

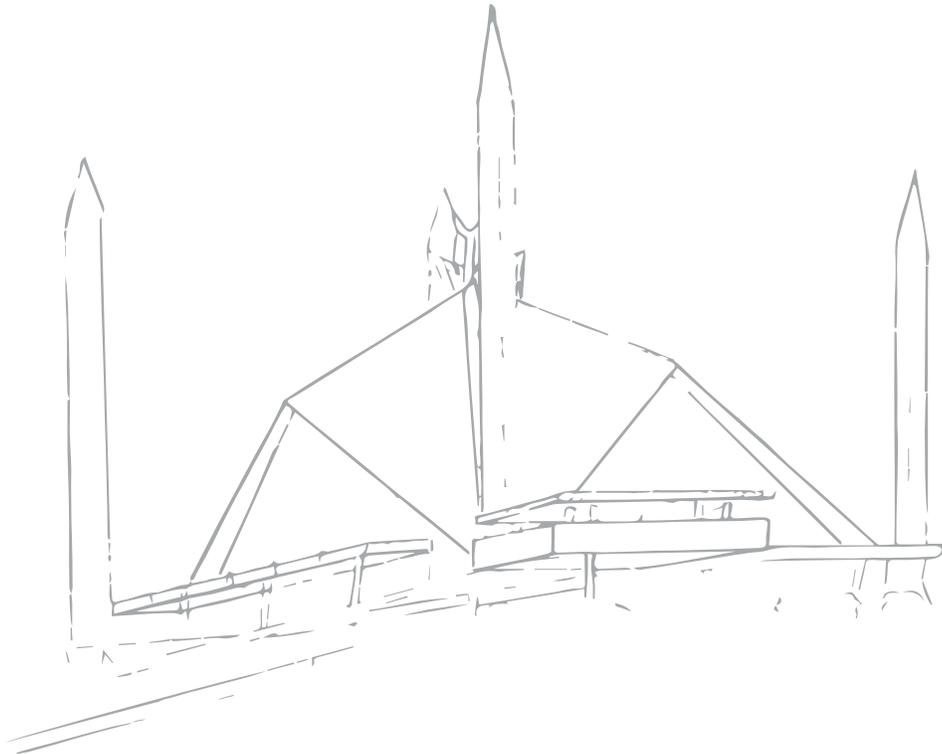


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Council of Islamic Ideology on Transfer of Property Act, 1882: A Critical Study

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Abstract

This paper aims to investigate the role of a constitutional Institution, Council of Islamic Ideology, in the process of Islamization of laws in Pakistan through its various reports on different statutory laws. To evaluate the contribution of CII in the process of Islamization of Laws in Pakistan, this study sought to conduct an analytical study of 14th report of CII on Transfer of Property Act, 1882 from Shari'ah and State law perspectives to spotlight the research gaps in the work of CII. The paper finds that the work of CII lacks in many respects, for instance, sometimes the report lacks in understanding the position of statute on point under discussion and sometimes it lacks in elaborating the position of Shari'ah. Moreover, sometimes it lacks in making recommendations which may address Shari'ah issues in enactments. This work focuses on the need of further research regarding the reports of CII. At the end, this work proposes a strategy for future endeavors to cover up the flaws in the reports of CII. Furthermore, this study suggests recommendations for Islamization of TOP Act, 1882. The work submits that, this study is an attempt to give some recommendations to make the role of CII to be more effective that may respond to the present day needs.

Key Words: Islamization, Council of Islamic Ideology, Shari'ah, Statute, the Transfer of Property Act, 1882.

1. Introduction

As the colony of the English Empire, Pakistan inherited many English laws.¹ One of such laws is the Transfer of Property Act,

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¹<https://www.dawn.com/news/840172/three-legal-systems>, accessed October 29, 2017.

1882 which was the first statutory law on certain important issues related to property law. The laws made by the Britain had the roots in Common Legal System.² Article 2 of Constitution of Pakistan, 1973 provides that Islam shall be the state religion of Pakistan.³ In addition to Article 2, Article 227 of the COP, 1973 lays down another responsibility on the State of Pakistan to bring all the existing laws within the conformity of the teachings of the Holy *Qur'ān* and the *sunnah*.⁴

Article 227 of the COP, 1973 provides two important principles i.e. the State shall be responsible to bring all existing laws in conformity with injunctions of Islam as enunciated in the Holy *Qur'ān* and *sunnah* and no law shall be enacted that is repugnant to injunctions of Islam as laid down in the Holy *Qur'ān* and the *sunnah*.⁵ In the pursuance of first responsibility, Federal Shariat Court (FSC) was constituted under Chapter 3-A of Part VII of the COP, 1973.⁶ FSC was entrusted with the task of examination of existing laws in the light of injunctions of Islam as laid down in the Holy *Qur'ān* and the *sunnah* under Article 203-D (1) of the COP, 1973.⁷ In pursuance of second responsibility, the CII⁸ was constituted under Article 228 of the COP, 1973. CII was entrusted with the examination of existing laws in the light of teachings of Islamic law under Article 230 (1) (c) of the COP, 1973.⁹

² Ibid.

³ Manzoor Ahmad, *The Constitution of the Islamic Republic of Pakistan*, 1973 (Lahore: Kausar Law Books Publishers, 2011), 17.

⁴ Ibid., 653.

⁵ Ibid.

⁶ The provisions of Chapter 3-A of Part VII were inserted in the Constitution of Pakistan, 1973 by Constitution (Amendment) Order, 1980 (President's Order. No. 1 of 1980).

⁷ Ahmad, 599, 604.

⁸ The Council of Islamic Ideology was initially proposed in the first Constitution of Pakistan in 1956 with the name of "Islamic Commission." Article 198 (1)-(4) of the Constitution of Pakistan, 1956 deals with the "Islamic Commission." On August 1, 1962 the Council of Islamic Ideology was established as Advisory Council of Islamic Ideology under Article 199 of the Constitution of Pakistan, 1962. Advisory Council of Islamic Ideology was re-designated as Council of Islamic Ideology under Article 228 of the Constitution of Pakistan, 1973. This information is accessed from <http://cii.gov.pk/aboutcii/history.aspx>.

⁹ Ahmad, 654.

This work is an attempt to analyze the main legislation on transfer of property, i.e. TOP Act, 1882 which provides legal rules on contracts of sale of immovable, mortgage, lease, exchange, gift and transfer of actionable claims, from *Shari'ah* and statutory law viewpoints. In this paper certain issues have been selected in each transaction to indicate the extent to which the legal rules in statutory law contain *Shari'ah* objections and recommendations have been made to make them *Shari'ah* compliant. The following discussion is a simplified presentation of the research on the topic.

2. Scheme of Transfer of Property Act, 1882

The TOP Act, 1882 can be divided into three parts for the sake of convenience. The first part comprises of introductory provisions of law. The second part consists of legal rules which are applicable to various financial transactions regarding moveable and immovable properties, respectively, in general and also contains some exceptions to these general rules. The third part consists of statutory provisions on contracts of sale of immovable property, mortgage, lease, exchange, gift and transfer of actionable claims.

3. Analytical Study of 14th Report of CII on Transfer of Property Act, 1882

The prime purpose of this paper is to conduct the analytical study of Annual Report 1983-1984 of The CII, Pakistan.¹⁰ 17th session of The CII was held on 17th to 27th July 1983 in Karachi, on 24th to 27th September 1983 in Islamabad, on 5th to 16th November 1983 in Islamabad and on 24th December 1983 to 2nd January 1984 in Karachi. A full board session was held in order to scrutinize the law on transfer of property that is the TOP Act, 1882 of Pakistan. That session was chaired by Justice Dr. Tanzil-ur-Rehman. Critical Analysis of the law on the Transfer of Property was presented by Chief Research Officer of the Council Hafiz Muhammad Latif Saleem. In the light of these valuable comments, the council prepared a report on the TOP Act, 1882. The Council analyzed each and every clause of the Act and declared a number of clauses

¹⁰ The Council of Islamic Ideology, *Islamization of Laws, 14th Report on Transfer of Property Act 1882*.

un-Islamic. Some suggestions have been made by the Council in order to make changes in the relevant law but the report also exhibits shortcomings and failed to raise certain important other objections from *Shari'ah* perspective. Although, this report is the most important source for this study and guides the researcher at various points, yet there is a need of further research and making suggestions so that the law can be *Shari'ah* based and *Shari'ah* compliant.

Chapter II of The TOP Act, 1882 comprises of 49 sections in total covering various important legal rules: for instance, legal rules on void conditions, void transfers, vested and contingent interests, transfer by ostensible owner, fraudulent transfer and doctrine of *lis-pendens*. The 14th report of CII did not evaluate these 49 provisions of TOP Act, 1882 from *Shari'ah* perspective. The report only mentions that the applicability of these provisions is very vast, covering diverse financial transactions on property whether moveable or immovable. Furthermore, the report mentions that this is not a proper place to investigate the infinite *Shari'ah* objections over these provisions of law. Such an approach to evaluate the statutory laws from *Shari'ah* viewpoint is not up to standard because the report lacks in *Shari'ah* appraisal of major part of the TOP Act, 1882.

In the proceeding parts of this paper, work of CII regarding the third part of TOP Act, 1882 is analyzed in the light of *Shari'ah* and law. The loopholes in the report of CII are spotlighted regarding the understanding of position of state law on various issues. Moreover, the *Shari'ah* objections are raised regarding a variety of legal rules incorporated in TOP Act, 1882.

4. Contract of Sale of Property in Land

This portion of the paper is dedicated to analyze the legal status of contract of sale and agreement to sell the property in land. Section 54 of the TOP Act, 1882 defines contract of sale as:

“A transfer of ownership in exchange for a price paid or promised or part paid and part promised...a contract for the sale of immovable property is a contract that a sale of such property shall take place

on terms settled between the parties. It does not, of itself, create any interest in or charge such property.”¹¹

The above mentioned definition provides with two transactions i.e. contract of sale where ownership of immoveable property is transferred absolutely, transferring all the rights in the property, to the buyer by the seller for price. No rights are left in the transferor after the conclusion of such a transaction. Contract of sale of immoveable property is an executed contract.¹² Contract for sale refers to an agreement to sell. In a contract for sale or an agreement to sell of immoveable property the parties to the contract agrees that sale of such property will take place in future but on agreed terms as settled between the parties at present. A contract for sale or an agreement to sell is an executory contract.¹³ Therefore, it does not create any interest or right or title of person regarding the property in question except that it gives him a right to file a suit for specific performance of an agreement and in addition he can also claim damages for breach of an agreement.¹⁴ An agreement for sale of immoveable property is not required to be registered compulsory in accordance with section 17 of Registration Act 1908.¹⁵

From the perspective of Islamic law, an agreement to sell an immoveable property purports future contract and future contract is not permissible in Islamic law because it is well settled principle of Islamic law that transaction cannot be affected at future date.¹⁶ Future contract is permissible only where the promise to perform

¹¹ M. Mahmood, *The Transfer of Property Act, 1882*, 7th ed. (Lahore: Al-Qanoon Publishers, 2013), 451; Shaukat Mahmood and Nadeem Shaukat, *Transfer of Property Act*, 6th ed. (Lahore: Legal Research Center 2013), 319; Muhammad Naseem Chaudhary, *Commentary on The Transfer of Property Act 1882* (Lahore: Civil & Criminal Law Publications, 2014), 444.

¹² Ehtasham Mehmood, *The Transfer of Property Act 1882* (Lahore: Mansoor Book House. n.d), 99.

¹³ Chaudhary, 487.

¹⁴ Ibid., 405.

¹⁵ Mahmood and Shaukat, 27.

¹⁶ What Shari‘ah Experts Say Futures, Options and Swaps, *International Journal of Islamic Financial Services*, Vol. 1, No. 1 (n.d): 1, accessed January 10, 2017, <http://Islamic-finance.net/journals/journal1/art4.pdf>.

is not binding and also do not linked with other things like down payment or earnest money.¹⁷ If mutual promise is binding on both parties, it is subject to the general prohibition against the sale of debt for debt, and is therefore unlawful.¹⁸ By no stretch of imagination, it can be inferred that *Shari'ah* preferred spot transactions instead of deferred ones and put strict limitations to be observed in cases where counter values in a transaction are deferred.¹⁹

The humble scribe submits and recommends that in order to exclude an agreement to sell an immovable property from general prohibition of sale of debt for debt, section 54 of the TOP Act, 1882 should be amended in a way that mutual promise in an agreement to sell must not be linked with anything that suggests a contract of sale like down payment. The 14th report of CII did not point out this important and vital difference between the legal statuses of contract of sale and an agreement to sell.

Moreover, the 14th report did not cite the *Shari'ah* objection on section 56 of TOP Act, 1882. The *Shari'ah* issue in legal rule on marshalling by subsequent purchaser can be addressed easily by inserting a single phrase, that is, the consent of mortgagee is mandatory to be obtained while selling the mortgaged property to a subsequent purchaser. The 14th report of CII on TOP Act, 1882 only pinpoints that statutory law comprising of legal rules on contract of sale of immovable property are insufficient to cover various financial transactions discussed by the manuals of *fiqh* under the heading of *bay'*. Such an approach is not satisfactory. Therefore, efforts should be made by the experts of *Shari'ah* and Law to provide a guideline and framework for the legislators which could be helpful in bringing a law that is *Shari'ah* compatible on the contract of sale of property in land.

¹⁷ Muhammad Tahir Mansoori, *Shari'ah Maxims Modern Applications in Islamic Finance*, 1st ed. (Islamabad: Shari'ah Academy International Islamic University, Islamabad, 2007), 167.

¹⁸ Ibid.

¹⁹ Abdur Rahmān b. Muhammad 'Iwaḍ Al-Jazā'irī, *Al-Fiqh 'alā Al-Madhāhib 'l-'Arba'ah*, (Cairo: Dār Al-Kutb al-'Ilmiyyah, 2003), 2: 135.

5. Contract of Mortgage

The 14th report of CII on TOP Act, 1882 finds out the following six issues, from the perspective of Islamic law, inherent in legal rules embodied in sections 58-105 of TOP Act, 1882:

- The possession of mortgaged property by mortgagor to the mortgagee is not an essential ingredient for the validity of contract of mortgage.
- The mortgagee is allowed generally to get benefit from the mortgaged property.
- The contract of mortgage on property can be made for an indefinite period of time.
- The right of redemption cannot be exercised before the date of maturity.
- Partial redemption by any of the owners in a joint ownership is not allowed generally.
- Further encumbrance can be created on a mortgaged property.

In the proceeding sections (5.1, 5.2, 5.3, 5.4 and 5.5) of this work, I will conduct the *Shari'ah* appraisal of different kinds of mortgage as incorporated in section 58 of TPA, 1882.

5.1 Simple Mortgage

The essential ingredients of simple mortgage are that the mortgagor himself undertakes the personal liability to pay the mortgage money to the mortgagee. The possession of the mortgaged property is not delivered to the mortgagee. The mortgagee is not entrusted with the right of foreclosure. The mortgagee is entrusted with the right of sale of mortgaged property in case of failure of repayment of loan or debt on specified and certain date when it becomes due. The transaction of simple mortgage is effected through registered document. Two distinct remedies are available with the mortgagee in case of simple mortgage. One of these two is suit for money decree and another is a suit for the sale of the mortgaged property.²⁰

²⁰ Mahmood, 189.

The *Shari'ah* analysis of simple mortgage reveals that simple mortgage resembles with a contract of *kafalah* in a sense that it involves personal guarantee. In a contract of *kafalah* personal guarantee of principal debtor is granted to the creditor by third person called surety whereas, in a contract of simple mortgage, the mortgagor undertakes personal liability himself to pay the mortgage-money to the mortgagee. Therefore, simple mortgage is a combination of personal guarantee and guarantee in the form of property apparently.²¹ The possession of the mortgaged property is not delivered to the mortgagee in simple mortgage and delivery of possession of property in a contract of *rahn* is an essential ingredient for the making and conclusion of contract of *rahn* in Islamic law. It is based on the saying of Allah Almighty in the Holy *Qur'an*:

“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.”²²

5.2 Mortgage by Conditional Sale

The essential ingredients of mortgage by conditional sale are that the mortgagor is not personally liable in case of default for the repayment of loan or debt. The mortgagor ostensibly sells the mortgaged property to the mortgagee. The mortgagor is ostensible seller and the mortgagee is ostensible buyer. The ostensible sale will be converted into absolute sale on the default of payment of loan or debt. If mortgage money is returned to the mortgagee (creditor) by the mortgagor (debtor) then mortgagee will resell the mortgaged property to the mortgagor at the expiration of stipulated time period against the price being the loan or debt advanced to him. The mortgagee is bound to resell the mortgaged property to mortgagor when mortgagor paid the

²¹ This analysis with respect to a contract of simple mortgage that it is neither a contract of personal guarantee nor a contract of guarantee in the form of property.

²² *Al-Qur'an*, 2: 283.

mortgaged money to the mortgagee. Suit for foreclosure is available with the mortgagee in case of default in payment of mortgaged money to the mortgagee by the mortgagor. The transaction of mortgage by conditional sale is effected through registered document.²³

The *Shari'ah* analysis of mortgage by conditional sale reveals that in mortgage by conditional sale two separate and distinct transactions have been tied together that is not permissible in *Shari'ah* under the pretext of prohibition of *Bay'tain fil Bay'ah wāḥidah*.²⁴ In mortgage by conditional sale it is stipulated in an agreement that the mortgagee will be the owner of the mortgaged property in case of default by the mortgagor in payment of amount of mortgaged-money. In Islamic law, the *murtahin* does not have a right to stipulate a condition that he should be the owner of the asset in case of default.²⁵ Nevertheless, there is no prohibition for the *murtahin* to purchase the mortgaged asset at market value and take the portion of the value to which he is entitled.²⁶

5.3. Usufructory Mortgage

The essential ingredients of usufructory mortgage are that the mortgagor delivers the possession of the mortgaged property to the mortgagee. The mortgagee is entitled to retain the possession of the mortgaged property until the payment of mortgaged money. The mortgagee is also entitled to receive rents and profits of the mortgaged property and the rents and profits may be appropriated in lieu of interest or in lieu of principal or in lieu of principal and interest both as agreed between the mortgagor and mortgagee in mortgage deed. The mortgagor is entrusted with right of redemption after the payment of due amount or the due amount is discharged by appropriation of rents and profits received in lieu principal and interest. The mortgagee is not

²³ Mahmood, 190.

²⁴ The writer developed this idea and compares mortgage by conditional sale with *bay'tain fi 'l-bay'ah*.

²⁵ Wahbah al- Zuhylī, *al-Fiqh Al-'Islāmī wa 'Adillatuhū*, (Damishq: Dār Al-Fikr. n.d), 6: 4209.

²⁶ It was decided in 7th session of Islamic Fiqh Academy which was held in Jeddah, Saudi Arabia on 9th to 14th May, 1992.

entrusted with the right of sale or foreclosure of the mortgaged property.²⁷

The *Shari'ah* analysis of usufructory mortgage reveals that in usufructory mortgage contract of lease and contract of mortgage have been merged together which is prohibited in *Shari'ah*. In usufructory mortgage two contracts have been concluded between the mortgagor and mortgagee simultaneously: one is of contract of lease; and other is of contract of mortgage. In Islamic law, contract of *rahn* and contract of *ijarah* cannot be made simultaneously with respect to the same property because contract of *ijarah* is *lāzim* contract and therefore, binding while contract of *rahn* is *lāzim* for *rāhin* and *ghayr-lāzim* for *murtahin*, therefore, non-binding for *murtahin*. In such a case the contract of *rahn* remains intact and contract of *ijarah* will be cancelled automatically.²⁸

5.4. English Mortgage

The essential ingredients of English mortgage are that the mortgagor himself undertakes the personal liability to pay the mortgage money to the mortgagee. The property is transferred absolutely to the mortgagee by the mortgagor in English mortgage. This absolute transfer is subject to the condition that upon repayment of mortgage money by the mortgagor to the mortgagee on the specified and certain date the mortgagee will retransfer the mortgage property to the mortgagor. The possession of mortgage property is delivered to the mortgagee by the mortgagor. The mortgagee is entrusted with the right of sale but not with the right of foreclosure.²⁹

The *Shari'ah*-based analysis of English mortgage reveals that absolute ownership is transferred to the mortgagee by the mortgagor and that is in clear contradiction of definition of

²⁷ Mahmood, 127-128; Vepa P. Sarathi, *Law of Transfer of Property* (Lucknow: Eastern Book Company, 2000.), 195-196.

²⁸ Muhammad Burhan Arbouna, "The Combination of Contracts in *Shari'ah*: A Possible Mechanism for product Development in Islamic Banking and Finance", *Thunderbird International Business Review*, Vol. 49, No. 3 (May-June, 2007): 355.

²⁹ Mahmood, 130; Sarathi, 200.

mortgage where an interest is only transferred in specific immovable property for the purpose of securing the payment of loan or debt. Absolute ownership is transferred in case of sale and not in case of mortgage. Besides this, the proviso is also attached that the mortgagee will retransfer the mortgage property to the mortgagor upon the payment of mortgage money. Here it is similar to buy back transaction (*bay' al-wafā'*) which is not allowed in *Shari'ah*. Therefore, if English mortgage is considered to be sale even then it is in violation of the rules of Islamic law for the transaction of sale.³⁰

5.5. Mortgage by Deposit of Title-deeds

Mortgage by deposit of title deed is also called as Equitable Mortgage. In Mortgage by deposit of Title deeds the mortgagor deposited the title deeds of his property to be mortgaged to the mortgagee with an intention to form the security for the loan or debt.³¹

The mortgage by deposit of title deeds seems to be *Shari'ah* compliant because it covers the delivery of possession of mortgaged property in the form of title deeds which amounts to constructive possession and constructive possession is admitted by Islamic law. The report declared this type to be un-Islamic. Hence, the report finding in this regard is not acceptable. The argument of this work is that CIL, in its 14th report, did not analyze the definition and kinds of mortgage from *Shari'ah* viewpoint. Thus, the Council did not raise *Shari'ah* objections in section 58 of the Transfer of Property Act, 1882. Had the report succeed in providing the model of mortgage financing in compliance of the rules of Islamic law, the report would have been more and more beneficial and advantageous.

³⁰ The writer developed this idea and compares English mortgage with *bay' l-wafā'*.

³¹ Mahmood, 131; Sarathi, 204.

6. Contract of Lease

The significant and notable contribution of this report is the Shari‘ah analysis of legal rules incorporated in section 105 to 117 on a contract of lease of property in land.

6.1 Shari‘ah Issues in Definition of Contract of Lease

Section 105 of the TOP Act, 1882 defines the contract of lease as:

“A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.”³²

Shari‘ah analysis of definition of contract of lease as incorporated in section 105 of the TOP Act, 1882 reveals that there are some important objections from the perspective of Islamic law. The very first issue which can be raised is that contract of lease allowed the payment of amount as consideration in the form of a share of crop and in this sense it resembles with the contract of *muzār‘ah* and not with the contract of *ijārah*. Second objection on definition of contract of lease from the perspective of Islamic law is that the contract of lease can be made in perpetuity and Islamic law on contract of *ijārah* can only be made for a specific or known time period and it cannot be made for an indefinite period of time. Third vital objection on definition of contract of lease is that the consideration paid in a contract of lease can be premium or rent or both. The price paid in the form of premium is not justified from *Shari‘ah* point of view. The payment of price in the form of premium must be defined clearly and must be clearly stated by

³² Mehmood, 757; Mahmood and Shaukat, 733; Chaudhary, 793; Mahmood, 224; Sarathi, 306; Nafeer Ahmed Malik, *The Transfer of Property Act, 1882* (Lahore: Punjab Law Book House, 2012), 251-252.

the law and such a payment of price as premium is required to be paid in lieu of security deposit or advance payment.³³

6.2 Determination of Lease on the Happening of any Event

Section 111 of the TOP Act, 1882 clause (b) and (c) provides that a contract of lease of immoveable property elapses by the happening of an event where determination of contract of lease is dependent upon the happening of an event. The words used in section are 'happening of any event' that shows that it covers happening of both certain and an uncertain event.³⁴ From the perspective of Islamic law, determination of contract of *ijārah* can be made conditional upon the happening of some certain event such as determination of contract of *ijārah* on the arrival of month of Ramadan or on the arrival of Eid etc. Determination of contract of *ijārah* cannot be made conditional on the happening of an uncertain event.

6.3 Option to Determine the Contract of Lease

Section 110 of the TOP Act, 1882 provides that where there is express provision in a contract of lease that it can be terminated before the expiration of stipulated time period and the lease agreement does not provide that with whom the lessor or the lessee such right to terminate is vested then in such a situation the lessee and not the lessor shall have a right to do so. ³⁵ In Islamic law the contract of *ijārah* is a *lāzim* contract therefore, both the lessor and lessee should have equal right in such a situation to repudiate the contract of lease.

6.4 Payment of rent in Arrear Along with Interest

Section 114 of the TOP Act, 1882 provides that on payment of rent in arrear along with the interest and cost of the suit by lessee to the lessor the leased property will be delivered to the lessee as if the forfeiture had not occurred. This section is allowing the

³³ CII, 151.

³⁴ Mehmood, 241.

³⁵ Ibid., 245.

payment of amount of money as interest by the lessee to the lessor that is not allowed by *Shari'ah*.³⁶

6.5 Original Lease and Under-Lease

The legal rules on contract of lease enunciated in the TOP Act, 1882 provide the right to the lessee to under-lease the leased property under section 115.³⁷ This rule is not clear about obtaining of consent of the lessor of original lease by the lessee to lease the leased property further on the basis of under-lease. Obtaining the consent of original lessor by lessee to sub-lease must be made obligatory by introducing amendment in section 115 of the TOP Act, 1882.

6.6 Exemption of Leases for Agricultural purposes

Section 117 of the TOP Act, 1882 provides that the provisions of Chapter V of TOP Act, 1882 are not applicable to leases for agricultural purposes.³⁸ This section is clearly contradicting with other sections such as 105, 106 and 108 where the law is providing legal rules regarding leases of agricultural land.

7. Contract of Exchange

In its report, CII declares that the definition of contract of exchange is *Shari'ah* complaint and the Council stated that *'aqd al-muqāyadah* is the counterpart of the contract in question in Islamic law. Unfortunately, the report did not identify the contradiction present in the law and also did not identify the gaps or loopholes. In this section of article, gaps and loopholes in statutory law on contract of exchange as enunciated in the TOP Act, 1882 from the *Shari'ah* perspective have been identified.

³⁶ This argument is based on the general prohibition of *ribā* in *Shari'ah*.

³⁷ Mehmood, 246.

³⁸ *Ibid.*, 248.

7.1 Definition of Contract of Exchange and issues from the *Shari'ah* perspective

Section 118 of the TOP Act, 1882 provides with the definition of contract of exchange. Contract of exchange is defined as, “when two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an exchange”.³⁹ This definition of contract of exchange resembles with the contract of *muqāyaḍah* in Islamic law. Mutual exchange of ownership of one property with the ownership of another property and neither of two or one of these two is money is called as contract of *muqāyaḍah*.⁴⁰ Contract of exchange of things or *muqāyaḍah* is different from the contract of sale or *bay'* as in former mutual exchange of ownership of things takes place while in a contract of sale there is an exchange of a thing for price.⁴¹

The law on contract of exchange can be enriched and can also be made *Shari'ah* compliant by introducing conditions required to be met for a valid contract of *muqāyaḍah*. The requisites for a valid contract of *muqāyaḍah* include that both the things must be exchanged mutually and possessed immediately during session of meeting of the parties to the contract.⁴² The things exchanged in a contract of *muqāyaḍah* must not be among the things, the mutual exchange of which is prohibited because of presence of *ribā 'l-faḍl*⁴³ and the prohibition of *ribā 'l-faḍl* is established on the authority of *ḥadīth* narrated by 'Ubādah b. Ṣāmit who said:

“The Messenger of Allah (PBUH) said; Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, like for like, in equal weights, from hand to hand. If those species differ,

³⁹ Chaudhary, 963.

⁴⁰ Mullā Khusraw Muhammad b. Farāmurz b. 'Alī, *al-Durar Al-Hukkām Sharḥ Ghurar Al-Aḥkām*, (Beirut: Dār Ihyā' al-Kutub al-'Arabiyyah, n.d), 2: 142.

⁴¹ Ibid.

⁴² 'Alī b. Abī Bakr b. Abdul Jalīl al-Marghinānī, *Al-Hidāyah Sharḥ Bidāyat al-Mubtadī*, (Beirut: Dār Ahyā' al-Turāth al-'Arabī, n.d), 5: 109; Mulla Khusraw, *al-Durar Al-Hukkām*, 1: 348.

⁴³ Al-Marghinānī, 5: 109.

then sell as you like as long as it is from hand to hand."⁴⁴

The mutual exchange of both things must take place at the spot or on immediate basis and must not be deferred.⁴⁵

7.2 Right of Party deprived of thing received in Exchange

Section 119 of TOP Act, 1882 provides the legal rule that if any party to a contract of exchange is deprived of the thing received by him under a contract of exchange by reason of defect in the title of the other person then such other person is liable to him for the loss caused to him and such a person is entitled with an option for the return of the thing transferred without consideration.⁴⁶ The first part of this section where the party is liable to make the loss good if other party will suffer from loss owing to his defect in title is *Shari'ah* compliant. The last part of this section is bearing issue from the *Shari'ah* perspective where the person is given an option to return the thing transferred without consideration in above mentioned situation. Such a person has also transferred the thing to other person and that was actually in consideration of the thing transferred to him by other person. He must exercise the given option of return of the thing transferred to him and must also demand another thing in replacement of a defected thing or he must demand money in consideration of a thing transferred to other person. Section 114 needs amendment in its second part.

7.3 Rights and Liabilities of Parties

Section 120 of the TOP Act, 1882 provides that in a contract of exchange the parties to the contract acquires the rights and liabilities of a seller as to what which he gives and has acquired the rights and liabilities of buyer as to what he takes.⁴⁷ This section

⁴⁴ Muslim b. al-Hijjāj al-Qushayrī, *al-Ṣaḥīḥ*, Kitāb al-Musāqāt, Bāb al-Ṣarf, Ḥadīth No. 1587.

⁴⁵ Zain Al-Dī Bin Ibrāhīm Bin Muhammad Ibn Nujaim, *Al-Baḥar Al-Rā'iq Sharḥ Kanz Al-Daqā'iq*, (Beirut: Dār Al-Kutb Al-Islāmī, n.d), 5: 282.

⁴⁶ Chaudhary, 973.

⁴⁷ *Ibid.*, 976.

is *Sharī'ah* compliant and does not violate any injunction of the Holy *Qur'ān* and *Sunnah*.

7.4 Exchange of Money

Section 121 of the Transfer of Property Act, 1882 provides with a legal rule that, “on an exchange of money, each party thereby warrants the genuineness of the money given by it”.⁴⁸ Section 121 is in contradiction with section 118 because section 118 excludes the exchange of money from the definition of ‘exchange’ and indicates that definition only covers mutual exchange of commodity with a commodity. In Islamic law distinct legal rules are applicable on contracts of *muqāyadah* and *ṣarf*. Contract of *ṣarf* in Islamic law means the mutual exchange of money or currencies.⁴⁹ Currency exchange contract or *bay' 'l-ṣarf* is practiced and permitted by the Holy Prophet (PBUH) but certain conditions are required to be fulfilled for a valid currency exchange contract or *bay' 'l-ṣarf*. These conditions include that both the parties to the contract must possess the exchanged currency before physical parting or before the session of meeting ends to avoid *ribā 'l-nasī'ah*.⁵⁰ Furthermore, equality of quantities is required where currency of the same genus is exchanged i.e. gold for gold or silver for silver.⁵¹ The currency exchange contract is binding;

⁴⁸ Ibid.

⁴⁹ Mansūr b. Yūnus Bin Ṣalāḥ al-Dīn b. Ḥasan b. Idrīs al-Buhūṭī, *Sharḥ Muntahī Al-Irādāt* (Beirut: ‘Ālim Al-Kutb, n.d), 2: 73; Shamim Roshan Ara, “Buyu‘ Fāsida”, *Minhāj*, vol. 8, No. 4 (Lahore: Research Cell, Dyal Singh Trust Library, 1990), 142; ‘Alā al-Dīn Abū Bakr b. Mas‘ūd b. Aḥmad al-Kāsānī, *Badā'i' Al-Ṣanā'i' fī Tartīb al-Sharā'i'*, (Beirut: Dār Al-Kutb Al-‘Arabī, 1974), 5: 215; Abū Muhammad Mawffaq al-Dīn ‘Abdullah b. Aḥmad b. Muhammad b. Qudāmah, *Al-Mughnī*, (Cairo: Maktabah Al-Qāhira, 1968), 4: 41.

⁵⁰ Muhammad b. Yūnus b. Ṣalāḥ Al-Dīn b. Ḥassan Bin Idrīs al-Buhūṭī, *Kashshāf al-Qinā' 'an Matn 'l-Iqnā'*, (Beirut: Dār Al-Kutb Al-‘Ilmiyyah, n.d), 3: 266; Al-Kāsānī, *Badā'i' Al-Ṣanā'i' i'* 5: 215; Ibn Qudāmah, *al-Mughnī*, 4: 41; Ministry of Awqaf and Islamic Affairs, Kuwait, *Al-Mawsū'ah al-Fiqhīyyah al-Kuwaitiyyah*, (Kuwait: Ministry of Awqaf and Islamic Affairs, 1983), 26: 350.

⁵¹ Abū Al-Qāsīm Muhammad b. Aḥmad b. Jazzī, *Al-Qawānīn Al-Fiqhīyyah* (Fās: Maṭba‘āt Al-Nahḍah, n.d), 166; Ibn Qudāmah, *al-Mughnī*, 4: 39; Ministry of Awqaf and Islamic Affairs, *Al-Mawsū'ah Al-Fiqhīyyah*, 26: 355.

therefore it must not contain any option.⁵² It must be devoid of options. The trading of currencies must take place immediately and should avoid deferment.⁵³

The legal rules on mutual exchange of money have been incorporated in *Shari'ah* Standard No. 1 issued by Accounting and Auditing Organization for Islamic Financial Institutions. It is permissible to exchange money with money provided that it is done in compliance with the *Shari'ah* rules that both the parties to the contract must take possession of the counter values before the parting of the parties to the contract or before the dissolution of the session. The counter values of the same currency must be of equal amount. The contract shall not contain any conditional or deferment clause regarding the delivery of one or both counter values.⁵⁴ Currency exchange contract shall not take place on the forward or future markets.⁵⁵ Reciprocal possession in a contract of *ṣaraf* is the delivery and acceptance of delivery within the session of the contract on the spot basis.⁵⁶

8. Contract of Gift

The legal rules on contract of gift are incorporated in the TOP Act, 1882 in sections 122 to 129. In this section of article at hand, gaps or loopholes have been identified in the 14th report of CII which conduct the scrutiny of prevalent law on contract of gift from *Shari'ah* perspective. The report of CII did not draw the attention of legislators to the point that overall the provisions of law dealing with contract of gift of property whether moveable or immoveable are in accordance with *Shari'ah* rulings on contract of *hibah*.

The report rightly pointed out that the statutory law on contract of gift lacks in dealing with the following issues; like

⁵² Al-Buhūti, 2: 73; Ibn Jazzī, 166; *Al-Mauwsū'ah al-Fiqhīyyah*, 26: 354.

⁵³ Al-Kāsānī, 5: 219; Ibn Jazzī, , *Al-Mauwsū'ah al-Fiqhīyyah*, 26: 354-355.

⁵⁴ *Shari'ah Standards for Islamic Financial Institutions*, Accounting and Auditing Organization for Islamic Financial Institutions, Standard No. 1, "*Trading in Currencies*", Article 2/1, 5.

⁵⁵ *Ibid.*

⁵⁶ AAOIFI, Standard No. 18, "*Possession (Qabd)*", Article 3/7, 330.

issue of the validity of contract of gift made in contemplation of death, legal status of *'umrā* and *ruqbā*, *hibah tafḍīlī*, legal status of contract of *hibah* in favor of siblings, children, parents and spouse. It also lacks in providing the legal rule in case the gifted property is a joint property. Furthermore, the report recommends that sections from 163 to 180 from 3rd Volume of book titled, *Majmū'ah qawānīn e Islam* by Tanzīl ur Rehmān with reference to contract of gift must be promulgated as an integral part of the statutory law.

9. Transfer of Actionable Claims

The legal rules on Transfer of Actionable Claims are incorporated in sections 130 to 137 of the Transfer of Property Act, 1882. Council of Islamic Ideology, in its 14th report on the Transfer of Property Act, 1882, did not evaluate the provisions of this chapter in detail and only made a declaratory statement that transfer of actionable claims amounts to contract of agency for collection of debts. The analysis of Council of Islamic Ideology in its report is not sufficient and needs further work. This section of the article is designed to conduct *Shari'ah* analysis of definition of transfers of actionable claims so that the flaws in the report can be highlighted. Section 130 (1) of the TOP Act, 1882 defines Transfer of Actionable Claims as:

“The transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent, shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as in hereinafter provided be given or not.”⁵⁷

Section 130 of the TOP Act, 1882 does not provide clearly that what is meant by ‘transfer of actionable claim’. In fact the section

⁵⁷ Mehmood, 945; Mahmood and Shaukat, 987; Chaudhary, 1020; S. Badar-ul-Hassan, *The Transfer of Property Act 1882* (Lahore: Irfan Law Book House, 1st ed. n.d.), 537; Malik, 308-309; Mahmood, 256.

reveals only that how the transaction of transfer of actionable claim can be made effective and complete and insists upon the execution of an instrument in writing signed by the transferor. Section 130 states that on execution of an instrument in writing duly signed by the transferor all the rights and remedies of the transferor shall vest in the transferee. The transferee of an actionable claim is entitled to institute a suit or proceeding on his own name and can do so without seeking the consent of transferor to do so and without making him a party. The transfer of an actionable claim can be made with or without consideration.

Section 130 also contains two illustrations. Illustration no 1: A owes money to B, who transfers the debt to C. B then demands the debt from A, who pays, B. The payment is valid and C cannot sue A for the debt. Illustration No. 2: A effects a policy on own life with an insurance company and assigns it to a bank for securing the payment of an existing or future debts. If A dies, the bank is entitled to receive the amount of the policy and can sue on it without the concurrence of A's executor. The CII, in its 14th report, only declares that transfer of actionable claim involves the transfer of a claim to a debt or unsecured money by creditor to a third person and it resembles with the assignment of a right.⁵⁸ This analysis of CII is lacking in various aspects that the analysis conducted by CII did not identify the gaps in the law.

The above quoted two illustrations show that 'Transfer of actionable claim' means transfer of payable right or receivable debt. The first illustration indicates a transaction in which the claim to a debt is transferred from a creditor to a third person who is not the debtor of a transferor, it does not amount to *hawālah* and is called as agency contract for collection of a debt. Apparently the transaction seems to be within the parameters of *Shari'ah* but it must contain that the consent of debtor, creditor and third person must be obtained and is mandatory.⁵⁹ The second illustration indicates the assignment of a claim to a debt from one creditor to another creditor. In Islamic law, *hawālah 'l-haqq* appears to be

⁵⁸ CII, 154.

⁵⁹ The Council of Islamic Ideology did not analyze these provisions of law in the light of *Shari'ah* in its 14th report. This work, however, analyzed these provisions of law in the light of *Shari'ah* and discussed the law along with its counterpart concepts in *Shari'ah*.

counterpart of the transaction indicated in second illustration. In order to make the transaction valid as quoted in second illustration, the conditions required to be met are those which are mentioned in a contract of *hawālah* generally. Transfer of debt or assignment of a debt whereby liability of one debtor is transferred to another debtor is called as *hawālah 'l-dayn*.⁶⁰ Transfer of a liability from one debtor to another debtor and transfer of a right or claim from one creditor to another creditor can be made only while complying with the rules of contract of *hawālah*.⁶¹

Section 130 of the TPA Act, 1882 needs amendments in various aspects. The definition needs improvement so that it covers the transaction itself and not only the *modus operandi* of it. The section must be amended to contain clearly the conditions or the requisites required to make the transfer of actionable claim to be valid form *Sharī'ah* viewpoint.

10. Conclusion and Recommendations

In a nutshell, it can be concluded, from the above detailed analysis of CII 14th report on TOP Act, 1882 that the report succeeds at few places where it spotlights issues from the *Sharī'ah* perspective, for instance, in a contract of mortgage and lease on property in land. Whereas, the present paper finds that the work of CII lacks in many respects, for instance, sometimes the report lacks in understanding the position of statute on point under discussion, like in case of transfer of actionable claims and sometimes it lacks in elaborating the position of *Sharī'ah* like in case of contract of exchange. Moreover, sometimes it lacks in making recommendations which may address *Sharī'ah* issues in enactments. Furthermore, this study suggests recommendations for Islamization of TOP Act, 1882. This paper is an attempt to give some recommendations to make the role of CII more effective in responding to the present day needs. At the end, this work proposes a strategy of taking on board the experts on statutory law so that position of statutory law on point can be made clearly and later on *Sharī'ah* analysis may be conducted and recommendations must be made to make the statutory law

⁶⁰ Ibid.

⁶¹ Al-Jazā'iri, 3, 250.

Shari'ah-based and *Shari'ah* compliant. In future endeavors made in bringing the existing laws to be in compliance of *Shari'ah* must not only declare some provisions of law to be un-Islamic and rather focus on suggesting reforms in the law.
