer it without the express consent of the pledgee.

4.2 RIGHTS AND THE OBLIGATIONS OF PLEDGOR AND PLEDGEE

Pledge is a form of security to secure the performance of an obligation or an amount of debt from default. Things given in pledge are “pledged property”. Law determines the rights and obligation of the parties.

▪ POSSESSION

The pledgee has the right of possession which is different from the ownership. The owner has right of possession also with many other rights. The pledgee has right of possession only, even he has no right of enjoyment.

There must be delivery of goods pledged to the pledgee by the pledgor, delivery can be actual or constructive, to constitute a valid pledge. Possession is an equivocal term; it may be actual possession or mere right to possession. A pledge can be made by Constructive delivery of possession. If the pledged property is in the possession of pledgor, it may be considered as constructive delivery of possession if the goods pledged remains under the specific authority of the pledgee.

▪ SALE

⁹⁸ Ibid.

⁹⁹ Shaukat Mahmood, *The Contract Act(IX Of 1872)* (Lahore: Legal Research Centre, 1981), p.656

¹⁰⁰ Ibid.

The pledgee has a right to retain the goods for the performance of the promise or for other expenses incurred by him to preserve the goods pledged.

Under law if pawnor defaults in payment of debt or performance of promise at the stipulated time, the pawnee or pledgee may bring a suit against him and retain the goods pledged as a collateral security or he can sell the goods pledged but after serving a reasonable notice of the sale.

The goods are under the possession of Pawnee and he has a right of action for debt, possession does not mean that he cannot exercise his right of action for debt. If the pawnor has paid the amount due before sale then the pawnor may redeem back his goods pledge. The pledgee can sue for his debt before selling the pledged property and adjusting its price toward the payment of the debt.¹⁰¹ This law is equally applicable to cases where a time for the payment of the debt has been fixed in the original agreement and where no such time is fixed. The Pawnee has to keep the pledged property in safe custody because on repayment of money by the pawnor, the property will be handed over to the him. If goods destroyed without the negligence of the Pawnee the loss falls on the pawnor, and the Pawnee may recover his amount of debt. The Pawnee has given the power of sale that is exclusively for him and it is up to the Pawnee to exercise it or not and the Pawnee cannot sell the pledged goods without giving notice to the pawnor, and he has no right of foreclosure till the expiration of a reasonable notice to the pawnor.

▪ REDEMPTION

The pledgor, who has committed default in payment of debt or performance of promise may redeem the things pledged but before the actual sale of the pledged property and after paying the amount due and all the other expenses incurred due to his default.

Before the actual sale of the goods the pawnor has a right to redeem the goods if proper notice has been served by the pawnor, if no such notice served he cannot exercise his right.¹⁰² According to the law the pledgor cannot agree to waive notice at time of entering in to the contract. If the pledgee sells the pledged goods, without notice of sale to the pawnor, he has committed unauthorized conversion. Pledgee has to pay full value of the goods minus the debt and also the extraordinary expenses incurred by him for preservation of the goods to the pawnor. Therefore, a pledgor should pay mortgage money to the pledgee then seek redemption of his property. But if the amount due was not previously paid by the pledgor and he takes an action for redemption of property, such action is maintainable in eye of law but may result in the payment of costs to the pledgee.

5. DIFFERENCE BETWEEN MORTGAGE AND PLEDGE

Pledge and mortgage both are forms of security and used to secure the financial obligations in our daily life. There is a huge difference between them from legal point of view.

¹⁰¹Ibid, pp.660-661

¹⁰² Ibid, p.666

1. Subject matter of pledge is moveable property and mortgage is immovable property.
2. In pledge written form of contract is not required but there must be an actual and physical delivery of possession¹⁰³ of commodity to the pledgee, mortgage contract on the other hand, must be written, testified and registered and delivery of possession is not necessary. Title of property can also be transferred under some circumstances in mortgage.¹⁰⁴
3. The mortgagee has right to use the mortgage property but pledgee cannot use the pledge property.¹⁰⁵
4. A commodity can be pledged for one debt but a mortgagor can get more than one debt over the same property.
5. The mortgagee can grant sub-mortgage but pledgee cannot pledge the commodity to any third person for debt.¹⁰⁶
6. The mortgagee in mortgage contract can impose certain restrictions¹⁰⁷ on the mortgage property and pledger cannot impose such restrictions in pledge.

6. DIFFERENCE BETWEEN RAHN AND MORTGAGE/PLEDGE

Mortgages, pledges, liens, charges etc, come under security in conventional laws. These are kinds of security and different from each other. Creditor enjoys a secure position and having priority over other unsecured creditors and his rights are protected in law.

Single term *Rahn* is used for all kinds of securities whether related to movables or immovable in Islamic law. Rights of creditor and debtor are established, recognized and protected in rules and principles of *Shari'ah*.

There are lot of similarities between conventional concept of mortgage, pledge, charge etc, and Islamic concept of *rahn* but there is a fundamental difference between them, which is interest or *ribā*. Conventional mortgages and pledges are interest-based and in fact, it is a profitable business. Creditor charges an amount of interest on debt or mortgage price. The interest may be taken in the form of using or renting property by the creditor or mortgagee/pledgee.

On the other hand, concept of *rahn* or security in Islamic law is benevolent or voluntary charitable. It is based on kindness, love and helping people and hence, cannot be used as a profit generating business. Creditor is not permitted to use *rahn* property in any way because it will amount to *ribā* and *ribā* is forbidden in Islam.

7. CONCLUSION & RECOMMENDATIONS

¹⁰³ Fisher and Lightwood, *Law Of Mortgage* (London: Butterworth and Co. Ltd, 1977), p.4

¹⁰⁴ Cheshire and Burn, *Modern Law Of Real Property* (London: Butterworth and Co. Ltd, 1982), p.653

¹⁰⁵ Dr. Ashok Sharma, *Business Regulatory Frame Work* (New Delhi: V.K Enterprises), p.156

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

Islam is a comprehensive way of life, offering distinct principles and rules that guide every aspect of human existence. Among its core values are justice, fairness, brotherhood, and equity, which are essential for a society to be truly humane. In the realm of economics and finance, these principles are crucial because they govern monetary matters. The Islamic financial system is aligned with Sharī'ah law, which not only permits wealth creation but insists that economic activities comply with ethical and moral standards set by Islam.

Unlike conventional financial systems that often prioritize profit maximization, sometimes through exploitative practices like *ribā* (usury), Islamic finance promotes justice, compassion, and the equitable distribution of wealth. *Ribā* is strictly prohibited in Islam because it concentrates wealth in the hands of a few, depriving others of their fundamental rights. Instead, one of the primary goals of Islamic economics is the fair circulation of wealth among all members of society. Security in financial transactions is a universal concern across all systems, as it provides confidence and trust between contracting parties. In Islamic finance, this concept is governed by the rules of *rahn*, an Islamic legal principle that encompasses pledges, mortgages, liens, and other forms of security. *Rahn* secures the repayment of debts and mitigates the risk of default, encouraging lenders to provide interest-free loans, which are beneficial for societal welfare.

Rahn is a complete and comprehensive framework within Islamic commercial law that protects the rights of both creditors and debtors, preventing any party from exploiting the other. It differs from conventional pledges or mortgages by adhering to Islamic ethical standards, ensuring fairness and mutual benefit. *Rahn* can also be offered as a standalone service, popular among those seeking Islamic alternatives to conventional, interest-based financial products. For example, Islamic mortgages provide a Sharī'ah-compliant way for Muslims, especially in non-Muslim countries, to finance home purchases without engaging in *ribā*.