



Shari'ah Appraisal of Mortgage backed Sukuk issued by Financial Institutions for House Financing in Naya Pakistan Housing Program: An Analytical Study

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ARTICLE DETAILS	ABSTRACT
<p>History Revised format: February 2019 Available Online: March 2019</p>	<p>This article is focused on conducting the Shari'ah evaluation of mortgage backed sukuk by financial institutions in Pakistan under Naya Pakistan Housing Program for house financing. The financial product should strictly comply with the directives of Shari'ah. This research work explores the structure of mortgage backed sukuk to spotlight the efficacy of mortgage backed Sukuk in house financing projects. Furthermore, this study discusses the Shari'ah rulings with respect to the contract of <i>Rahn</i>. This endeavor is made to indicate Shari'ah requirements pertaining to the validity of financial product of mortgage backed sukuk for house financing. This research article finds that the present government should adopt the financial product of mortgage backed sukuk for house financing under Naya Pakistan Housing Program because structure of mortgage backed sukuk is Shari'ah compliant and Shari'ah based. Pakistan is a candidate of Shari'ah compliant housing finance because of constitutional responsibility of state of Pakistan under article 2-A and 227 of Constitution of Pakistan, 1973. Finally, suggestions have been put forward to issue mortgage backed securities for house financing project to the government of Pakistan.</p>
<p>Keywords Financial Product, Mortgage Backed Sukuk, House Financing, Naya Pakistan Housing Program, Shari'ah and Rahn.</p>	
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1. Introduction

Housing is a primary and fundamental need of a family unit in any society. This need of a human being is recognized by Universal Declaration of Human Rights. To reaffirm the need of housing for the citizens of the state, in 1996 United Nation organized a conference titled, Habitat Conference. (Ali Akbar Ghanghro, 2018). Shortage of housing facility is mainly faced by segment having low incomes. Low income segments need empowerment through availability of housing on affordable terms and conditions.

Mortgage financing is usually used in house financing because a person cannot afford to build a house all at one owing to the shortage of finances. Mortgage financing can be the best available way for him to achieve the desired result of having house of his own. Mortgage financing is a loan given by financial institution to a qualified

applicant for the purpose of acquiring a property in the form of house and putting that property as a collateral or security. The debtor will be the owner of the house and the financial institution is entitled to a claim on that property in case of default committed by the debtor in the payment of amount of money due to him. (Lamudi, 2017). Such a property is not free from encumbrance.

The present article is aimed to conduct the scrutinization of a mortgage backed sukuk that is extensively practiced by financial institutions in debt financing of housing in Pakistan in the light of Sharī‘ah rulings.

2. Naya Pakistan Housing Finance

The present Government of Pakistan (PTI Government) tried to make a national policy on house financing. The present government in Pakistan has raised the slogan of “Adequate shelter for all”. Naya Pakistan Housing Program is launched by the present Prime minister of Pakistan, Imran Khan, during his sermon to public on 10th Oct, 2018. Soon after the launching of this program by Prime minister, Imran Khan, NADRA issued a registration form on its website on 11th Oct, 2018. It is also manifested by the government that mere registration is not the allotment rather it would be an application to be considered by the authorities. NADRA had been given the responsibility of identifying those who need. The application can be submitted within two months, i.e. from 22nd October to 21st December 2018, at the selected district offices¹. The process fee is nominal of Rs. 250 only. This housing program is targeting low income strata of the society and announced 5 million Housing units to the citizens of Pakistan. Initially this pilot program has been initiated for seven districts of Pakistan namely, Sukkar, Quetta, Gilgit, Muzafarabad, Swat, Islamabad and Faisalabad. Till now the government pledged that the government would provide the requisite land for the pilot project. Moreover, the government would play the role of regulator and facilitator to provide feasible environment for public and private sectors and non-profit organizations who would execute the project. The government would play the role of one-window facilitation center to accomplish this project.

This study would suggest the best available option with the government in the present scenario to accomplish the task of house financing of 5 million units. This study also developed a structure or model that is devoid of discrepancies both from Sharī‘ah and state law viewpoints.

3. Financial Product of Mortgage Backed Sukuk for House Financing Program

Prime Minister of Pakistan, Imran Khan, announced on October 10, 2018 the establishment of National Finance Regulatory Authority which will work with the State Bank of Pakistan to develop the financial product based on mortgage for new housing program. In the following section of this research article an effort has been made by the researchers to develop a structure of mortgage backed sukuk for housing finance project.

Private mortgages remain small and do not meet the needs and requirements of the borrower. The borrower’s best interest lies with the fact the government should intervene and supervise the loan granted to the borrower from a financial institution. It’s worth mentioning here that house financing is at the tail end of the transition from being the government-dominated towards the private-sector led industry.

Sukuk represent Islamic securities and serves as an alternative to conventional bonds and debentures. Sukuk are hybrid securities bearing the characteristics of both debt and equity securities (Pegah Zolfaghari, 2017, p. 1). Mortgage backed Sukuk was a manifestation of a move from issuance of debt security without asset at the back to asset backed security.

4. Structure of Mortgage Backed Sukuk

Mortgage backed Sukuk are actually debt based security. Mortgage backed Sukuk are in fact different from asset backed Sukuk. Asset backed sukuk are basically ijarah based sukuk which represent the equity financing, whereas, the mortgage backed sukuk are based on mortgage which represents the debt financing.

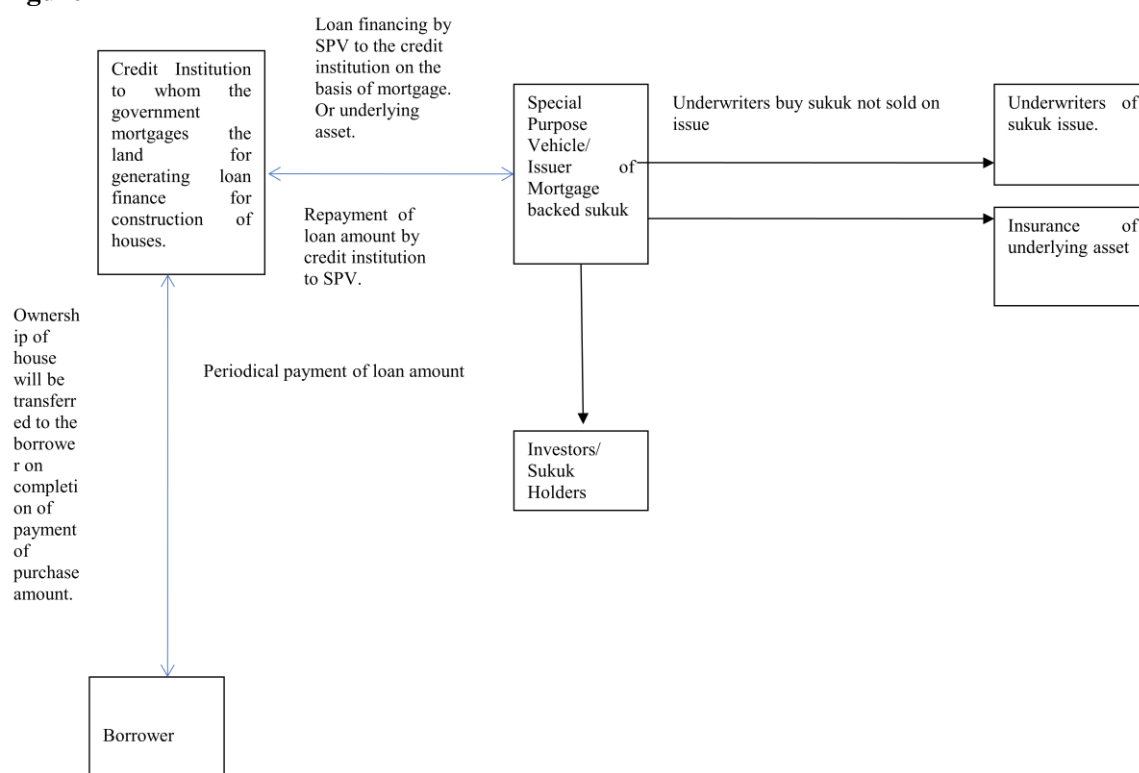
¹ The detail of district offices is given here. DC Office, Military Road Sukkur; Nadra Registration Center in front of Helper Eye Hospital Sariyab Road Quetta; DC Office Khamar Gilgit; DC Office Old Secretariat Muzafarabad; DC Office District Court Gulguda Saido Shareef Road Mangora Swat; Nadra Mega Center Blue Area Islamabad and DC Office Faisalabad.

The following are the major parties involved in mortgage backed sukuk for the construction of houses:

- Borrower, he will be the owner of the underlying asset once he paid all the installments to the government which is regulating and supervising the whole process to maintain transparency. The government announces to provide land for the project of Naya Pakistan Housing Program. The government of Pakistan will mortgage the property in land or immovable property to the credit institution for mortgage loan financing.
- Originating credit institution, the mortgagee, the creditor.
- Financial Intermediary or Special purpose Vehicle (SPV), the issuer of mortgage backed sukuk.
- Investor, the sukuk holder.

There may be numerous contracts involved in the structure or model of mortgage backed sukuk. These contracts include, the contract of hire purchase between the borrower and the government, the contract of mortgage between the government and originating credit institution, the contract between originating credit institution and financial intermediaries to whom the originating credit institution assigns its mortgagee rights and contract between Special purpose vehicle (SPV) or financial intermediary and investors. The structure of mortgage backed sukuk 2 is presented below in diagram for better understanding:

Figure 1



In the process of issuance of mortgage backed sukuk, the repayments made by the initial borrowers constitute cash flows that is received by financial intermediary and financial intermediary is able to issue asset backed-sukuk or mortgage backed-sukuk or residential mortgage backed security to investors or lenders who supply funds to the financial markets. The mortgaged property forms a contingent receivable in the accounts of the financial intermediary. Mortgage loans for homes usually have a nominal life of 25 to 30 years (Pelma Jacinath Rajapakse, 2011, p. 23). As a result of above mentioned process, the mortgage backed loans will be converted into tradable securities.

Mortgage loans for homes have better recovery rates than unsecured credit card receivables. Such loans have stable history of low default risk (Pelma Jacinath Rajapakse, 2011, p. 23). The researcher argues that, reliability on underlying asset increases the repayment of credit to the lender in mortgage backed sukuk structure.

2 This pictorial presentation is created by the researchers of this research paper. As a source, Malaysian model of Mortgage backed security, is consulted and analysed.

To comply with Shari'ah requirements, some points must be taken into consideration. The government must redeem the property in land from the credit institution within stipulated time period so that ownership of house on mortgaged land may be transferred actually to the borrower who is also required to make regular periodical payments to the government or credit institution. Such payments will provide a cash flow that will ultimately bar the default in payment of money.

The researchers argue that, Shari'ah compliance enhances the viability of mortgage backed sukuk because the financial sustainability of financial product is mandatory to avoid financial crisis. Furthermore, this article suggests that financial intermediary, with whom the government will enter a contract to finance house construction for the accomplishment of its Naya Pakistan Housing Program, should go for the issuance of mortgage backed securities instead of other house financing financial products because of their being more viable and Shari'ah compliant.

New financial institution with a name of Naya Pakistan Housing Authority is going to be established for the project of Naya Pakistan Housing Program that will provide a one window operation. HBFC has been abolished on 1st August, 2018 through House Building Finance Corporation (Amendment) Ordinance, 2018 which actually repealed the House Building Finance Act, 1952. The researchers strongly recommend that while establishing a financial institution to run the new housing scheme of the present government of Pakistan, the institution must be established keeping in view the injunctions of Holy Quran and Sunnah. No such thing should be introduced in the financial institution which will make it a controversial from Shari'ah viewpoint. The Shari'ah gaps of HBFC should be covered in new financial institution which will replace HBFC in house financing scheme.

5. Mortgage Financing in Islamic Legal Theory

In this section of the present research paper, mortgage financing in the light of Shari'ah is analysed to comprehend the Shari'ah issues or objections which may be raised by experts in Islamic Finance Law from Shari'ah viewpoint in the structure of Mortgage backed sukuk for house financing program. To comprehend the mortgage financing from Shari'ah viewpoint, some essential details have been discussed in the proceeding part of the research paper. The term used for mortgage in Shari'ah is rahn. Contract of rahn is one of the types of contract of suretyship.

5.1 Definition of Contract of Rahn

According to Hanafi school of thought rahn means retention of anything against any right through which right can be discharged. The thing which is retained must be valuable according to Shari'ah so that the thing can be made security against the loan (Ibn 'Abidin, 1992, Vol. 5, p. 339; Al-Sarakhsi, 1993, Vol. 21, p. 63). According to Shafi school of thought in contract of rahn something is made security against the loan. According to this school of thought contract of rahn excludes the benefits from being security of loan (Al-Khatib Al-Shirbini, n.d., Vol 2, p 121; Al-Sharqawi, n.d., Vol 2, p 122, 124). According to Maliki school of thought in contract of rahn any valuable thing itself or the benefit out of valuable thing can be made as a security for loan. If benefit is made security against the loan, the benefits received would be appropriated in lieu of payment of loan. In Maliki school of thought physical possession of the thing mortgaged is not necessary for the making of the contract of rahn (Al-Dardir, n.d., Vol 3, p 303). According to Hanbali school of thought in contract of rahn something valuable can be made security for the payment of loan so that in case of default of payment by the debtor or mortgagor the creditor or the mortgagee can satisfy his claim of payment of money from the value of the security (Ibn Qudamah, 1968, Vol. 4, p. 326).

The Shari'ah Standard No. 39 on 'Mortgage and Its Contemporary Applications' provides that the contract of mortgage means to make financial asset or so tied to a debt so that the asset or its value is used for repayment of the debt in case of default (AAOIFI, 2010, Shariah Standard No. 39, clause 2, p. 697).

5.2 Legitimacy of Contract of Rahn

The legitimacy of the contract of rahn is established by Quran, Sunnah and 'Ijma'.

Quran:

Allah Almighty said in the Holy Quran:

﴿وَإِنْ كُنْتُمْ عَلَىٰ سَفَرٍ وَلَمْ تَجِدُوا كَاتِبًا فَرِهَيْنَ مَقْبُوضَةً فَإِنْ أَمِنَ
بَعْضُكُمْ بَعْضًا فَلْيُؤَدِّ الَّذِي أُؤْتِمِنَ أَمَدَّتَهُ ۖ وَليَتَّقِ اللَّهَ رَبَّهُ ۗ وَلَا تَكْتُمُوا
الشَّهَادَةَ ۗ وَمَنْ يَكْتُمْهَا فَإِنَّهُ ۖ عَآثِمٌ قَلْبُهُ ۗ وَاللَّهُ بِمَا تَعْمَلُونَ عَلِيمٌ﴾



“And if you are on a journey, and you find not a scribe then let there be pledge with possession. And if in between you one entrusts the other, then let he whom he trusted deliver his trust and fear Allah Who is his Lord and conceal not evidence; and whosoever would conceal evidence, then his heart is sinful from inside, and Allah knows your deeds”. (Sūrah Al- Baqarah: 283).

The above quoted Āyah from Sūrah Al-Baqarah indicates the permissibility of contract of rahn during journey but all the Muslim jurists agree upon the permissibility of entering into contract of rahn by the parties to the contract either on journey or not. This Āyah also indicates that contract of rahn is made permissible while there is no one available for the writing of a debt transaction. So contract of rahn was made an alternative of writing. Non availability of a person to write a debt is not a pre-requisite for the contract of rahn because of permissibility of contract of rahn without this condition in Sunnah.

Sunnah:

روى البخاري و مسلم عن عائشة رضي الله عنها "أن رسول الله صل الله عليه و سلم اشترى من يهودي طعاما و رهنة درعا من حديد

The Holy Prophet ﷺ bought some foodstuff from a Jew and mortgaged his armour to him as security for the payment of amount of money as price. (Saḥīḥ Al-Bukhari, n.d., Ḥadīth No. 2509, kitāb al-rahn, 1997, Vol. 3, p. 398).

و عن أنس قال: "أن رسول الله صل الله عليه و سلم درعا عند يهودي بالمدينة، و أخذ منه شعيرا لأهله

It is also reported on the authority of Hazrat Anas (May Allah peace be upon him) that Allah’s apostle ﷺ mortgaged his armour to a Jew in Madinah and bought bread from the Jew for his family. (Sahih Al-Bukhari, n.d., Ḥadīth No. 2508, kitāb al-rahn, 1997, Vol. 3, p. 398).

’Ijmā’:

Muslim scholars agreed upon the permissibility of contract of rahn.

5.3 Legal Status of Contract of Rehan

Contract of rahn is not an exchange contract. It is not a profit earning contract. It is a contract of security. It is a gratuitous contract or aqad al-tabarru‘ah (Wahbah Al-Zuhaylī, n.d., Vol. 5, p. 181). Contract of rahn is permissible in nature but not an obligatory contract (Ibn Qudāmāh, 1968, Vol. 4, p. 327; Al-Buhutī, n.d., Vol. 3, p. 307). Delivery of possession is mandatory in gratuitous contracts to make it binding or lāzim. There is a legal maxim in Islamic Jurisprudence that,

لا يتم التبرع إلا بالقبض

“Gratuitous contract cannot be completed without delivering possession” (Muhammad Sidique, p. 322).

Contract of rahn is lāzim for mortgagor but not for mortgagee. Therefore, the mortgagee can rescind the contract at any time and can demand his due payment and return the property as security to the mortgagor ((AAOIFI, 2010, Shariah Standard No. 39, clause 3/1/1, p. 697).

5.4 Methods of Creation of Contract of Rahn and its Sharī‘ah Rulings

The contract of rahn can be created through following ways:

- The seller sells the commodity to the buyer. The possession of the commodity is made by the seller through delivery to the buyer. The buyer promised to pay the price of the purchased commodity on a specific future date. The seller asked the buyer to furnish the security for the payment of price on specific future date and

buyer furnished the security and placed his valuable thing as security for the payment of price and entered into the contract of rahn with the buyer. This is permissible and agreed upon by the schools of thought owing to its necessity in daily life.

- In this situation firstly the loan or debt is established and later on contract of rahn is made to secure the payment of loan or debt. This is also permissible and agreed upon by the schools of thought.
- In third situation, the thing or commodity is made security and contract of rahn is entered into by the parties to the contract before the establishment of loan or debt. For instance A took 1000 rupees from B on loan and B asked A to provide security for the payment of loan and A entered into a contract of rahn with B.

According to Ḥanafī and Mālikī schools of thought this contract of rahn is valid because in this situation the contract of rahn is acknowledgment of a right like in contract of Kafālah. According to Shāfi and Ḥanbalī schools of thought such contract of rahn is not valid because according to them the creation of right is mandatory for making of contract of rahn (Abū Ishāq Al-Shirāzī, n.d., Vol. 1, p. 305).

5.5 Essential Elements of Contract of Rahn

According to Imām Abū Ḥanīfah the only element which is required to make the contract of rahn is offer and acceptance like other types of contracts (Al-Kāsānī, 1974, Vol. 6, p. 135; Ibn ‘Ābidīn, 1992, Vol. 5, p. 340). According to majority of Muslim Jurists there are four elements of contract of rahn. The first element is offer. Second element is acceptance. Third element is tangible property which is made security for the payment of money. Fourth element is the claim of money which is taken by Rāhin from Murtahin (Al-Dardīr, n.d., Vol. 3, p. 304; Al-Khaṭīb Al-Shirbīnī, n.d., Vol. 2, p. 121; Al-Buhutī, n.d., Vol. 3, p. 307).

5.6 Conditions of Contract of Rahn

5.6.1 Conditions Pertaining to Rāhin and Murtahin

The person who is eligible to make a contract generally is also eligible to make contract of rahn because contract of rahn is also one of the types of contracts and this contract is similar to contract of bay‘ in Sharī‘ah.

5.6.2 Opinion of Ḥanafī School of Thought

According to Ḥanafī school of thought contract of rahn is a financial transaction. Thus, to make the contract of rahn valid, rāhin and murtahin must be able to distinguish between right and wrong on the basis of human intellect and reason. Majority 3 or puberty is not an essential requirement to make the valid contract of rahn (Al-Majellah, 1980, Article 708, p. 74). Therefore, the minor who is authorized to make financial transaction is also allowed to make contract of rahn because contract of rahn is collateral to commerce and trade. Sabi mumayyaz or the minor who has attained some discretion and the one who is prodigal can make the contract of rahn if the permission is granted by their guardians respectively. Guardian of minor or insane person can make a contract of rahn to secure the payment of money which is taken for the benefit of a minor or insane person. This is allowed under the pretext of necessity.

According to Ḥanafī school of thought if either of the parties to the contract of rahn becomes insane after entering into contract of rahn but before giving the possession of property to murtahin then contract of rahn will become bāṭil (Al-Kāsānī, 1974, Vol. 6, p. 135).

5.6.3 Opinion of Majority of Muslim Jurists

According to Majority of Muslim Jurists, contract of rahn can only be allowed on the behalf of minor by his guardian in case of necessity or for the benefit of minor. Contract of rahn is one of the types of gratuitous contracts and it is also not obligatory. Thus, it is not allowed to a person who has been coerced or the one who is insane or prodigal or insolvent to enter into a contract of rahn. According to Majority of Muslim Jurists guardian or trustee is entrusted with the right to make contract of rahn on the property of minor and murtahin must be in such situation a trustworthy person. Murtahin must also be a rich man. Witnesses must also be there while making contract of rahn. The time period for which the contract of rahn is made must also be a short span of time. If any of the conditions is

3 According to English law minor is a person who has not attained 18 years of age. According to Majority Act, 1875 where the guardian has been appointed by the court of wards or the court of wards take charge of minor’s property, in such situation a minor will attain the age of majority after 21 years. According to Sharia’h majority of a person is not determined in terms of age but in terms of puberty.

missing, the contract of rahn will not valid according to them. Guardian of the property of the minor is also not allowed to make contract of rahn on the property of minor for the security of a payment of money which is due on the guardian in favour of any other person (Al-Dardīr, n.d., vol 3, p 231-292).

According to Shāfī and Ḥanbalī schools of thought, if either of the parties to the contract of rahn becomes insane after entering into contract of rahn but before giving the possession of property to murtahin then contract of rahn will not become bāṭil (Al-Buhutī, n.d., Vol. 3, p. 309). According to Mālikī school of thought if rāhin dies or becomes insane or insolvent or suffering from such a disease cure from which is impossible then contract of rahn will become bāṭil (Al-Dardīr, n.d., Vol. 3, p. 231-292).

According to Shariah Standard No. 39, the death of the rāhin or the murtahin has no effect on the validity of the contract of rehan. The respective inheritor shall substitute the dead party to the contract (AAOIFI, 2010, Shariah Standard No. 39, clause 3/1/5, p. 398).

5.7 Conditions Pertaining to Claim of Money

The conditions pertaining to a claim of money for the security of which the contract of rehan is created between rāhin and murtahin includes that the claim must be determined; established and enforced no matter what is the source of creation of that claim. The claim must be known and specified (Ibn Jazzy, n.d., p 232).

5.8 Conditions Pertaining to Property

The following are the conditions pertaining to property in the contract of rahn (Ibn Rushd Al-Hafīd, 1988, vol 2, p 269,270):

- The property must be one of those things in which transaction is permissible in Sharī'ah.
- The property must be known and specified.
- The property must be capable of taking into possession.
- Possession of the property must be given to murtahin by rāhin with his free consent.
- The property can be moveable or immovable. It can also be mithlī or ghair mithlī.
- The property must exhibit some monetary and legal value.
- The nature of the property must be such that it is capable of being sold. Therefore property must be in existence and capable of taking possession of it at the time of making of contract of rahn.
- Physical possession of the property must be given to murtahin.
- Usufruct or interest in the property cannot be transferred to murtahin from rāhin such as to allow murtahin to use or to get benefit from property in consideration of a claim of money. This opinion is exhibited by majority of Muslim scholars. According to Mālikī school of thought usufruct or interest in the property can be transferred to murtahin by rāhin in consideration of a claim of money.
- The property must be in the ownership of rāhin. This is the condition for the enforcement of contract of rahn.
- The property must be of sufficient value so that the amount claimed can be recovered in case of need.

The general rule is that everything on which contract of sale can be made can also be the subject-matter in a contract of rahn (Liaquat Ali Khan Niazi, n.d, p. 287).

5.9 Condition of possession of property

Muslim jurists agreed upon the condition of possession of property in the contract of rahn. But Muslim jurists differ in their opinions in determining the nature of condition of possession. According to Majority of Muslim Jurists (Ḥanafī, Shāfī and Ḥanbalī) possession of property is a condition to make the contract of rahn lāzim. Possession of property is not a condition for the validity of contract of rahn. Before possession contract of rahn is not lāzim for rāhin. Thus, rāhin can rescind the contract of rahn before giving possession of property (Al-Kāsānī, 1974, Vol. 6, p. 137; Abū Ishāq Al-Shirāzī, n.d., Vol. 1, p. 305; Ibn Qudāmah, 1968, Vol. 4, p. 328). Their opinion is substantiated with the dalīl (evidence) from Holy Quran that Allah Almighty said:

﴿وَإِنْ كُنْتُمْ عَلَىٰ سَفَرٍ وَلَمْ تَجِدُوا كَاتِبًا فَرِهَيْنِ مَقْبُوضَةٌ فَإِنْ أَمِنَ
بَعْضُكُمْ بِبَعْضٍ فَلْيُؤَدِّ الَّذِي أُؤْتِمِنَ أَمْنَتَهُ ۗ وَلْيَتَّقِ اللَّهَ رَبَّهُ ۗ وَلَا تَكْتُمُوا
الشَّهَادَةَ ۗ وَمَنْ يَكْتُمْهَا فَإِنَّهُ ۗ عَازِمٌ قَلْبُهُ ۗ وَاللَّهُ بِمَا تَعْمَلُونَ عَلِيمٌ



“And if you are on a journey, and you find not a scribe then let there be pledge with possession. And if in between you one entrusts the other, then let he whom he trusted deliver his trust and fear Allah Who is his Lord and conceal not evidence; and whosoever would conceal evidence, then his heart is sinful from inside, and Allah knows your deeds”. (Surah Al Baqarah: 283).

Above quoted ayah indicates that contract of rehan cannot be completed without delivering the possession of property from rāhin to murtahin. Furthermore, Contract of rahn is one of the types of gratuitous contracts therefore it needs delivery of possession of property from rāhin to murtahin for its completion.

According to Mālikī school of thought delivery of property from rāhin to give its possession to murtahin is not the condition for the completion of contract of rahn. According to this school of thought contract of rahn becomes lāzim merely by offer and acceptance. Rāhin will be forced to give the possession of property except where murtahin delays or rāhin becomes insolvent or dies. If murtahin delays deliberately in demanding the possession of property from rāhin or if rāhin agrees on not to take possession of property from rāhin and property will remain in the possession of rāhin then in such situation the contract of rahn becomes bāṭil (Ibn Rushd Al-Ḥafīd, 1988, Vol. 2, p. 271; Ibn Jazzy, n.d., p. 323; Al-Dardīr, n.d., Vol. 3, p. 313).

5.10 Perpetuity in Possession by Murtahin

The researchers argue that the property must be in possession of murtahin till the property will be redeemed by rāhin after the payment of money. Contract of rahn is lāzim only for rāhin and not for murtahin. Murtahin can demand his money back at any time and want to end the contract. Murtahin is entitled to do so. Thus, property can be redeemed by rāhin before the payment of money becomes due if murtahin wishes so.

After the conclusion of contract of rahn between rāhin and murtahin if property is sent back to rāhin by murtahin then in such a situation the contract of rahn becomes bāṭil according to Mālikī school of thought (Al-Dardīr, n.d., Vol. 3, p. 313). According to Ḥanafī school of thought in such a situation the contract of rahn does not become bāṭil.

How to Give the possession of property to make Contract of Rehan

Muslim jurists agreed upon the fact that in case of immovable property possession is exhibited by abandonment of property only or by removing the impediments of taking possession of immovable property (Al-Kāsānī, 1974, Vol. 6, p. 138; Ibn Rushd Al-Ḥafīd, 1988, Vol. 2, p. 269; Al-Khaṭīb Al-Shirbīnī, n.d., Vol. 2, p. 128; Ibn Qudāmah, 1968, Vol. 4, p. 232, Abū Ishāq Al-Shirāzī, n.d., Vol. 1, p. 305).

Muslim jurists differ in their opinions in case of moveable property that what constitutes the fact of giving possession. According to Ḥanafī school of thought in case of moveable property possession is exhibited by abandonment of property only (Al-Kāsānī, 1974, Vol. 6, p. 138). On the other hand, according to Shāfī, Ḥanbalī and Imām Yūsūf from Ḥanafī school of thought in case of moveable property possession is not completely exhibited by abandonment of property only. It further needs transfer or conveyance of moveable property from rāhin to murtahin (Al-Kāsānī, 1974, Vol. 6, p. 138; Al-Khaṭīb Al-Shirbīnī, n.d., Vol. 2, p. 128; Ibn Qudāmah, 1968, Vol. 4, p. 328, Al-Buhutī, n.d., Vol. 3, p. 318).

According to Shariah Standard No. 39 the possession of marhūn takes place as possession of a sold property. The possession could be actual by putting a hand on the property or it could be legal through registration and documentation. Same legal rules apply to both types of possession (AAOIFI, 2010, Shariah Standard No. 39, clause

3/1/2, p 697). Rāhin and murtahin may agree to deliver the possession of property to an upright third person as a trust (Al-Majallah, 1980, Article 705, p. 74).

6. Conclusion and Recommendations

This research paper concludes that Sharī'ah impediments must be taken into consideration by the issuing authority to make the structure of Mortgage backed sukuk to be Sharī'ah compliant. Loans granted on the mechanism of mortgage backed sukuk are relatively better recovery rates than unsecured loans because of the presence of an underlying asset and an encumbrance in the form of mortgage on an underlying asset. This research article recommends that SPV management must be separate from the management of originating mortgage backed sukuk authority to ensure that the credit quality of originator of mortgage backed sukuk is separate from the credit quality of issuer (SPV) of mortgage backed sukuk.

This article, furthermore, recommends the establishment of Sharī'ah supervisory board. The Government of Pakistan along with the financial institution which will work in collaboration for house financing should consult Sharī'ah experts for their valuable opinions before launching the financial product so that it will not deviate from the injunctions of principles of Islamic Finance Law. Besides this, Sharī'ah supervisory board should be established which may provide guidance about Sharī'ah regulatory framework for the financial product of Mortgage backed sukuk for house financing project of the Government.

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