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## A Comparative Research Study of Official Mortgage and Possessory Mortgage

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### ABSTRACT

A mortgage is a contract by which money is pledged as a debt, for this reason, it is said that a mortgage is a guarantee for the mortgagee's claim. In other words, mortgage is the seizure or retention of a thing or property in exchange for a right so that the right can be obtained through it. The importance of this research study is that as the issue of mortgage exists in practice, many people face many challenges while practicing it in their daily lives. So, this research study will assist them fulfilling their needs in practicing mortgage. The main purpose of the research article is to explain and analyze the similarities and differences between the official mortgage and the possessory mortgage. The doctrinal research methodology and descriptive, explanatory, and analytical research approaches are used in this work. It is worth mentioning that this research study is entirely based on library sources. At the end of this research, the researcher has concluded that the official mortgage has a number of similarities and differences with the possessory mortgage. The possessory mortgage is the deposit of collateral to the mortgaged in exchange for the loan by the mutual consent of both mortgagor and mortgaged in which it is necessary that the mortgaged property will be transferred to the creditor and he will take care of it until the acquisition of loan. Furthermore, the possessory mortgage can be in both movable and immovable property and the official mortgage can only be in immovable property. The mortgaged property remains with the mortgagor. But if the debtor does not return the loan to the mortgaged, the mortgaged has the right to sell the mortgaged property. When the mortgaged property is sold, the mortgaged has the priority to get the loan back.

### INTRODUCTION

A person receives a loan from another person. Later on, he refuses to pay the debt, or he is unwilling to pay the debt, so the debtor must pay the creditor's right because the creditor has cooperated with the debtor in good faith. Therefore, in order to solve these problems, Islamic Sharia and the Civil Code of Afghanistan have combined other rights related to the right of Ain, which is called the right of the mortgage. In other words, a mortgage is a loan use to buy or keep up a house, land, or other real estate. A mortgage is a written agreement that gives a lender the right to take your home if you do not return the money, they lend you according to the terms that you agreed to when you took out the mortgage. The Afghan civil code divided mortgage into two types: The possessory mortgage and the official mortgage. According to article 1770 of the Afghan civil code, the possessory mortgage is a contract in which a person gives a guarantee against a loan to another person (mortgagor) who will foreclose this right in order to obtain his right from him (mortgaged). This kind of mortgage is formed through a mutual consent of both parties (creditor and debtor) and does not need to be registered in an official document. Additionally, it encompasses both movable and immovable properties. As well, in this mortgage, it is necessary that the mortgaged property ought to be transferred to the creditor. So, in the possessory mortgage include both movable and immovable properties. According to the article 1832 of the Afghan civil code, the official mortgage is a contract based of which creditor

gains real right over estate that is allocated to discharge of debt and, due to this, creditor shall have priority right over other ordinary creditors and lower degree creditors and he may recover his credit from the estate in whomever possession it is. So, the official mortgage includes only an immovable mortgage.

### Introduction to Mortgage, Types, and Comparison

Linguistically, mortgage means proof, continuity, imprisonment, and necessity. In other words, mortgage is a pledge of something. In terms of legal terminology, a mortgage is a contract by which money is pledged as a debt, and for this reason, a mortgage is a guarantee for the mortgagee's claim. In other words, mortgage is the seizure or retention of a thing or property in exchange for a right so that the right can be obtained through it. Therefore, whenever the debtor places his property with the creditor in exchange for the goods that he has bought from the creditor, until he pays the creditor's right, in case of non-payment, the creditor can sell the debtor's property and get his/her right. This is called mortgage. From the researcher's perspective, the above definitions have some similarities and differences. The first similarity is, the mortgage is against another person's right. The second similarity is that the mortgage is a means of obtaining the right. The first difference is that in the first definition, the mortgaged property is not known, while in the second definition, only those properties that can be used are specified. Therefore, the second definition is a better than the first one.

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### The Nature of the Mortgage Contract

There are two opinions regarding the nature and essence of mortgage, each of which will be explained as follows.

1. All jurists and scholars agree that the mortgage contract is considered an endorsement contract, which is established by the agreement of the two parties for the protection and guarantee of the loan.

2. The point of controversy among the scholars regarding the nature of mortgage is, whether it is a commutative contract, a voluntary contract or both?

According to the Hanafi school of jurisprudence, this contract is voluntary, because the mortgagor does not take anything from the mortgaged in exchange for confiscating his property. Also, the mortgagor is not forced to pay or hand over the mortgage. From the point of view of Ibn Masoud, mortgage is from the kind of commutative contracts which is formed against a loan.

Zaheli then confirms the point of view of the Hanafi school jurisprudence and considers the mortgage as a voluntary contract. According to the Shafi'i and Hanbali school of jurisprudence, mortgage is not one of the sorts of commutative contracts. Because the debtor is not obliged to hand over the object for guarantee, while in commutative contracts, the contracting party is obliged to pay or hand over an object in exchange.

In conclusion, it can be said that a mortgage contract is one of the certified contracts that is formed in exchange of an object.

Now there is a question arises that whether the mortgage is a binding contract or a permissible? It can be said as an answer that a mortgage is a binding contract for the mortgagor and a permissible contract for the mortgaged. Because the mortgagor cannot cancel the contract whenever he wants, until a certain date is reached, the mortgaged can cancel the mortgage contract whenever he finds money.

### The Terms and Conditions of Mortgage

In order for a mortgage contract to be considered concluded, the presence of the following conditions is considered necessary.

First condition: Consent: The mortgage contract will be formed with the consent and pleasure of both parties (mortgagor and mortgaged).

Second condition: Possession: Anything that is mortgaged must be given to the mortgaged in possession. For example, if the land is mortgaged but someone else is in possession of it, then this mortgage is not valid.

Third condition: Intellect: Both the mortgagor and the mortgaged should be intelligent, that is they will understand the transaction.

4-Exchangeable: The mortgaged item will be able to be sold, the price will be collected, it will be available and it can be taken into possession at the time of purchase.

### Elements of Mortgage

The following four elements must be existed in a contract to consider it as a mortgage.

1. Mortgagor: The Mijalat alahkam aheadlayh defines the mortgagor as a person who has given the mortgage.

2. Mortgaged: The Mijalat alahkam aheadlayh defines the mortgaged as a person who receives or takes the mortgage.

3. Mortgage property: A property that is given as a mortgage. Everything which is given in a guarantee is considered as mortgage property.

4. Concubine: There should be an offer and acceptance in the contract of mortgage.

### Kinds of Mortgage

Based on Afghan civil code, mortgage is categorized into official and possessory mortgage. However, Islamic Shari'ah only recognize the possessory mortgage. Both types are going to be explained as follows.

### Possessory Mortgage

The possessory mortgage is a contract in which a person gives a guarantee against a loan to another person(mortgagor) who will foreclose this right in order to obtain his right from him(mortgaged). This kind of mortgage is formed through a mutual consent of both parties (creditor and debtor) and does not need to be registered in an official document. Additionally, it encompasses both movable and immovable properties. As well, in this mortgage, it is necessary that the mortgaged property ought to be transferred to the creditor.

It is worth mentioning that the possessory mortgage was also recognized the Romans. In the past, the possessory mortgage was criticized when the debtor (mortgagor) handed over the possession of the mortgage to the creditor or handed it over to a third party that both of them had agreed upon. However, in contemporary laws, the delivery of mortgaged materials is not considered an important pillar, but only as an obligation arising from the contract. It means that a mortgage is currently a consensual agreement and can only be done with mutual consent.

The provisions of possessory mortgage are regulated from article 1770 to 1801 in the Afghan civil code. Regarding the definition of the possessory mortgage, The Afghan civil code state that "Possessory mortgage is a contract on the basis of which mortgager undertakes to give his property to possession of mortgagee or another trustee person in exchange for a financial right whose full or partial payment shall have priority over rights of the first-degree creditors and creditors of lower degrees." It is clearly inferred from the mentioned article that based on the possessory mortgage, the mortgagor give his real estate or movable property to the mortgaged or his legal representative against the debt he/she is responsible for, so the debt is delayed. In this case, the mortgaged acquires the first right to other creditors by selling the property.

### Official Mortgage

The Afghan civil code defines official mortgage as "Official mortgage is a contract on the basis of which

creditor gains real right over estate that is allocated to discharge of debt and, due to this, creditor shall have priority right over other ordinary creditors and lower degree creditors and he may recover his credit from the estate in whomever possession it is.” It is inferred from the mentioned article that the official mortgage only encompasses immovable property, not movable property. Accordingly, in the official mortgage, the real estate remains under the possession of the mortgagor. In case, if the debtor or mortgagor fails to pay the loan, then the mortgaged has the right to sell the mortgaged property. And whenever the mortgaged property is sold, the mortgaged gets the right of priority over all the other debtors in getting his loan. Official mortgage has a number of features that which are going to be discussed as follows.

#### First Feature

The official mortgage should be registered. A formal mortgage must be established by the mortgagor and mortgaged through formal proceedings. Clause 1 of the article 1833 of the civil code of Afghanistan states that “Official mortgage shall not be concluded, unless on the official paper that is completed by relevant officials.”

#### Second Feature

A formal mortgage is not formed on any other properties other than the real estate. But unless the law dictates differently. Unlike the possessory mortgage, which can be formed in movable and immovable property.

#### Third Feature

The mortgager should own the mortgaged property in the formal mortgage. The civil code of Afghanistan declares that” Mortgager must be the owner of the mortgaged estate and have the capacity to take action on it.” In an official or formal mortgage, the mortgager keeps the property in his possession and only specifies the guaranteed property to the mortgaged from which the mortgaged can get his loan.

#### Fourth Feature

As mentioned above, in the official mortgage, it is not necessary that the mortgaged takes care of the mortgaged goods, but the mortgager can protect the mortgaged property himself. Therefore, in a formal mortgage, the owner of the mortgaged property enjoys the privilege of ownership. Based on this, he/she can sell or lease the property.

#### Fifth Feature

A formal or official mortgage is not divisible. This means that the official mortgage cannot be such that if the mortgager pays a part of the loan, then the right of the mortgage is considered paid from the portion of the mortgaged goods. Rather, the official mortgage continues until the full payment of the loan and remains on the entire property and is not considered to be paid from any parts of the mortgaged goods.

#### Sixth Feature

In a formal or official mortgage, the possession of the mortgager does not change on the mortgaged property, but remains with the mortgagor as before, but like before, the mortgaged property remains in the property of the mortgager.

#### Comparison of the Possessory Mortgage and the Official Mortgage

To make a comparison between the possessory mortgage and the official, first I have to point out the similarities and then the differences as follows.

#### Similarities between the Possessory and Formal Mortgages

##### First

Both the possessory and the formal mortgages are formed as a result of the contract.

##### Second

Both the possessory and formal mortgages are kinds of Subsidiary property right.

##### Third

Both the possessory and the official mortgages are not divisible.

##### Fourth

The mortgaged has the right on the entire mortgagor until he has received the loan.

#### Differences between the Possessory and Formal Mortgage

##### First

Since the mortgage is formed with the mutual consent of the parties, it does not to be registered. On the other hand, the official mortgage needs to be registered.

##### Second

The possessory mortgage can be in both movable and immovable property and the official mortgage can only be in immovable property.

##### Third

In possessory mortgage the mortgaged property is transferred to the mortgaged, but in official mortgage, the mortgaged property remains under the control of the mortgagor.

##### Fourth

The mortgaged property remains with the mortgagor. But if the loan is not returned back from the debtor to the mortgaged, the mortgaged has the right to sell the mortgaged property. When the mortgaged property is sold, the mortgaged has the priority to get the loan back.

#### CONCLUSION

At the end of this research, the researcher has reached



to the conclusion that according to the Afghan civil law mortgage is divided into two types: Official mortgage and possessory mortgage. Both the official and possessory mortgage has a number of similarities and differences with each other. Both mortgages are formed as a result of a contract. Moreover, both the possessory and formal mortgages are kinds of Subsidiary property right and both the possessory and the official mortgages are not divisible. Additionally, the mortgaged has the right on the entire mortgagor until he has received the loan.

Apparently, the official and possessory mortgages have some differences. The official mortgage has to be registered in an official document but the registration of the possessory mortgage is not required and just the mutual consent of the parties is sufficient. Furthermore, the possessory mortgage can be in both movable and immovable property and the official mortgage can only be in immovable property. Moreover, in the possessory mortgage the mortgaged property is transferred to the mortgaged, but in official mortgage, the mortgaged property remains under the control of the mortgagor. As well as, the mortgaged property remains with the mortgagor. But if the loan is not returned back from the debtor to the mortgaged, the mortgaged has the right to sell the mortgaged property. When the mortgaged property is sold, the mortgaged has the priority to get the loan back.

### Recommendations

After conducting this research, I make the following recommendations and suggestions to the readers and future researchers.

1. The researcher suggests to the people to be very cautious in the mortgage contract and refrain from

doing today's customary forms of mortgage, because this customary mortgage is forbidden in Islam.

2. Since in this research article, the researcher has compared only the possessory and official mortgage, the researcher suggests to the future researchers to compare and implement the official and possessory mortgage with the forms of customary mortgage, and mention the practical examples.

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