



**RESEARCH PAPER**

**Compatibility of Laws Governing Contracts of Sale in Pakistan: An Analytical Study in the Light of *Shari'ah* and Law**

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**PAPER INFO**

**Received:**  
January 11, 2020  
**Accepted:**  
March 18, 2020  
**Online:**  
March 31, 2020

**Keywords:**

Analytical Study,  
*Shari'Ah* And Law,  
*Shari'Ah* Issues,  
Statutory Law and  
Contract of Sale

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**ABSTRACT**

This paper attempts to analyze the *Shari'ah* compatibility of laws governing the 'contracts of sale' in Pakistan. The Transfer of Property Act, 1882 deals with the contracts of sale for immovable property while the Sale of Goods Act, 1930 regulates the sale transactions involving goods or moveable property. This paper investigates the *Shari'ah* compatibility of the provisions of two statutes. Three core transactions under the above mentioned legal regime have been identified to be incompatible with the *Shari'ah* rules. The study finds that (i) sections 54 and 56 of Transfer of Property , 1882; and (ii) sections 5 and 6(2) of the Sale of Goods Act, 1930 to be incompatible with *Shari'ah* rules and need to be amended accordingly to bring the 'sale contract' in conformity with *Shari'ah* principles. This study further finds the Marshalling of mortgaged property to be inconsonant with *Shari'ah* principles as it does not require the consent of mortgager to sell the mortgaged property and needs to be brought in conformity with *Shari'ah* principles.

**Introduction**

In the past decade, Moveable property includes goods and immovable property includes land (George W. Keeton, 1930). Sale of Goods Act, 1930 regulates the contract of sale for goods. While the Transfer of Property Act, 1882 deals with the contract of sale for immovable property. This paper attempts to analyze the *Shari'ah* compatibility of the contracts of sale under above mentioned statutes.

## **Legal Status of Contract of Sale and Agreement to Sell**

### **Contract of Sale and an Agreement to Sell the Property in Land**

Section 54 of the Transfer of Property Act, 188 provides with two transactions i.e. promise of sale and contract for sale (Mehmood, 2013; Mahmood & Shaukat, 2013). In a contract of sale ownership of immovable property is transferred absolutely along with all associated rights to the buyer against a determined consideration. No rights are left in the transferor after the conclusion of such a transaction. Contract of sale of immovable property is an executed contract (Mehmood, n.d). While the contract for sale refers to a promise to sell property. In a contract for promise of sale or an "agreement to sell" immovable property, the parties to the contract agree that sale of such property will take place in future on agreed terms between the parties. A contract for sale or an agreement to sell is to be executed in future. Therefore, it does not create any interest or right and does not transfer title. The same would merely give buyer a right to file a suit for specific performance of an agreement and in addition claiming the damages for breach of contract (Chaudhary, 2014). Moreover, an agreement for sale of immovable property is not required to be registered in accordance with section 17 of Registration Act 1908 (S Mahmood & Shaukat, 2007).

An agreement to sell does not create any title or vested right in favor of the vendee (PLD 2007 Karachi 358; 2003 CLD 552; 2011 CLC 1325, 1987 CLC 1149) and such vendee would get only a right to compel other party i.e. vendor to execute a sale-deed in respect of property in question (1990 CLC 588). Furthermore, ownership would not be transferred from vendor to vendee on the basis of an agreement to sell (PLD 2006 Lahore 43; 2010 CLC 220; 2011 CLC 1325; 2003 CLD 552). An agreement to sell involves future obligations, therefore, the same is required to be executed and attested by two witnesses (Mehmood, 2013; 2002 SCJ 893). Furthermore, an agreement to sell is not binding and a breach would entitle the aggrieved party to get damages only as agreement to sell creates *rights in personam* and not the *rights in rem* (Badar-ul-Hassan, 1993). Therefore an agreement to sell must be converted to a sale-deed in order to transfer the tile and associated rights (PLD 2004 Lahore 471). Without which, an agreement to sell is of no value and it does not create any interest in property (NLR 1991 UC 129).

An agreement to sell immovable property purports to sell the property in the future. However, a contract is not permissible under *Shari'ah* rules as the transaction cannot be affected at a future date. Future contract is permissible only where the promise to perform is not binding in nature and not linked with other conditions like down payment or earnest money. In cases, where the mutual promise is binding on the parties, it would attract the general prohibition under the doctrine of "sale of debt for debt", and would be inconsistent with *Shari'ah* rules (Mansoori, 2007).

The above discussion suggests that the *Shari'ah* rules preferred spot transactions instead of deferred ones and impose strict limitations in cases where counter values in a transaction are deferred (Al-Jaziri, Vol. 2, 2003). As such a binding "agreement to sell" the immovable property under Section 54 of the Transfer of Property Act, 1882 attracts the *Shari'ah* prohibition under "sale of debt for debt" and is inconsistent with *Shari'ah* commands. Therefore, the Section 54 of the Transfer of Property Act, 1882 needs to be suitably amended to the extent that the mutual promise in an agreement to sell must not be binding and not be linked with conditions like down payment.

### **Contract of Sale and an Agreement to Sell Moveable Property**

According to section 4 (1) of Sale of Goods Act, 1930 contract of sale of goods is defined as "a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price". Section 4 (3) of Sale of Goods Act, 1930 provides that, "where under a contract of sale the property in form of goods is transferred from the seller to the buyer, the contract is called a sale. However, where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called as agreement to sell". Section 4(4) of Sale of Goods Act 1930 provides that, "an agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred" (Choudhry, n.d, p. 6).

The above quoted definition of contract of sale of goods indicates that contract of sale of goods is different from an agreement to sell the goods. In a contract of sale of goods, the goods are immediately transferred from the seller to the buyer at the time of execution of the contract. On the other hand, in an agreement to sell, the goods are promised to be transferred at a future time or subject to fulfillment of certain conditions. Therefore, a contract of sale can be absolute or it can be conditional contract to be performed in future. An agreement to sell will become a contract of sale when the time elapses or the requisites are fulfilled (Jones, 2015).

According to the *Shari'ah* commands, the contract of sale can only be accomplished for the goods which do exist at the time of conclusion of a contract (Al-Kāsānī, Vol. 5, 1974). However, an agreement to sell under Sale of Goods Act, 1930 permits the sale of future goods or contingent goods (Farani, n.d).

Contract of sale is an executed contract whereas an agreement to sell is an executing contract (Borrie, 1980). A contract of sale is a contract, in addition to it, it is also a conveyance. An agreement to sell is simply a contract to be executed in the future. The rights created as a result of a contract of sale of existing goods are *jus in rem* whereas the rights created as a result of an agreement to sell are *jus in personam* (Badar-ul-Hassan, 1993). In a contract of sale of goods the buyer acquires rights in the goods whereas in an agreement to sell the buyer only acquires the right to claim the goods which is a personal right against the seller. In case of a breach of a

contract of sale the buyer is entitled for damages as well as for recovery of goods. In case of a breach of an agreement to sell the buyer can only sue for damages for breach and not for the recovery of goods (Hussain, 2010).

In the foregoing paragraphs the legal status of contract of sale of existing goods and an agreement to sell the future and the contingent goods have been discussed in the purview of statutory laws governing the "Contract of Sale" in Pakistan. In the proceeding paragraphs of this paper, the *Shari'ah* status of contract of sale of existing goods and an agreement to sell the future and contingent goods will be explored. For that purpose the 'contract of sale of goods' is to be examined under two different categories i.e.; 'existing goods' and the 'future goods'.

### ***Shari'ah* Compatibility of Contract of Sale of Existing Goods**

'Existing goods' are the goods in actual existence at the time of the contract of sale and are owned or possessed by the seller for the immediate delivery. The seller is presumed to own the title or authorized to enter in to a contract of sale. Contract of sale for existing goods would immediately transfers the goods with title and risk from buyer to the seller (Mannan, 1979). In a contract where existing goods have been ascertained or specified, the transfer of goods would conclude the contract. Such transaction under Sale of Goods Act, 1930, is similar to the *Shari'ah* based sale or "*bay' muṭlaq*" and would be in conformity with the *Shari'ah* principles.

### ***Shari'ah* Compatibility of an Agreement to Sell the Future Goods**

Future goods are those which can be manufactured or produced and acquired after the making of the contract of sale. Future goods can be ordered goods. Therefore, contract of future goods resembles with *Bay' Istiṣnā'*. Contract of *Istiṣnā'* refers to the request of manufacturing a specific item in a specific form (Al-Kāsānī, vol. 5, 1974). *Al-Majallah Al-Aḥkām* defined contract of *Istiṣnā'* in terms of contract of manufacture and sale that it is a bargain concluded between the person who order and the person who undertakes to manufacture the specific item in a specific form (Al-Majallah Al-Aḥkām, 1980). According to the *Shari'ah* rule, for a valid *Istiṣnā'* contract, the manufacturer should provide the raw material and the labour to produce the product specified in the contract (Al-Kāsānī, vol. 5, 1974). *Istiṣnā'* contracts are for manufactured and produced goods acquired after the making of the contract of *Istiṣnā'* and hence, operate on non-fungible goods. The peculiar feature of contract of *Istiṣnā'* is to finance manufacturing and production of goods on demand (Dau-Schmidt, 2017).

Future goods are ordered goods and contract for sale can be made by description or by sample or by both sample and description (See Sections 15 and 17 of Sale of Goods Act, 1930). *Shari'ah* does not allow the contract of sale for non-existence goods at the time of the contract (Mansoori, 2005). An agreement to sell can be made on future goods.

The statutory law on agreement to sell the future goods appears to be *Shari'ah* compliant and resembles with a supply contract or order contracts where order is placed by the buyer to the seller for goods by sample or description or by both sample and description and such goods are manufactured, produced and delivered by the seller.

### **An Agreement to Sell the Contingent Goods**

An agreement to sell contingent goods is not permissible in *Shari'ah* as it involves uncertainty regarding the happening of an event on which the conclusion of a contract depends. Such agreements are clearly prohibited in *Shari'ah*. As such Section 6(2) of Sale of Goods Act, 1930 does not conform to the *Shari'ah* principles.

### **Shari'ah Issue in Marshalling by Subsequent Purchaser**

Section 56 of the Transfer of Property Act, 1882 provides procedure on marshalling by subsequent purchaser of the property. If the owner of two or more properties mortgages these properties to one person and later on, the owner sells one of such mortgaged properties to another person. In such a situation the buyer or purchaser is entitled to have the right to ask the mortgagee to satisfy his claim out of the property or properties which have not been sold to him. If mortgage amount cannot be satisfied out of such property or properties then the subsequent purchaser cannot exercise such right of marshalling and property or properties sold to him can also be sold to satisfy the claim of creditor or mortgagee (Malik, 2012).

According to the *Shari'ah* principles, the contract of *bay'* will be considered as *nāfidh* when it becomes operative and its legal effects take place (Muhammad Tahir Mansoori, 2005). The contract of *bay'* will be considered as *mawqūf* when the enforcement of contract of *bay'* is suspended. The causes of suspension of contract of *bay'* may be defective capacity of the contracting parties or lack of proper authority or the right of third party is involved such as when the owner sells the mortgaged property and such a sale is subject to ratification by the mortgagee (Al-Mawsū'ah Al-Fiqhiyyah Al-Kuwaitiyah, vol. 9, n.d). Therefore, the selling of mortgaged property by the mortgagor to a subsequent purchaser will remain suspended till the consent to such a sale is acquired or obtained by the seller or mortgagor.

### **Shari'ah Analysis of Various Modes of Contract of sale of Goods**

According to section 5 of Sale of Goods Act, 1930 the contract of sale of goods may be made through immediate delivery of goods or there may be immediate payment of price or both or it may be agreed that the delivery is to be made at some future time or payment of price may be made at some future time or both or it may be agreed that the delivery or payment or both are to be made in installments as agreed between the parties to the contract (Hafeez-ur-Rahman, 2002).

Section 5 of Sale of Goods Act, 1930 provides with the multiple transactions such as:

- There may be immediate delivery of goods and also immediate payment of price.
- There may be immediate delivery of goods and payment of price is deferred to a future date.
- There may be immediate payment of price and delivery of goods is deferred to be made on some future date.
- There may be immediate delivery of goods with payment of price through installments.
- There may be delivery of goods through installments with immediate payment of price.
- There may be delivery of goods and payment of price both in installments.
- There may be agreement that delivery of goods and payment of price both to be made at some future date.

The laws applicable to all these modes of transactions mentioned in Section 5 are same as incorporated in the Sale of Goods Act, 1930. Under *Shari'ah* principles, each of these transactions is regulated separately and different legal rules are applicable to every mode of transaction mentioned in section 5 of Sale of Goods Act, 1930. There may be immediate delivery of goods and also immediate payment of price. Such a transaction is called as *Bay' Muṭlaq* (Al-Jazīrī, vol. 2, 2003). Where there is immediate delivery of goods and payment of price is deferred it is called as *Bay' Al-Mu'ajjal* (Al-Mawsū'ah Al-Fiqhīyah Al-Kuwaītiyah, vol. 9, n.d). In cases where there is immediate payment of price and delivery of goods is to be made at some future time it is called as *Bay' Al-Salam*. There may also be delivery of goods in installments with immediate payment of price. Such a transaction also comes under *Bay' Al-Salam* (Al-Jazīrī, vol. 2, 2003). There may be immediate delivery of goods with payment of price in installments. Such a transaction falls under the category of *Bay' Bil-Qisṭ* or *Bay' Bil Taqsīṭ* (Resolution No. 51/2/6 of Islamic Fiqh Academy, 2002). There may be delivery of goods and payment of price both in installments. Such a transaction is concluded in the form of various contracts separately and independently (Al-Mawsū'ah Al-Fiqhīyah Al-Kuwaītiyah, vol. 9, n.d). In cases where there is an agreement to deliver the goods and payment of price both are to be made at some future date it is called as an agreement to sell and it amounts to sale of debt for debt or *bay' al-dyn bi al-dyn* (Rushd, vol. 3, 2004) .

The mechanism provided in Sale of Goods Act, 1930, cover *Bay' Muṭlaq* alone and do not cover transactions other than ordinary sale mentioned in Section

5. Below is the detail on the counterparts of above mentioned transactions in section 5 of Sale of Goods Act, 1930 from *Shari'ah* perspective to explain that each transaction under *Shari'ah* rules is independent transaction and bears its peculiar features. *Shari'ah* rules sets limitations to be observed while making these transactions.

### ***Bay' Muṭlaq***

*Bay' Muṭlaq* is the transaction in which the goods are purchased by the buyer from the seller for a consideration to be paid in the form of certain amount of money (Al-Sarakhsi, vol. 15, 1993). *Bay' Muṭlaq* is an ordinary sale and it immediately transfers the property in goods along with the transfer of the risk and the title from the seller to the buyer (Ibn Rushd, vol. 3, 2004). Ownership of property is transferred to buyer and ownership of money as a price is transferred to the buyer (El-Gamal, 2002).

### ***Bay' Al-Mu'ajjal* or Credit Sale**

*Bay' al-Mu'ajjal* is a transaction in which the goods or the commodity is sold to the buyer by the seller at the spot the transaction is made and payment of price agreed between the seller and buyer is deferred. It means that goods are delivered immediately but price is to be paid on deferred basis on some future time. *Bay' al-Mu'ajjal* can also be called as deferred sale or credit sale. Under the *Shari'ah* principles the *Bay' al-Mu'ajjal* or credit sale is valid sale and there is no disagreement among the Muslim jurists on its validity. The validity of *bay' al-mu'ajjal* is based on two logical reasons; firstly, it includes in the generality of trade which is allowed in *Shari'ah* (Mansoori, 2005). Secondly, there is evidence from the *ḥadīth* that the Holy Prophet ﷺ bought a quantity of grain from on the basis of deferred payment and he pledged his armour as security for the payment (Sahīh Al-Bukhārī, Kitāb Al-Rahn, Ḥadīth No. 2509).

It can be concluded from above *Shari'ah* principles that the price of the commodity on deferred payment should not be more than the cash price and it should be according to prevailing market price (Muhammad Tahir Mansoori, 2005).

### ***Bay' Al-Salam***

According to Ḥanafī school of thought, contract of *Salam* is a contract of sale of *dhimah* or liability the features of which are described in exchange for a price or *ra's al-māl* which is paid in advance (Ibn Humām, Vol. 5, n.d; Ibn 'Ābidīn, Vol. 4, 1992). According to *Shāfi* and *Ḥanbalī* schools of thought contract of *Salam* is a contract on described merchandise which is sold as a deferred liability on one party in exchange for a price which is paid during session of contract (Al-Khaṭīb Al-Shirbīnī, vol. 2, 1994; Al-Buhūtī, vol. 3, n.d.). According to Mālikī school of thought contract of *salam* is a sale in which *ra's al-māl* or price paid in advance and

subject-matter or object is to be delivered on a deferred date or on a specified time (Al-Dardir, Vol. 3, n.d). Thus it is a contract in which the vendee pays the price in advance and the vendor undertakes to deliver the fungible commodity at specified time in future (Nicolas C. Dau-Schmidt, 2012). Such a transaction is called as *Salam* in *Hijaz* and *Salaf* in Iraq (Al-Jaziri, vol.2, 2003).

On the touchstone of *Shari'ah* principle of "Don't sell which you don't have", the contract of *Salam* appeared to be prohibited. Contract of *Salam* is allowed as an exception that the companions of the Holy Prophet ﷺ brought this mode of sale to his notice to seek his guidance (Al-Jaziri, vol.2, 2003). The Holy Prophet ﷺ called it a *Salam* and allowed it with certain stipulations. During the lifetime of the Holy Prophet ﷺ and the following period the practice of contract of *Salam* continued with reference to crops or agricultural produces. The later Muslim Jurists unanimously decided to consider it as a permissible mode of business. The Muslim Jurists extended the applicability of permission of contract of *Salam* from agricultural products to commodities which can be weighed and measured (Ibn Rushd, vol. 2, 1988).

It is evident from above discussion that a valid contract of *Salam* has to fulfill certain *Shari'ah* conditions. The price of the commodity must be paid in full in advance at the time of making of the contract. The delivery of the commodity must be made at some future time and future time must be specified at the time of making of contract (Al-Jaziri, Vol. 2, 2003). The commodity must be fungible thing i.e. weighable, measurable or counted items (Ibn Rushd, vol. 2, 1988). The commodity must be defined either by sample or by description or by both (Ibn Jazzy, n.d.).

### ***Bay' Bil Taqsit***

In such a transaction the possession of goods purchased is delivered to the buyer and buyer make the payment as price in installments to the seller as agreed upon at the time of making of the contract. Such a transaction in which price is paid on deferred basis and commodity is delivered on spot generally called as Installment sale or *Bay' Bil Taqsit*. In such a transaction, generally the price is higher than the cash price of the same commodity. Islamic Fiqh Academy in its sixth session held in Jeddah passed a resolution no. 51/2/6 on the permissibility of Installment sale of *bay' bil taqsit*. The same was also upheld by Islamic Fiqh Academy in its seventh session and passed a resolution no. 64/2/7.

### ***Bay' Istijrar***

*Istijrar* means purchasing goods in different quantities from time to time. There is only one master agreement in which all terms and conditions are settled and agreed upon by the parties to the contract. After conclusion of master



agreement, there is no further offer or acceptance or bargain. The buyer purchases the goods from time to time. There are two ways to determine price in such a transaction, i.e. either to determine the price after all transactions of purchase have been made and completed or the price can be determined in advance and the purchase is executed from time to time (Al-Mawsū'ah Al-Fiqhiyyah Al-Kuwaitiyah, vol. 9, n.d).

### ***Bay al-dyn bil-dyn***

The last mode of conclusion of contract of sale of goods is where delivery of commodity and payment of money as price both are deferred. Such a transaction amounts to *bay' al-dyn bil-dyn* as both counter values are deferred in such sale. *Shariah* clearly prohibits such transactions (Ibn Rushd, 2004). Therefore, Section 5 of Sale of Goods Act, 1930 is inconsistent with *Shari'ah* rules.

Section 4 of Sale of Goods Act, 1930 define contract of sale and agreement to sell the future and contingent goods along with section 6. Section 5 of Sale of Goods Act, 1930 provides that contract of sale may imply various transactions. The mechanism incorporated in Sale of Goods Act, 1930 are usually applicable on contract of sale of existing goods and do not cover various transactions as mentioned in Section 5. As stated above various transactions mentioned in section 5 of Sale of Goods Act, 1930 are separate and independent contracts. Under *Shari'ah* principles, separate rules have to be applicable on such transactions which are different from the ordinary sale.

In the light of above discussion it is evident that the Section 5 of Sale of Goods Act, 1930 lacks the capacity to separately deal with various forms of sale transactions under *Shariah* principles. It is therefore recommended that section 5 of Sale of Goods Act, 1930 be suitably amended and specific procedure be incorporated to accommodate the *Shariah* transactions in Sale of Goods Act, 1930.

### **Conclusion**

It is evident, from above discussion, that the contract of sale and an agreement to sell are entirely different transactions. While the former represents an executed contract and the latter represents an executory contract. The statutory provisions of Transfer of Property Act, 1882 dealing with the contract of land or immoveable property and contract of sale of goods in Sale of Goods Act, 1930 appear to be compatible with *Shari'ah* principles. The statutory provision of law dealing with an agreement to sell an immoveable property i.e. last paragraph of section 54 of the Transfer of Property Act, 1882 does not conform to the *Shari'ah* rules and needs amendment to bring it in the realm of *Shari'ah*. However, the law regulating the agreement to sell an immoveable property should be amended in a way that the transaction should not fall within the general prohibition of sale of debt for debt in Islamic law. Similarly, section 6 (2) of Sale of Goods Act, 1930 do not conform with the *Shari'ah* rules and should also be amended in a way that

contingent goods must include those goods the presence of which can be dependent upon the happening or non-happening of a certain event.

Section 56 of the Transfer of Property Act, 1882 too is not compatible with the *Shari' ah* commands which require the consent of mortgagee prior to the sale of mortgaged property by owner. The same needs to be amended to conform with the *Shariah* principles.

Section 5 of Sale of Goods Act, 1930 treats sale of goods as singular transaction and does not cover the various modes of sale as prescribed by *Shari' ah*. It needs to be brought in conformity with *Shariah* principles by adding specific provisions for each *Shariah* transaction.

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