

DE GRUYTER

Saad Bakkali, Abbas Mirakhor

RISK-SHARING FINANCE

AN ISLAMIC JURISPRUDENCE (FIQH) PERSPECTIVE

DE GRUYTER STUDIES IN ISLAMIC ECONOMICS,
FINANCE AND BUSINESS

DE
G

DE GRUYTER

Saad Bakkali, Abbas Mirakhor

RISK-SHARING FINANCE

AN ISLAMIC JURISPRUDENCE (FIQH) PERSPECTIVE

DE GRUYTER STUDIES IN ISLAMIC ECONOMICS,
FINANCE AND BUSINESS

DE
G

Saad Bakkali, Abbas Mirakhor

Risk-Sharing Finance

De Gruyter Studies in Islamic Economics, Finance and Business



Edited by

Abbas Mirakhor

Idris Samawi Hamid

Volume 10

Saad Bakkali, Abbas Mirakhor

Risk-Sharing Finance



An Islamic Jurisprudence (Fiqh) Perspective

DE GRUYTER

ISBN 9783110590463

e-ISBN (PDF) 9783110593433

e-ISBN (EPUB) 9783110590555

**Bibliographic information published by the Deutsche
Nationalbibliothek**

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.dnb.de>.

© 2021 Walter de Gruyter GmbH, Berlin/Boston

Contents

Acknowledgment

Prologue

1 Introduction

1.1 Fiqh and Shari'ah

1.2 Risk Sharing and Fiqh

1.3 Literature Review

1.4 Contemporary Shari'ah-compliant Financial Instruments

1.5 The Concept of Risk Sharing

1.5.1 Current Approaches to Shari'ah Ruling

1.5.2 Shari'ah-based Framework in Risk Sharing

1.6 Objectives

1.7 The Scope of the Study

1.8 Expected Results and Policy Implications

1.9 Chapter Outline

2 Al-Bay': The System and its Contractual Mechanisms

2.1 The Concept of al-Bay'

2.1.1 Introduction to the Linguistic Meaning of al-Bay'

2.1.2 Morphological Structure of al-Bay'

- 2.1.3 Lexical Analysis of the Main Base Word of “al-Bay’”
- 2.1.4 Lexical Meaning of the Term ‘ba’, ya’/ waw, ‘ayn’

2.2 Introduction to the Usage of al-Bay’

- 2.2.1 Al-Bay’ in the Context of Fiqh
- 2.2.2 Al-Bay’ in the Quran
- 2.2.3 Al-Bay’ in the Context of Al Quran

2.3 The Difference between al-Bay’ and al-Tijarah

- 2.3.1 Issues Regarding Synonymousness in the Context of Arabic Language and the Holy Quran
- 2.3.2 Synonyms in the Holy Quran
- 2.3.3 Are al-Tijarah and al-Bay’ Synonyms?

2.4 Definition of al-Bay’ System and its Characteristics

- 2.4.1 Justice: The Foundation of the al-Bay’ System
- 2.4.2 Property Rights: The Subject of al-Bay’ System
- 2.4.3 Ownership in Light of Fiqh Discussions on Dhaman
- 2.4.4 Definition of Al-Mal (Property Rights/Estate)
- 2.4.5 Other Al-Bay’ system characteristics

3 Risk Sharing as a Mechanism of the Al-Bay’ System

3.1 Risk and Shari’ah Treatment

- 3.1.1 Risk Arising from Contract
- 3.1.2 Risk Arising from Future Uncertainty

3.2 Treatment of Risk

- 3.2.1 Risk Aversion
- 3.2.2 Risk Transfer
- 3.2.3 Risk Sharing and its Parameters

3.3 Risk Sharing and Contract Legitimacy

3.3.1 The Conditions of a Legitimate Contract

3.3.2 Risk and Risk Taking as Part of Fuqaha Consideration

3.3.3 Istisna' and Risk

3.4 Conclusion

4 Applying Risk Sharing to Intangible Asset Financing

4.1 Innovation and Contract Creation

4.2 Investing in Intangible Assets

4.2.1 The Fiqh Structure of Investing in Education

4.2.2 Overview of the Investment

4.2.3 The Product Structure

4.2.4 The Fiqh Issues

4.3 Conclusion

5 Conclusion

5.1 Policy Recommendations

5.2 Limitations of the Study

5.3 Future Research

References

Acknowledgment

بسم الرحمن الرحيم وبه نستعين

All praise be to Allah, Lord of the Worlds, and may the peace and blessings be upon the noblest of Prophets and Messengers, our Prophet Muhammad, and on his family.

We seek refuge in Allah from the evils of the soul and the wickedness of our deeds. Whomsoever Allah guides, none can misguide, and whomsoever Allah misguides, none can guide. I thank Allah, the Exalted, for the completion of this book.

This work has been concluded with the support and encouragement of numerous people including family members, friends, and colleagues. We would like to express our gratitude to all those who made this possible. We ask Allah to reward all these peoples with His endless love and blessings.

والحمد أولاً وآخراً

Prologue

One of the perennial issues and major criticisms facing contemporary Islamic finance revolves around the design and development of instruments that replicate those in the conventional finance space. This has led to the emergence of a new asset class that is devoid of the most important features that are envisioned to reflect the ideal form of Islamic finance – namely stability, financial inclusion, fairness and justice, as well as poverty alleviation. This is because the Islamic finance instruments that are currently used in the industry are directly or indirectly transfer the risk to the other parties involved. Many scholars view the Fiqh approaches taken in this regard as contributing toward the conversion of “Shari’ah inspiration” to “Shari’ah risk” that has to be priced in Islamic finance transactions. Accordingly, these fiqhi approaches relate to bilateral real sector transactions, whereas contemporary finance mainly deals with multilateral and multi-counterparty transactions. Fiqh has yet to develop the Shari’ah conceptualization for this mode of financing. Thus far, it has become a norm for large financing projects to rely on a complex structure of interconnected bilateral contracts that in totality becomes opaque, complex and costly. This led to the Kuala Lumpur Declaration where prominent Fiqh jurists and economists declared risk sharing as the essence of Islamic finance, opening the doors for a new fiqhi approach to take the lead. This Declaration (Fatwa) provides a prime motivation to search for a comprehensive Shari’ah model of risk sharing that can serve as a capstone contract encompassing all potential contemporary financial transactions. This book is an attempt towards meeting that very objective.

From the Shari'ah perspective, the technical aspects of risk sharing in contemporary finance have yet to be defined in Islamic literature. Nevertheless, this concept has been widely used in Islamic jurisprudence. Al-Musharakah fi Al-Makhatir is one of the terms used to describe risk sharing. Others refer to the legal maxim such as Al-Ghunm Bi Al-Ghurm, which can be interpreted as "gain is justified with risk taking". Other fiqhi literature also derives the concept of risk sharing under a different term, which is dhaman (literally meaning liability). Some scholars argue that the word 'dhaman' has acquired a new meaning in modern Arabic where it is now equivalent to the English word "risk". Nonetheless, the question is whether this method of understanding risk sharing will indeed solve the problem of fictitious contractual arrangements. The fiqhi approach, in this regard, suggests that to grant permissibility to a transaction, the parties involved should contribute to the business either by capital or effort. In other words, risk should be borne in accordance with the ability to bear the risk. This book is a comprehensive study of the Shari'ah sources to establish both the theoretical, as well as an applicable practical concept of risk sharing to address the contemporary problem.

This study begins the discussion by referring to Verse 278 of Surat al-Baqarah to distinguish the concept of risk sharing from the ribawi system. Allah said: "Allah has permitted al-bay' and prohibited al-riba." The findings suggest that al-bay' in this Verse refers to a system in which a mutual exchange occurs where one bundle of property rights is exchanged for another. The rules surrounding the exchange construct the said system. The outcome of this system can claim that it is through its rules which govern just exchange, distribution, and redistribution that the entire Quranic position on economic relations is oriented towards risk sharing. Hence, this work defines risk sharing based on the rules pertaining to exchange and Muqtadhayatu Al-'Uqud

or the legal consequences of these rules. Thus, risk sharing is the ultimate result of applying rules that constitute the al-bay' system, where the risks associated with transactions are taken by the parties who are involved based on their willingness (tradhi) and their ability (al-wos') to take the risk. In applying this concept to the current economic system, risk sharing will serve as a contractual or societal arrangement whereby the outcome of a random event is borne collectively by a group of individuals or entities involved in a contract, or by individuals or entities in a community. The book concludes with the application of risk sharing to a contemporary need of talent financing and addresses the relevant shari'ah issues.

1 Introduction

The replication of conventional products in the design and development of Islamic finance instruments in their present form and operation is a perennial issue facing the industry. This has led to the emergence of a new asset class that is devoid of the most important features that are envisioned to reflect the ideal form of Islamic finance; namely stability, financial inclusion, fairness and justice, as well as poverty alleviation.

The instruments that are currently used in the Islamic finance industry have been widely deemed to be Shari'ah compliant. This Shari'ah compliant approach adopted by the industry is viewed as contributors towards the conversion of "Shari'ah inspiration" to "Shari'ah risk" that has to be priced in Islamic finance transactions.¹ To be fair, this approach renders its judgements based on the available fiqh on transactions that are not contemporized and has changed very little since the middle ages of the history of Islamic jurisprudence. Accordingly, this fiqh also relates to bilateral real sector transactions, whereas contemporary finance mainly deals with multilateral and multi-counterparty transactions. Fiqh has yet to develop the Shari'ah conceptualisation of this modality of financing. Thus far, it has become a norm for large financing projects to rely on a complex structure of interconnected bilateral contracts that in totality becomes opaque, complex and costly. It is therefore very timely that risk sharing has been declared as the essence of Islamic finance in a recent statement issued by prominent fuqaha and Muslim economists, popularly known as the Kuala Lumpur Declaration.² This Declaration (Fatwa) provides a prime motivation to search for a comprehensive Shari'ah model of risk sharing that can serve as a capstone contract encompassing all

potential contemporary financial transactions. This book is an attempt towards meeting that very objective.

1.1 Fiqh and Shari'ah

There is a difference between Shari'ah and fiqh, although, in practice the two are often mixed up.³ This confusion may arise from the definition of Shari'ah itself. Shari'ah is often used to refer to the entire Islamic system which maintains the understanding of mujtahidun (pl. of mujtahid – a person who exercise ijtihd, applying methodology to arrive at the rulings) who differ from one another in the methodologies used and outcomes arrived at. Therefore, mixing up scholars' opinions with Shari'ah may lead to confusion. Indeed, considering scholars' opinions as "The Divine Shari'ah" would ultimately result in having Shari'ah with two or more rulings for one particular matter which is not totally accurate. Moreover, attaching opinions of the scholars to Shari'ah and giving them the same status may generate another problem – the possibility of Shari'ah being right or wrong as the ijtihad is.⁴ This probability is not accepted for the Divine, at least for those who believe in it. Similarly, the main feature of Shari'ah is the perpetual nature of its rulings and teachings, whereas the understanding of scholars at different points of time may not be. Not unless we ease the terminology of "Shari'ah" to maintain the whole system and we refer to 'the real Shari'ah' as Nusus al-Shari'ah (the divine texts). Thus, the fiqh or the understanding of scholars must be distinguished from Shari'ah.

The main classification in jurisprudence literature places the sources of Shari'ah under two categories: 1) primary sources and 2) secondary sources. Most of literature categorize Quran and Sunnah as primary sources, whereas Ijma' and Qiyas and

other “sources” are categorized as secondary sources. In fact, the only source that stands by itself without any need for external evidence is the Quran (self-evident truth);⁵ whereas Sunnah needs to be in line with the Quran as a source of law; as do the other sources. This leaves us with only one primary source of Shari’ah which is the Quran. However, the Quran itself stated many times that the sunnah of the Prophet has to be followed and obeyed.⁶ This implies that the Sunnah of the Prophet is a source of Shari’ah. These two sources were the main origins of Shari’ah during the time of the Prophet with some additional mechanisms which were referred to back then as Raey (opinion) or Ijtihad and Qiyas later on. These methods did not stand alone as sources of law. They are more about the maximum effort that an individual would make, based on his knowledge, to arrive at the rule of a given matter. The result of this effort was subject to the Prophet’s corrections (if any) and final approval.⁷ Here, we should notice that Ijtihad at the time of the Prophet was in space of implementing and applying the general rules that were stated clearly by the Quran and the Sunnah.

The death of the Prophet was a sign of the completion of Shari’ah in two ways, namely: legislation and application. The companions after the time of the Prophet found themselves with this “limited” number of textual sources; however, they had a strong belief that the Shari’ah was complete. Nevertheless, their application of these sources may sometimes differ from one to another. In fact, differences in opinion about what is likely to be the rule in certain matters came right after the death of the Prophet.⁸ As a result, another “source” of law was emerged during this period and it is known as Ijma’ (consensus)’. The purpose of ijma’ was to overcome these differences in opinion.⁹ Consensus in this era was a result of exchanging opinions

through shura. Shura is an Arabic word which literally means consultation. Shura was a basic Islamic principle whereby Muslims, usually under a system of proportional representation, would gather and debate arising matters. Once an opinion is derived, which takes into consideration public interest and the betterment of the society as whole, it would be recommended to the Khalifah (head of the state). This method was not alien to the companions as they learnt it from the Prophet. The Prophet, himself, consulted his companions on a number of issues through the institution of shura. This is also evident from a number of Quranic verses that emphasize on employing shura. Ijma' or consensus comes right after this as a seal of approval of the resulting shura, giving additional strength to the ruling.¹⁰ This era left us with tremendous examples of brave applications of Shari'ah. Ijtihad was at the time very close to the sources of Shari'ah, and it was implemented directly through them. We can state the sources of Shari'ah at this time as shown in → Figure 1.1.

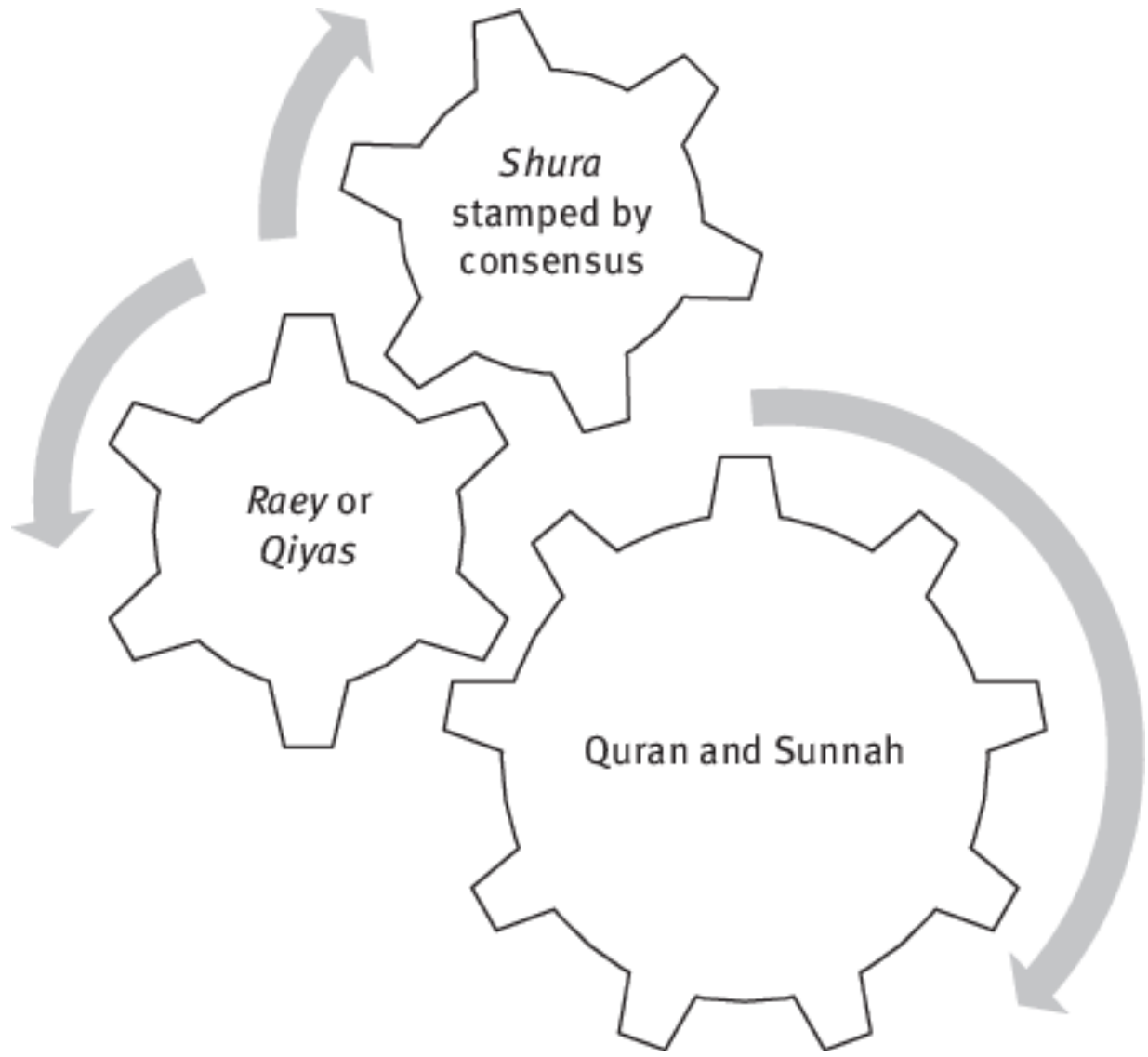


Figure 1.1: Sources of Shari'ah.

- Quran and Sunnah being the primary sources of legislation,
- Then, Raey or Qiyas being the understanding of what is likely to be the Shari'ah rule in a given matter,
- Finally, collective ijtiḥad that was discussed through the institution of shura stamped by consensus.

After the four guided caliphs, a massive disturbance took place. It was the time when Ummah was divided into a number of groups. It was also the time when various methodologies for seeking rules from the Quran and Sunnah were created. Some new “sources” of law also surfaced during this time. Scholars back then tried to follow the way of the companions of the Prophet who had spread all over the Muslim world. As a result, everyone followed the companions that he reached. Narrating the traditions of the Prophet was a very popular practice at the time. During the same period, many ahadith or traditions were falsified and fabricated.¹¹ Consequently, all of these sources needed to be revised and checked for their validity. The fiqh discipline of this period was rapidly growing, along with the methodology of deriving rules. As a result, a number of legal schools had emerged, with each school having its own way of interpreting and deriving their views from the sources. Moreover, and especially after the book of Imam Shafi’i “Al-Risala” in Usul Al-Fiqh, the methodology of deriving rules from Shari’ah was separately discussed.

The fiqh is therefore the effort made by scholars using their chosen methodology, to arrive at the rules as described by the sources (Shari’ah). In other words, fiqh is simply the opinion of scholars and a way of understanding the Shari’ah. Shari’ah remains superior to all fiqhi understandings. Therefore, this book is a fiqhi examination of the concept of risk sharing in contemporary finance.

1.2 Risk Sharing and Fiqh

The concept of risk sharing has gained greater attention from researchers and policy makers following the global financial crisis. The crisis was evidence that excessive debt within an

interest-based system, as well as complex instruments such as derivatives played a major role in transferring risk, which makes the overall economic system inherently unstable.¹²

Many argue that risk sharing as the foundation of Islamic finance can promote greater stability and resilience of the financial system.¹³ The roundtable discussion that was jointly organised by ISRA (International Shari'ah Research Academy), IRTI (Islamic Research and Training Institute) and Durham University emphasized risk sharing as a salient characteristic of Islamic financial transactions. It is not only exemplified in equity-based contracts but also in exchange contracts which require sales to be in the form of genuine transactions in an open market. The discussion recommends governments to move away from interest-based systems and to work towards enhancing risk-sharing systems by levelling the playing field between equity and debt. Specifically, even though the Shari'ah recognizes the permissibility of debt, it is acknowledged that excessive debt has detrimental effects on society.

From the Shari'ah perspective, the technicalities of the concept of risk sharing have yet to be clearly defined in Islamic literature. This has led to certain confusion of some scholars on the importance of the merits of risk sharing.¹⁴ An example is the confusion from the misconception that arises following the promotion of risk sharing concept as fundamentally against hedging or risk management tools, which are commonly used by financial institutions for risk mitigation.¹⁵ Some scholars also refer to the word 'dhaman', which has acquired a new meaning in modern Arabic and is now equivalent to the English word "risk". Yet it remains unclear whether this can be possibly translated into the risk sharing concept. Others have referred to the original source which is the Verse 278 of Surat al-Baqarah to distinguish it from the ribawi system. Allah said: "Allah has

permitted al-bay' and prohibited al-riba". Despite this, translating bay' into sale or trade may narrow the scope of the concept since it does not reflect a complete economic and financial system; i.e. it does not represent the contractual arrangement of partnership as the partners are exchanging terms but are not trading.

This confusion has resulted in adverse consequences, particularly in the design of Islamic financial instruments. The rationale is that modern financial transactions have different features and constraints as compared to the classical transactions in Islamic finance, such as mudharaba and murabaha. While these types of traditional contracts have not evolved, the world of finance has moved towards the development of methods and means of multilateral, arms-length and multi-counterparty interest rate-based financing. In the absence of a fiqhi approach that could assist in the formulation of this type of financing in an Islamic manner, it is common for the financial sectors of Muslim economies to import interest-based debt financing from the conventional system.¹⁶ For example, the traditional Islamic contract needs to combine a main contract with different "supporting" contracts in order to achieve the objective of modern financial transactions; resulting in the combination of more than ten contracts in certain cases. The existing fiqhi approach therefore converts most of the financing arrangements into risk-sharing based contracts that are fundamentally not financing contracts. As a result, the whole exercise has been viewed by many scholars as an exercise of circumvention rather than one based on genuine differentiation.¹⁷

The above major issue highlights the need to develop a new fiqhi approach of risk-sharing based financing which is suitable for contemporary means of multilateral, arms-length and multi-counterparty financing. Therefore, this book attempts to conduct

a comprehensive study on the Shari'ah sources of risk sharing in order to establish both a theoretical and practical concept.

1.3 Literature Review

The volume of existing literature that comprehensively explains the general concept of risk sharing, as well as from a Shari'ah perspective, is rather limited. Nonetheless, the principle of risk sharing as expressed in the initial section of this chapter has been discussed in many classical fiqhi books. What is lacking is a study which provides the theoretical framework for risk sharing. Apart from the study undertaken by 'Adnan 'Uwaidah on the theory of risk taking in Islamic economics, there remains no further research on fiqhi related to this issue. In his study, 'Adnan 'Uwaidah proved that taking a part of risk in any transaction should be a main condition in gaining legitimate profits. He concluded that legitimate profits arrive from the contribution of a financier to the business in the form of capital, work or dhaman (guarantee or responsibility). However, his work did not discuss risk in finance as a separate subject matter from risk arising in normal trade. An ISRA research paper published in 2014 discussed the linkage between liability for risk and legitimacy of reward as a governing principle that needs to be fully observed in any financial transaction. It was concluded that taking risk in Islamic financial transactions entails each contracting party to agree to bear their portion of the fundamental financial risks and liabilities that are connected to real economic activities – which are indispensable, for them to be entitled to any benefits.¹⁸ In essence, this ISRA research paper emphasized what has been stated in the Fiqh books which discuss the legal maxim 'Al-ghunm Bi Al-Ghurm' and sheds light on some of its application. This study therefore attempts to take

a step forward in framing the concept of risk sharing in Islamic finance, and its application within the contemporary finance framework based on multilateral, arms-length and multi-counterparty transactions. The literature however does express the need for a fiqhi approach to develop the Shari'ah conceptualization of this modality of financing.

The first section of the book discusses the current practices of structuring Islamic asset classes through a combination of multiple financial contracts in order to mimic its conventional counterparts, thereby absorbing the risk transfer element in Islamic finance. The second section discusses the concept of risk sharing in Islamic finance that is lacking in the current practice of Islamic finance.

1.4 Contemporary Shari'ah-compliant Financial Instruments

The shift towards the global markets and expansion of product offerings in Islamic finance, from merely banking-based into wider areas of financial market-based instruments, has made Islamic financial markets one of the fastest growing sectors in Islamic finance industry. Nevertheless, the mentality of mimicking conventional instruments through combining multiple Islamic financial contracts inadvertently include the element of risk transfer in the design of Islamic financial products. It is well known that conventional banks engage in risk shifting and risk transfer activities, however, Alaa Alaabed, in her study: "Risk Shifting and Islamic Banking" found that Islamic banks also engage in risk shifting activities.¹⁹

For Islamic equity, Shari'ah compliant firms should ideally be fully financed by equity financing. The prohibition of debt trading (Bay' al-Dayn) except at par value, discourages firms

from placing Murabahah financing in their liability structures. In contrast, even though firms are allowed to trade ijarah sukuk at a discount or premium, this instrument is structured in a bankruptcy remote company via a special purpose vehicle (SPV), thereby setting it aside in the off-balance sheet structure as contingent claims. Sadly, the current practice has steered far from the suggestion of the ideal theory. The qualitative Shariah screening excludes firms with any non-compliant activity (i.e. liquor, gambling, interest-based financial institutions, etc.) while the quantitative Shari'ah screening strictly imposes the zero interest-based leverage. Given that only a small number of current listed firms fit into this requirement, a certain degree of tolerance is therefore required.²⁰ As a result, Islamic equity is still being exposed to the effects of leverage, particularly during times of economic downturn.

For Sukuk, the instrument should ideally represent true ownership of assets that generate a stream of revenue for investors. Based on the underlying asset and contractual relationship, the generated revenue can be either regular (murabaha, ijarah) or irregular (musharakah, mudharabah). The current practice is however in conflict with what the Shari'ah rules have suggested. For fixed-income instruments, murabaha sukuk is traded at a premium or discount which violates the rule of bay' al-dayn.²¹ Ijarah sukuk on the other hand, is designed as a lease-buy back which falls under bay' al-wafae.²² Musharakah and mudharabah sukuk have been structured to distribute profits of their enterprises at fixed percentages based on London Interbank Offered Rate (LIBOR), instead of delivering an irregular stream of revenue for investors. In order to justify this practice, the issuer includes a paragraph in the contract which states that if the actual profits from the enterprises exceed the percentage based on LIBOR, then the amount of excess shall be paid entirely to the enterprise manager as an incentive for the

manager to manage effectively. If the actual profits are less, the manager may take it upon himself to pay out the difference. The sukuk also guarantee the return of the holders' principal at maturity through a binding promise made by the issuer of the manager. In addition, these sukuk do not conform with the concept of true ownership where the sukuk holders cannot recourse to the underlying assets.²³ Consequently, the existing sukuk have similar characteristics as conventional bonds and sukuk issuers can issue sukuk without necessarily generating real assets in the economy. As discussed earlier, this risk transfer element will result in over-leveraging, overconfidence and an underestimation of risk in the market.

For mortgage products, the Bay' Bithaman Ajil (BBA) contract used is essentially a true sale of an asset with a higher price as compared to the current market price due to the deferred payment. However, the current practice of BBA is hardly differentiated from conventional mortgage used in home financing. The only difference that one may find is the way cash is advanced from the bank to the client. In a conventional mortgage, this is done through a conventional loan, while in BBA it is through Bay' Al-Inah or Tawwaruq. Fundamentally, the true exchange of assets does not take place, or at least is fictitiously made, in order to merely obtain liquidity from creditors.²⁴

For Islamic private equity, it is marked by a higher risk profile and a longer time span of illiquidity that is financed using profit and loss sharing partnership structures, which are in line with the principle of risk sharing. Initially, Islamic private equity was often executed via the screening of the debt levels of firms, where certain levels should not be exceeded.²⁵ Recently, Islamic private equity has also embarked into a new phase that is based on the concept of leverage buy out. The deal is financed through equity contributions with the balance being funded by bank loans using Murabahah, Commodity Murabahah/Tawarruq or

Ijarah. Ijarah financing involves Bay' al-Wafae which is in the form of sale and leaseback of a real asset that is utilized by a business. These fixed-income instruments are also used to refinance the deal and provide mezzanine bridge financing via high-yield subordinated debt.²⁶ Despite the fact that the debt has not been traded in the market in the form of Sukuk, a substantial leverage component is sufficient to justify the risk transfer element within the business model of private equity, as previously discussed.

As for Islamic hedge funds, the controversy centers on the use of short selling, derivatives and over-leveraging. Some scholars hold a minority view in accepting the sale of a stock on the basis of future delivery (Salam) to replicate short-selling activity, for example the Al Fanar Fund. Other scholars aim to replicate the economic effect of a conventional short sale using 'arbun – a down payment with a revocation option – whereby the client may benefit from falling prices but can substantially lose from rising prices. In terms of the use of derivative products, recent scholars promote the Bay' al-Istijrar concept which offers wide flexibility, including the replication of Asian and barrier options.²⁷ It is through short selling and the use of derivatives alongside substantial leveraging using Murabahah or Ijarah (with Bay' al-Inah, Bay' al-Dayn and Bay' al-Wafae) that has made it possible to establish hedge fund activities in Islamic finance.

It can therefore be observed that each Islamic asset class has mostly mimicked its conventional counterparts, thereby resulting in risk transfer through the combination of multiple financial contracts.

1.5 The Concept of Risk Sharing

1.5.1 Current Approaches to Shari'ah Ruling

The major problem facing Islamic financial instruments is the attempt by banks and financial institutions to mimic the risk-return profiles of their conventional counterparts; which is viewed to place the Islamic financier at an advantageous position within the financial industry. It is therefore common for Islamic financial instruments to combine multiple contracts in a single transaction in order to achieve similar economic outcomes of those in the conventional sphere, often resulting in a more complicated structure.²⁸ From the ruling perspective, each Islamic instrument seems to comply with what have been formally stated as Shari'ah requirements without looking at the intention or the end result of the contract.²⁹ However, the contract is only a tool of achieving an objective that may be good or bad; thereby the validity of the contract may not necessarily result in its permissibility.³⁰ In addition, many scholars have attempted to link the compliance of these economic outcomes with the objectives of Shari'ah or Maqasid al-Shari'ah. The main problem of this approach is that Maqasid al-Shari'ah has often been used to justify the more "exceptional" rulings based on excessive use of maslaha (social welfare) and dharurah.

The current structure of Islamic financial instruments as mentioned above can lead to some adverse consequences. Firstly, it has created a structure-objective mismatch which has steered Islamic finance away from the ends that it was initially meant to serve.³¹ Secondly, Islamic finance has been led to transform the Islamic law from becoming inspiring set of rulings that it is meant to be, to becoming an additional risk that Islamic financial institutions are exposed to.³² Third, a number of Islamic financial contracts that have been employed are deemed to be

fictitious contracts in which the Islamic financial institution's ownership is mostly on paper and is not long lasting.³³

Overall, the current situation requires a change in the approach that will articulate a rational basis rooted and derived from the principles of the Shari'ah in distinguishing halal (permissible) from haram (prohibition). This research suggests the concept of risk sharing as a Shari'ah-based approach to be applied in contemporary finance. Many argue that risk sharing as the foundation of Islamic finance can promote the stability and resilience of the financial system.³⁴ From the Shari'ah perspective however, the technicalities of risk sharing have yet to be defined in Islamic literature. This has stirred confusion among some scholars on the level of importance of the merits of the theory of risk sharing.³⁵ This confusion stems from the misconception that arises from some authors that promote this concept as being fundamentally against hedging or risk management tools, which are commonly used by financial institutions for the purpose of risk mitigation.³⁶ In particular, the strong debate among Islamic scholars mainly takes place from an intensive discussion on the concept of risk sharing without much investigation on the "subject matter" of risk sharing in finance, which is the financing itself.

The confusion that arises in understanding the concept of risk sharing is mainly attributed to the fact that modern financial transactions have different features and constraints as compared to classical transactions in Islamic finance, such as Mudharabah and Murabahah. Fiqh of these types of traditional contracts did not develop further, despite the world of finance moving on to be developed in various ways and means of multilateral, arms-length, and multi-counterparty interest-rate based financing. In the absence of a body of Fiqh that could assist in the formulation of a Shari'ah-compliant version of this

type of financing, the financial sectors of Muslim economies have imported interest-based debt financing from the conventional system.³⁷ For example, a traditional Islamic contract needs to combine a main contract with different “supporting” contracts in order to achieve the objectives of modern financial transactions. The existing Fiqh approach facilitates the contemporary financing arrangements via a number of contracts that are originally risk sharing in nature but not meant to serve the contemporary finance. In addition, deploying these contracts, especially after such combination, in the contemporary finance limits the risk sharing aspects in each one of them. As a result, the whole exercise is viewed by many scholars as an exercise of circumvention rather than based on genuine differentiation.³⁸

1.5.2 Shari’ah-based Framework in Risk Sharing

The above major issue highlights the need for an understanding of risk-sharing based financing that is more akin to a genuine principle, from the Shari’ah point of view which is suitable for contemporary finance. It requires a comprehensive study on the Shari’ah sources and philosophy in order to establish both a theoretical, as well as practical concept of risk sharing to address the contemporary problem.

Risk sharing does not have an equivalent or established term in Arabic. However, the concept has been widely used in Islamic jurisprudence. *Musharakah fi al-Makhatir* is one of the terms used to describe risk sharing.³⁹ Others refer to the main legal maxim such as *Al-Ghunm Bi Al-Ghurum* (no responsibility undertaken, no profit to be deserved).⁴⁰ The Fiqh approach, in this regard, suggests that in order to grant permissibility to a transaction, the parties involved should contribute to the

business either by capital or effort. In other words, risk should be borne in accordance to the ability of bearing the risk.

Other fiqhi literature also derives the concept of risk sharing under a different term, which is dhaman (which literally means liability). Some scholars argue that the word 'dhaman' has acquired a new meaning in modern Arabic where it is now equivalent to the English word "risk". Nonetheless, the question is whether this method of understanding risk sharing will truly solve the problem of fictitious contractual arrangements.

In understanding the original source that advocates a risk sharing system, Islamic literature begins the discussion by referring to Verse 278 of Surat al-Baqarah to distinguish it from the Ribawi system. Allah said: "Allah has permitted al-Bay' and prohibited al-Riba." The Holy Quran has used the term al-Bay' and al-Riba in this Verse to simply mean that the Quran focuses on a particular system against the Riba system. Specifically, al-Bay' originally means exchange. Translating Bay' into sale may narrow the scope of the concept. The Bay' in the Verse is given as an alternative to Riba, a concept that represents more than excessive payment to the debt. Riba is therefore described as a system where risk is either shifted or transferred. When Allah gives an alternative, it should be one that is deemed much better, wider and more effective. This cannot be sufficiently justified by merely translating al-Bay' into trade or sale. It does not mean that the Fiqh terminology is wrong; it is just stating that the Fiqh terminology should not be generalized at the expense of the original term in the Quran.

Translating the word al-Bay' as trade also does not reflect the feature of al-Bay' as a complete economic and financial system. For instance, the market players or the contracting parties are not represented by the word 'trade' because the buyer and lessee are not performing any trade. It is merely traders who are represented by the word. The word 'trade' also

cannot represent the contractual arrangement between the partners. This is because they are exchanging terms but not trading goods. For them, trade will come after the business begins to function. If al-Bay' means 'trade' that is Tijarah in Arabic, the Quran will not use them in the same Verse to mean the same thing; in Verse 24:37, it is stated: "[Are] men whom neither Tijarah nor Bay' distracts from the remembrance of Allah", as this goes against the rule of eloquence in Arabic. Overall, the word al-Bay' with the meaning of "exchange" stands more appropriately. Al-Bay' as a mutual exchange in which one bundle of property rights is exchanged for another. Al-Bay' or exchange has surrounding rules that construct the system. It can therefore be argued that it is through these rules which govern just exchange, distribution and redistribution that the entire Quranic position on economic relations is oriented towards risk sharing. Put differently, it is worth to deduce that the risk sharing elements are derived from the al-Bay' system.

By looking at the rules pertaining to exchanges based on Muqtadhayatu Al-'Uqud (the legal consequences of the contracts) as well as the pre-conditions for transacting, one can observe the following:

- The risks in a transaction is based on the ability (al-wos') of the person who will bear the risk, of which the ability is assessed on the basis of the person's capital possession, either in terms of wealth or knowledge and effort. For example, in original Mudarabah structure, the risk associated with the transaction is borne by both parties based on their abilities, which are in the form of capital and work. In business-based transactions that are structured by Shari'ah, the associated risks are commensurate with the ability of everyone involved. This is also in line with the concept of 'adl that is commonly

translated as justice; which is in fact positioning things rightly in their right places and grants everyone his genuine rights. Transferring risk is thus deemed as a way of placing risk in unjust places.

- Another important element is the taradhi (willingness) to put the ability at risk. The contracting parties in a transaction have to come up with a mutual agreement on the type of risks and methods that they employ in sharing the risk. It is important that both parties have a clear picture on the risks to be shared.

Based on these two elements, risk sharing is a result of applying rules that constitute the al-Bay' system, where the risks associated with transactions are taken by the parties who are involved based on their willingness and their capacity or ability to take the risks. In applying this concept to the current economic system, risk sharing will serve as a contractual or societal arrangement whereby the outcome of a random event is borne collectively by a group of individuals or entities involved in a contract, or by individuals or entities in a community.⁴¹

1.6 Objectives

The major objective of the book is to establish a new Fiqh approach to risk sharing based on an understanding of the Shari'ah, which is accommodative to contemporary finance.

Therefore, this book aims to study risk sharing in Shari'ah and the extent to which the risk sharing theory is relevant to Shari'ah requirements in conducting financial transactions, provide a new Fiqh approach to risk sharing that satisfies both Shari'ah and contemporary means of multilateral, arms-length and multi-counterparty financing, and provide a framework for innovating new financial contracts based on risk sharing.

1.7 The Scope of the Study

The scope of the research is categorized into three major parts:

1. The theoretical foundation of risk sharing based on Fiqh
2. The framework of the al-Bay' system and the parameters of risk sharing to be applied to contemporary finance
3. The application of the theory.

To achieve the above objectives, the book extracts the grounds of a divine ruling and possible reasons or causes, for example, for the ruling on prohibition of Riba. The prohibition of Riba can be due to many reasons such as lack of justice, an act deemed as taking advantage of the needy, not involving any effort or risk taken by one of the parties, or due to the element of contractual risk transfer. Examining the likely reason or cause for such prohibition (in Riba or other prohibited elements) provides the justification needed to arrive at a conclusion of whether risk sharing is one of the possible core principles in Shari'ah rulings, provided that risk transfer is the cause of the prohibition of Riba. After listing all possible causes of Tahrim (prohibition), the study conducts al-Manhaj al- Tahlili (the analytical approach) to filter the results from the first step. It continuously tests number of Shari'ah rulings to determine the most plausible grounds for the ruling. In other words, the study uses this technique to determine the actual cause for prohibition (hypothetically, risk transfer) and the cause for permissibility (hypothetically, risk sharing). This study excludes all other possibilities.

The last step is to place the standing causes in application. This will determine the principle, which is ready for application after identifying its definition, category, limitations and parameters. The theoretical approach is further explained in → Figure 1.2.

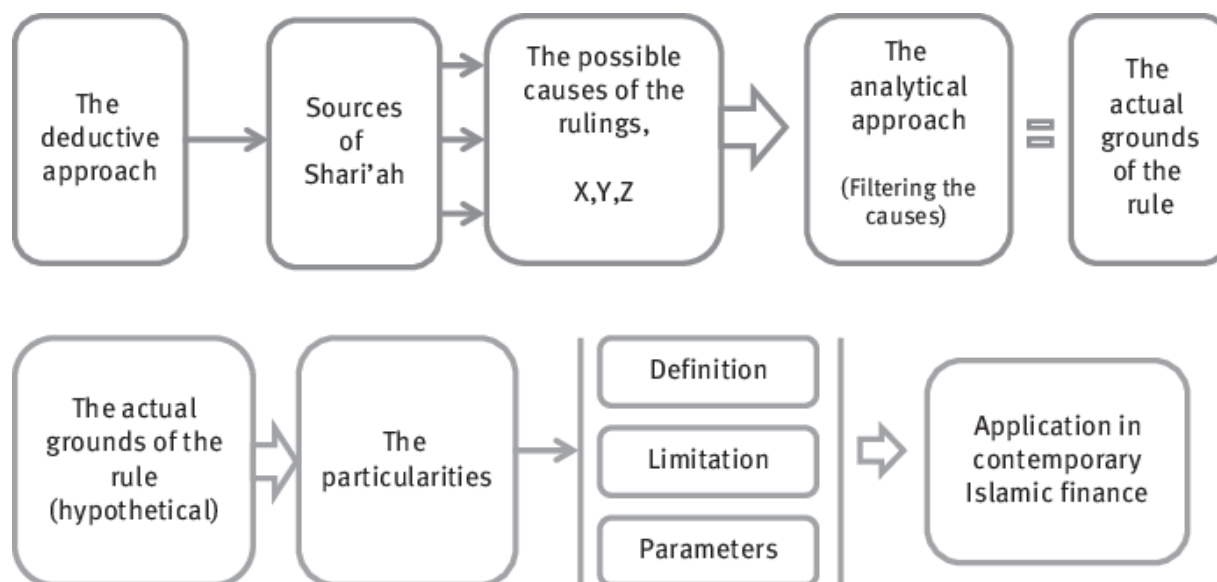


Figure 1.2: The theoretical approaches of the study.

This book refers to the Verses in the Quran as well as hadiths of the Prophet. These hadiths are referred to their books of narrations, such as Bukhari, Muslim, and others by stating the number of the hadith and the chapter it is included in. When a hadith is narrated by Bukhari or Muslim in their Sahih books, the authenticity of the hadith is not stated, other than these two books the study relies on the reliable scholars to determine the authenticity of the hadiths.

1.8 Expected Results and Policy Implications

This research is expected to advance the theory of risk sharing especially from the Shari'ah perspective, which may assist not only policy makers but also products developers in Islamic finance industry. It aims to provide the framework to innovate new products based on risk sharing without the limitations of applying traditional contracts in contemporary finance. This

research will also provide a new product based on the theory of risk sharing that is derived from this study.

1.9 Chapter Outline

The first chapter provides an overview of the whole study. It discusses the motivation, research objective, scope, research questions, methodology and the expected results.

The second chapter discusses the theoretical foundation of the al-Bay' system. This includes the linguistic aspects of the relevant terminologies and its usage in the Quran and the Sunnah of the Prophet. It further clarifies the misconception on Tijarah (trade). The chapter concludes that al-Bay' in the Quran and Sunnah refers to a wider meaning than it is usually referred to. In fact, it is a system that governs the aspects of financial dealings. It further states that al-Bay' is applied through the mechanisms of risk sharing. The chapter also establishes the basis of the system of al-Bay' and its mechanisms.

The third chapter focuses on risk and risk treatment. It has defined risk and highlighted the categories of which Shari'ah has different considerations. The chapter proves that risk aversion is the recommended act as per Shari'ah rules, but one cannot avoid the risk of a desirable outcome by transferring the risk to other parties. Such risk treatment is prohibited in Islam. Shari'ah encourages risk sharing as observed in the rules of financial dealings by employing two parameters that are the ability (wos') and willingness (taradhi) to bear the risk.

The fourth chapter applies the risk sharing parameters to the new contract structure of exchange. It further discusses the Shari'ah issues on such structures. It has been observed that risk sharing provides us with a Fiqh solution that allows Islamic finance to participate in the real economy and to be a driving force by facilitating innovation and creativity in the economy.

Chapter 5 summarises the whole study and provides the overall conclusion and policy recommendations pertaining to the

Fiqh framework of risk sharing and its applicability in Islamic finance. This last chapter also suggests possible areas for further research.

2 Al-Bay': The System and its Contractual Mechanisms

This section is considered an introduction to the subsequent sections of the book, within which it intends to establish the principle of risk sharing in contemporary Islamic finance. In a bid to achieve the set objective, this study begins with a discussion focusing on the concept of al-Bay' from the perspective of the Quran and Sunnah of the Prophet. Linguistic origin and usage of the concept will also be discussed.

The concept of al-Bay' in the Quran is introduced as a replacement or alternative to a Riba-based financial system. The Quran has clearly made a distinction between the two, stating in Verse 2:275: "But Allah has permitted al-Bay' and has forbidden Riba". This research indicates that the concept of al-Bay' is an antithesis of the concept of Riba. Although the two concepts are equal in terms of implementation and comprehensiveness, they are different in terms of processes, mechanisms and outcomes.

In a Riba-based system, risk is transferred from lender or fund provider to other party (the borrower). The borrower may accept the risk transferred due to need for fund or an expectation that the market will go in his favor without being obliged to share profit. In this type of contract, the "validity" of the contract depends on the parties agreeing to the terms and the lender may enjoy the benefit of his venture regardless of the uncertainties and risks assumed by the borrower or the actual outcome of the borrower's venture. Whereas in the al-Bay' system, risk is essentially shared between the parties. In fact, this type of contract depends on how the risk and uncertainties are treated as there should be no transfer or shifting of risk from

one party to another. The future risks and uncertainties involved in risk sharing based contract are not necessarily shared between the parties in the form of partnership as the term may suggest. In the context of Shari'ah this type of contract got a more comprehensive meaning and flexible mechanisms that accommodate various types of contractual arrangements and exchanges of property rights, including sale based contract where exchange of two properties happens at a particular time along with the risks and uncertainties associated with each of the exchanged properties. Although the parties are not sharing the future risk of the exchanged properties, but they are also not entitled for their benefits as well. There is a tie between the property risk and reward in this contractual system. More is to explore when it comes to the connotation and operationalization of al-bay' system as the term bay' itself suggests.

In this chapter, a linguistic approach is adopted, in which the definition of al-Bay' in the Quran, its lexical definition, and its linguistic usage are linked together, to arrive at its connotative meaning around which the concept of al-Bay' revolves. Equally, the differences between al-Bay' and al-Tijarah, particularly in the context of the Quran, will also be explored. The reason for this is that the word al-Bay' in the Verse: "But Allah has permitted al-Bay'," has been erroneously translated to refer to Tijarah or trade, especially when it is translated to the English language. In this study, it will be proved that the concept of al-Bay' is different from the concept of Tijarah, which means "trade" in the context of the Quran.

The purpose of this is not just to affirm the linguistic and technical meanings of the concept of al-Bay', but to also indicate its comprehensiveness and characteristics, for that it is a comprehensive general system that involves contracts and the financial system to-date.

2.1 The Concept of al-Bay'

Scholars across different areas of study have introduced terms that are anomalous to their fields. Linguistic meaning and technical meaning of certain terms may be alike or different in varying situations. Likewise, the technical meaning of a particular concept varies from one culture to another and from one environment to another. The variance in the technical meanings of a particular term can be traced to the natural and semantic evolution of the term that are not necessarily determined by a particular factor nor guided by a particular arrangement.⁴² In the process of semantic evolution, meaning of words can be broadened or narrowed, and its connotative meanings can also be modified, in which the connotative meaning of a term can be changed to another similar metaphorical meaning or to figurative meanings very different from the original meaning.⁴³ However, its vagueness can also be connected with difficulties in recognizing the context, period, and other factors that are responsible for this semantic evolution, although the usage and etymological analysis of the concept of this study can diminish the vagueness surrounding the intended meaning of the concept, since the objective here is the adoption of technical meaning of the concept of al-Bay' in the field of Fiqh.

Moreover, in Fiqh, al-Bay' is defined as an exchange of one property right for another. It also refers to the transfer of possession and ownership of a property right.⁴⁴ It should be pointed out here that the Fiqh definition of al-Bay' does not necessarily represent the Shari'ah and Quranic definition of the concept, and it will be expounded in the subsequent sections that the previous Fiqh scholars had adopted the linguistic meaning of al-Bay' and broadened it based on its etymology.

This study will examine the definition of al-Bay' based on the following parts: The first part will present a linguistic and etymological definition of al-Bay', while the second part will discuss the usage of the term and its derivatives in the context of the Quran and juristic work. The third part will look at variances in the linguistic, etymological and Quranic definition of both al-Bay' and Tijarah.

2.1.1 Introduction to the Linguistic Meaning of al-Bay'

It is important to study the linguistic connotations and analysis of a concept and its usage, as it will consequently lead to comprehensive knowledge on the particular concept, its etymological make-up and its connotative usages. This approach is a traditional one that has been adopted by contemporary studies. The first set of linguists have studied many terms, examined their etymological base, and put them on one origin. This was undertaken by al-Tha'labi and others. There are, among the scholars, who for example, examined the juristic usage of some terms, while some examined the usage of certain terms in a particular school of thought. In this section, we will follow suit in order to achieve the set objectives.

2.1.2 Morphological Structure of al-Bay'

The verbal noun "Bay'" is derived from a trilateral (3-lettered) verb "ba'a". It is composed of three root letters with a vowel in the middle. The form of the verb is usually connected to a general meaning. For example, the form "fi'alah" is usually used to refer to an action that is taken as a profession like sina'ah which means the profession of manufacturing. The verb "ba'a"

while Al-ba'u means crime.⁴⁸ According to al-Asma'i, al-ba'u refers to an act of borrowing dogs for hunting. For example, abi'ni farsak means: "Lend me your horse". Other derivatives are istab'a and yastab'i, which means: "To borrow".⁴⁹ These meanings are in some way related to contracts and rights, since there would be no crime except if a right is trampled upon, and nothing can be borrowed except that which is possessed by someone.

وعب: The word **wa'aba, al-wa'b, i'abuk al-shaye fi al-shaye** means to insert something inside another. It also means setting out for war or invasion. For example, aw'aba al-qawm means: "They set out for war" or "They invaded". Al-isti'ab in Arabic means comprehensiveness. In addition, it may mean spaciousness. For example, baytun wa'ib, wi'aun wa'ib⁵⁰ mean: "Spacious house" and "Spacious container". These meanings indicate clarity, visibility, sophistication and knowledgeability, which are the requisites of Shari'ah-based transactions. This is because a commodity must be visible in any given transaction, and any defects must not be hidden. One must also have the adequate knowledge about the commodity to be exchanged.

ويع: **Waba'a** means "increase" and indicates clarity, visibility and declaration.

بوع: **Bu': al-ba'**⁵¹ means "The range of the outstretched arms". This indicates stretching and visibility because what is stretched would be visible.

عبء: **'ibe': al-'ibe'**, with plural form of **al-a'bae'**⁵² denotes burden(s). It also indicates endurance and responsibility – which are the outcome of the contract and the basis of financial transactions in Shari'ah since both parties will bear their own specified risks.

عبا: **'Aba: al-'abayah** denotes a cloak that has black stripes. The plural forma are **al-'aba'** and **al-'aba'ah**, which

linguistically, also refers to that without stripes.

Al-'aba is termed "**maqsur**" in etymology. It is said that "al-rajul al-'abam" refers to: "A man suffering from Dysphasia".⁵³ It may also be said: "lam a'bae bihi" which means: "I do not consider the issue a big deal" or "I underestimate the issue". In addition, "'aba'a" means 'to prepare'.⁵⁴

عيب: **'Ayb**: means defect, and by saying '**aba al-shaye**, it means: "He declared a defect in something". The term '**aba al-mae** also means making a hole so water passes through it in the river bank. It can also mean bag and chest/promulgation.⁵⁵ In relation to a sales contract, the defect is antithetical to the intent of sale transaction.

بيع or بوع : **Bay'** or **bu'** are both from the same source, and as mentioned before, denotes agreement or allegiance. For example, **tabaya'u 'ala al-amri** means: "They have an agreement regarding an issue". Other derivatives include **al-Bay'at**, **mubaya'at** and **tabayu'** which all have the same meaning. In a tradition of the Prophet, he reportedly said: "Won't you **tubayi'ani** that you will embrace Islam?" The term **al-mubaya'ah**, as discerned from the Hadith, means "pledge of allegiance" or "pledge of loyalty". It seems that there is pure exchange (barter) of possessions between two parties that involved.⁵⁶

The Summing of the Lexical analysis is provided in Table 2.1 below.

Table 2.1: The Lexical Analysis of the Word Al-Bay’.

#	The Word	Usage	The relation to the term Al Bay’
1.	باع "ba'a"	Committing crime Lending Borrowing	related to contracts and rights
2.	وَعَب "wa'aba"	Inserting something inside another Comprehensiveness Spaciousness	These meanings indicate clarity, visibility, sophistication and knowledgeability.
3.	وَبِع "Waba'a"	increase	Clarity, visibility and declaration
4.	بُوع "Bu'"	The range of the outstretched arms	This indicates stretching and visibility
5.	عَبَّ "ibe'"	Burden endurance responsibility	The outcome of the contract and bearing the burden and the responsibility of the contracts.
6.	الْعِبَا "Al-'aba"	Underestimating prepare	Consideration of others.
7.	عَيْب "Ayb"	Defect,	The defect is antithetical to the intent of sale transaction
8.	بِيع / بُوع "Bay' or Bu'"	Exchange of terms or properties	-

2.1.4 Lexical Meaning of the Term 'ba', ya' / waw, 'ayn'

As discovered in the course of this research, the base word has three major meanings from which other various meanings evolved, which can be summed up as follows:

Firstly, it means spreading out. For example, **bi'tu al-habl baw'an** means: "I spread out the rope", and the meaning is also reflected in another example: **farasun Bay'un**, refers to the horse, which can run fast and has a wide stride. Figuratively, it can also be used to denote generosity. For example, **yabu' bi malihi** means: "He spends his money generously".⁵⁷ This may indicate that the word **al-ba'** was termed in relation to its outstretching nature. "**bi' bi'**" when used in a statement, is made when one is asked to put more effort in obeying Allah.⁵⁸ **Al-'ayb** is strongly connected with contracts in terms of its usage, while **al-'ib'** denotes showing of interest.

Secondly, the term refers to **al-'ardh**, meaning to lay open or on display. This meaning was generated from the first meaning, since the outcome of the outstretching is to display, such as in the example: **abi'tu al-shaye 'aradtahu**; meaning: "I sold what I displayed".⁵⁹

Al-Bay' involves the exchange of goods and services for an agreed amount of money or the equivalent. Al-shirae refers to the exchange of (agreed upon) money or the equivalent from the buyer for the goods and services from the seller. This indicates that both terms are synonymous with each other, and both can be used interchangeably. In addition, this is reflected in the Verse: "And they sold him for a reduced price" surah Yusuf, Verse 20. Likewise, in the Hadith of the Prophet which states: "No one should enter into a Bay' of what his brother has already concluded Bay' upon."⁶⁰ Another example is: "I display something" as reflected in the word of a poet. Farsan falysa jwaduna bimuba'i which means: "Our horse is not for display".

It is often referred to with al-mubaya'ah and al-musharah, as based on the following: Allah has said in the following Verses of the Quran: "Allah has permitted Bay' and has forbidden Riba" surah al-Baqarah, Verse 275, "And leave Bay'" surah al-Juma'ah,

Verse 9. "There will be no Bay', nor any friendships" surah Ibrahim, Verse 31; and "There is no Bay' and no friendship" surah Baqarah, Verse 254. Other examples are: baya'a al-sultan meaning pledging allegiance to the ruler, and in relation to this, Allah said: "So rejoice in your transaction which you have contracted" surah al-Tawbah, Verse 111 referring to the allegiance called "Bay'at al-ridhwan", which was mentioned in His word: "Certainly was Allah pleased with the believers when they pledged allegiance to you, [O Muhammad], under the tree") surah al-Fath, Verse 18), and also contained in the Verse: "Indeed, Allah has purchased from the believers their lives and their properties." (surah al-Tawbah, Verse 111)

Regarding al-ba', the source of the middle letter is waw (و), as indicated in the statement: ba'a fi al-sayr yabu' meaning: "Walk fast by moving both legs afar from each other."⁶¹ Numerous Fiqh scholars have posited that it was derived from al-ba'. The reason is that each of the two parties are involved in what is called 'give and take'.

Thirdly, this is the meaning that is associated with contracts, because contracts involve endurance, obligation and agreement between the two parties – subject to their willingness.

In this regard, it is obvious that the lexical meanings of al-Bay' revolves around the terms adopted in Shari'ah-based contracts. These terms are, among others, al-izhar, al-'ayb, al-tahammul, al-taklif, meaning visibility, defect, bearing, and burdening respectively. These terms form a part of the general concept of the Islamic financial system, which is based on transparency, justice, and the bearing of risk.

2.2 Introduction to the Usage of al-Bay'

2.2.1 Al-Bay' in the Context of Fiqh

All the fuqaha (jurists) are unanimous on the fact that al-Bay' generally denotes exchange, although the scholars are divided on the characteristics of this particular exchange, given the rules guiding it. In fact scholars of the early eras of fiqh generalize the term to involve all kinds of exchange, however, the Fiqh context may have dragged the term into specific usage referring to special kind of exchange. For example, Hanafi defined Bay' as the exchange of a desired item for another desired item. Also, Abu Yusuf defined it as an exchange of property for another property, which is exchanging equivalent for an equivalent (in value).⁶² According to the Maliki school of thought, al-Bay' refers to a contract of exchange on a subject other than usufruct.⁶³ The Shafi'i school of thought defines it as an exchange equivalent in value, in which it leads to the ownership of the exchanged items.⁶⁴ Similarly, the Hanbali school of thought describes al-Bay' as the exchange of a property right for another property right in which it leads to ownership and acquisition of such exchanged items.⁶⁵

The previous definitions revolve around exchange, substitution, and swapping; all of which are connected with one another. The conceptual meaning of al-Bay' in the context of Fiqh may differ from the original meaning of the term, because the conceptual meaning of a particular term in the context of a particular field of study may be broadened or narrowed beyond the normal or derivative meanings of such term. In the next section, this book will point out other usages of the term, among which is the usage of the term in the context of the Quran. In this particular context, the use of the term is broader than its usage in the field of Fiqh, although it is imperative here to point out that al-Bay', as described by the majority of Fiqh scholars, involves any exchange or substitution; including all the exchanges that occur in the business partnership and beyond.

2.2.2 Al-Bay' in the Quran

The word “al-Bay’” was mentioned in the Quran in different places and in different contexts, but there are consistencies in its meanings – i.e. contract, exchange, and substitution. These meanings are strongly related to the linguistic meanings that were mentioned in the previous section. Discussing these meanings and their connotations will help in achieving the objectives of this research, which is to establish and highlight the fundamentals of contractual agreements in Islamic finance.

Moreover, the concept of al-Bay’ has been mentioned in the context of financial contracts as well as political contracts. The Quran has made **al-mubaya’ah** (covenant of allegiance) the basis for political contracts in Islam, while al-Bay’ is the basis of the financial system, to replace a Riba- based system. Allah clearly distinguished between Bay’ and Riba-based contracts and drew a line between them; Allah said: “Those who consume Riba cannot stand [on the Day of Resurrection] except as one who stands as being beaten by Satan into insanity. That is because they say, Bay’ is [just] like Riba. But Allah has permitted Bay’ and has forbidden Riba. So, whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah. But whoever returns to [dealing in Riba] – those are the companions of the Fire; they will abide eternally therein.” (surah al-Baqarah, Verse 275) Accordingly, the permissibility is substituted to Bay’ and impermissibility is for Riba. It has been posited by the people who engage in Riba-based transactions that the actual difference between the two contracts (Bay’ and Riba) is confusing, and that both are one and the same, given the benefits or expected benefits gained from both contracts. They have gone to the extent of making Riba the basis for Bay’, claiming that Bay’ is [just] like Riba. However, equating a Bay’ contract with a Riba-based contract is not a sound analogical

deduction, because in a sound analogical deduction, the divergent area should have similarities with the convergent area. However, those who claim that Bay' is like Riba do not genuinely want hold on to the analogy; they just believe that both contracts are similar in all ramifications, thus how can one of two similar items be categorized as permissible and the other as impermissible? Based on this, it is perceived that both contracts can be interchanged, whereby any one of the contracts can be given preference over the other. This is an inverted analogy (عكس وقلب التشبيه).⁶⁶ This issue is among the more subtle and delicate issue on which a majority of the exegetists have expatiated.⁶⁷

Ibn 'Atiyah, in his tafsir, expounded that the claim that Bay' and Riba are similar is underpinned by the fact that Riba is the subject matter in the text, and not al-Bay'. Thus, they equate Riba with al-Bay', and since al-Bay' is permissible, hence Riba is also permissible. To substantiate their assertion, they made some illustrations: it is permissible for a man to buy something of two dirhams in value with two dirhams, so also it should be permissible to buy two dirhams with another two dirhams. The illustration was based on a simile approach. The perception that Riba is permissible has reached the extent of making it the basis, and that al-Bay' is only permitted subject to the permissibility of Riba. Therefore, as it is claimed by the proponents of Riba, permitting Bay' and prohibiting Riba is unacceptable and refutable, because both are alike. However, as posited by Ibn 'Atiyah, this analogy has been debunked by the text, which made one permissible and the other impermissible.⁶⁸

In the same vein, al-Razi made the following exposition:

People, in their bid to analyze the issue of Riba, made the following illustrations: a man can buy a commodity at ten dirhams, and then sell it at eleven dirhams – this is permissible. Likewise, if he borrows ten dirhams and then repays it with

eleven dirhams, this should also be permissible. The reason is that, logically, there is no difference between the two. This is in the regard of **Riba al-naqd**. This is also applicable to **Riba al-nasiah**, because if a man purchases a cloth, which can be purchased at ten dirhams with down payment, at the rate of eleven dirhams with delayed payment, this is permissible. Also, it should be permissible to repay eleven dirhams for the loan of ten dirhams taken for a month. The reason is that, logically, there is no difference between the two. This claim is also underpinned by the fact that there is mutual consent between the two parties. Mutual consent between the two parties is a factor that would make Riba-based transaction permissible. In addition, Bay' is made lawful to enable the gratification of human needs. In a scenario where a man is seriously in need of something but he presently has no means to acquire it, and he expects to get some amount of money from it in the future but cannot procure a loan to acquire it, he might find himself mired in hardship and difficulty for a long time. In a scenario where a Riba-based contract is permissible, the lender will lend the borrower money to purchase the item and have him repay it with interest when he gets money. This is a better option than enduring hardship before one has the money to acquire the commodity. Given this rationale, Riba-based contracts should be permitted like other contracts, which are made lawful in order to enable the fulfillment of human needs. However, this proposition has been debunked by one phrase by as Allah the Exalted, which is: "But Allah has permitted Bay' and has forbidden Riba." The fact is that their proposition which is based on analogical deduction, contradicts the Quranic text.

Moreover, Al-Qaffal stated that there is a difference between the two scenarios. If a man purchases a cloth, which is supposed to be purchased at ten dirhams, and if he makes a down payment at twenty dirhams, in this transaction there is the

exchange of cloth for twenty dirhams in as much as there is mutual consent between the two parties. There is tangible exchange between the two parties, and it is not as though one party takes something from the other party without giving something in exchange. However, if he buys ten dirhams with twenty dirhams at a delayed time, there is no exchange in this scenario. It is therefore illogical to assert that the interest charged on the money is for the purpose of making up for the delay.⁶⁹

Reason being that time delayed is not considered property, and therefore cannot be exchanged for interest charged on the actual money. Herein lies the difference between the two scenarios. Some scholars have opined that their analogical deduction is void, because al-Bay' denotes exchange, which is devoid of deceit while in a Riba-based contract, there is deceit and unjust consumption of people's money. Also, unlike al-Bay', the interest charged in the Riba-based transaction has no equivalent to which it can be exchanged, as opposed to the al-Bay' contract where a commodity is exchanged for money.⁷⁰ This detailed viewpoint clarifies the difference between the two systems, and will be further expounded upon along with the fundamentals of Bay' and its rules.

Al-Bay' in this research, refers to a comprehensive contractual system. This is underpinned by the fact that "al" (which means "the") in the word al-Bay' refers to a concept that is known and therefore to specific system. However, it is not concerned about a claim that the term al-Bay' came in an ambiguous (mujmal) way, indicating that al-Bay', given its linguistic denotation, involves all types of exchange including Riba-based contracts, and other contracts that have been forbidden by Shari'ah. If we are to accept this claim, then the ambiguousness of the term should be explained in detail, and

this calls for an explanation of the features and mechanisms of the system under scrutiny.

There are some scholars who hold that the term is general ('am), but restricted to permitted transactions. The difference between al-Bay' being either general ('am) or ambiguous (mujmal) can be discerned from its functionality and the inference, because al-Bay', as an ambiguous term, implies that other similar terms should not be held as a source of law unless a detailed explanation is maintained (mubayyan). The one who holds this view based his argument on the fact that a word dispensed with "al" does not absolutely indicate that the term is a 'am. Instead, the word "al" refers to a specific type of exchange that is permissible. Additionally, assuming the terms (Bay' and Riba) are 'am terms, the statement would not hold, because the statement "Riba is unlawful" indicates that all kinds of Riba-based contracts are unlawful, and since Riba connotes an increase, there would be no Bay' except that which prompts an increase. Which is why the first part of the Verse renders all Bay' transactions as permissible, while the last part of the Verse forbids them all, accordingly, the distinction between halal and haram is vague. To make the distinction between halal and haram, there is a need to return to the Prophet's explanation in this particular regard.⁷¹

There had been a response to the remark of al-Qurtubi regarding the provision that states: "Allah has permitted Bay', but He forbids Riba". He said that it is among the forms of generalization in the Quran. He further posited that the "al" in the word denotes a generalization (i.e. al-jins) of the word, and does not denote a known subject (i.e. al-'ahd). This is because the word al-Bay' was not mentioned in earlier Verses to which the statement can be referred to. For example, as Allah the Exalted said, "By (the time). Verily! Man is in loss." Then Allah exempted some people by saying: "Except those who believe (in

Islamic Monotheism) and do righteous good deeds". Although al-Bay' is a general term, it is specified by Riba and other things that have been unanimously forbidden such as alcohol, dead animals, entrapment, etc. This is the viewpoint of a majority of the Fiqh scholars. Some scholars perceive mujmal in the statement of the Quran in which it distinguishes the permissible from the impermissible. However, permitted contracts and non-permitted contracts cannot be determined without considering the explanation of the Prophet's sunnah, even if it explicitly indicates permissibility of the Bay' contracts. This is the difference between 'am and mujmal. 'am indicates permissibility of Bay' precisely and generally, inasmuch there is no evidence of specificity. Whereas in mujmal, all sales contracts are not generally permitted until there is a clarification indicating their permissibility. In this context, the first viewpoint (i.e. generalization) is preferred.⁷²

It is incumbent to make the "al" in the word Riba an article that refers to al-'ahd (i.e. renown subject), which does not denote generalization, as in the statement: "Riba is made unlawful", because it was part of the practice of Arabs, although there is no need to make a distinction between al-Bay' and Riba in this case, because the Verse has indicated an understanding of the two. Pre-Islamic Arabs used to frequently deal in both al-Bay' and Riba. It should therefore be noted that both terms (al-Bay' and al-Riba) are renowned terms. If it is said that Arabs do not generalize all the forbidden Bay' contracts, the response would be: "It is acknowledged." However, there is a difference between forbidden contracts, Riba-based contracts and permissible Bay'. This is what this work aims to expound; that is it correct to assert that the concepts of al-Bay' and al-Riba both indicate al-'ahd (a renown subject), including their mechanisms and the processes involved.

In sum, the Bay' contract which is referred to in this Verse does not necessarily mean only buying and selling as perceived by some jurists. Rather, it involves a contractual system that acts as guiding principles in its dealings in the Islamic financial system. This system is an antithesis of the forbidden Riba, which is also a defined contractual system in itself.⁷³

The following are other examples that illustrate that al-Bay' involves other Shari'ah-compliant contracts and does not just involve buying and selling. It is also made clear that the definition of Riba should not just be limited to the Fiqhi definition of the term, and should also include certain conceptualizations and systems:

Firstly, the Shari'ah definition of al-Riba goes beyond the Fiqh definition, since linguistically, al-Riba means increase; and not every increase is forbidden. If it is perceived that every increase is forbidden, then every profit on each investment or business transaction is also forbidden. However, the said increase is specific, and unlike the profits (increase) accrued in the business transaction. For example, al-Riba includes many forbidden acts, as mentioned by al-Qurtubi. Al-Qurtubi noted that the scope of Riba in Shari'ah is broad. It could involve ill-gotten money, as indicated in Allah's word: "And their involvement in Riba after they have forbidden to do so" and "(They like to) listen to falsehood, to devour anything forbidden." Riba, in this context, is therefore not the common Riba which is forbidden by Shari'ah.⁷⁴ In this specific context it refers to ill-gotten money from bribery, and the usurpment of property from illiterates, as indicated in the Verse: "There is no blame on us to betray and take the properties of the illiterates (Arabs)." Based on this, all that emanate from ill-gotten money is forbidden.⁷⁵

Similarly, Ibn Kathir elaborated in his observation: "al-mukhabarah (i.e. sharecropping) is a kind of forbidden

agricultural dealing, al-muzabanah, which means exchange of unripe/fresh date which has not been harvested for the ripe one, is also a kind of forbidden dealing. In addition, al-muhaqalah, which means exchange of grains which are still in their ears for the grains, which have been removed from their ears. These types of dealings and their likes are forbidden in order to put an end to Riba. The reason for forbidding these dealings is the lack of knowledge regarding the equivalence of two things of a different nature, such as the measure of fresh/unripe fruit to be equated to the measure of dried/ripe fruit. Based on this, Fiqh scholars have noted that this vagueness in measurement can lead to interest (that is commonly gained from Riba-based transactions), and because of this vagueness, many things were forbidden by the scholars based on their understanding of the significance of constricting the means that may lead to Riba, and their different viewpoints which are determined by the level of their knowledge, as indicated by Allah: "But over all those endowed with knowledge is the All-Knowing (Allah)."⁷⁶

Also, Shari'ah has classified some business transactions, some of which are well-known to fall under uncertainty, as Riba-based business contracts. The following are some of the examples:

- Hadith: "Whoever sells farm products that are not yet ripe, has involvement in Riba"⁷⁷
- Hadith: "whoever is involved in Ijbae is involved in Riba". Al-ijbae refers to selling farm products that have not yet matured and it is usually classified as a type of uncertainty based sales not as a Riba-based sale contract. However, the Hadith used the term Riba to refer this type of sale.
- In the Hadith narrated by 'Aishah (may Allah be pleased with her), it was noted that when the last Verses of al-Baqarah were revealed mentioning Riba, the Prophet went

out to Masjid (mosque), recited the Verses to the congregation, and forbade business dealings in alcohol.⁷⁸ This is a unique exposition and justification, since, as noted by the Fiqh scholars, the definition of Riba does not encompass business dealings in alcohol. The Verses regarding Riba are originally about prohibition of all that fall under the general concept and overall system of Riba. Based on Shariah and convention, dealings in alcohol and other commodities that are harmful to mankind denotes an exchange of unequal things. Ibn 'Ashur observed that it can be discerned that the prohibition of alcohol-based transactions is borne out of implementing the Verse prohibiting Riba, but it does not mean that alcohol-based transactions are a constituent of Riba. Instead it is just an invalid sale transaction.⁷⁹ In this thesis, alcohol-based contracts denote the exchange of two unequal things, which involves uncertainty and deceit. However, Allah knows best. Ibn Kathir, in his commentary on the Hadith, posited that the Verse sought to prohibit the means that can lead to a person's involvement in forbidden matters. He added that some scholars, who commented on the Hadith, revealed that when Riba and the means leading to it were forbidden, alcohol was prohibited, and thus the means that can lead to a person's involvement the dealing of alcohol was were also prohibited. There are among the scholars (e.g. Ibn al-'Arabi) that hold the view that the concept of Riba connotes all invalid contacts, given the Hadith that forbids alcohol.⁸⁰⁸¹

Then, they resolved that Riba in the context of Shari'ah is broader than in the context of Fiqh. The word Riba was mentioned in the Hadith reported by Muslim and others that the Prophet said: "Gold should be exchanged for its gold equivalent,

silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt etc. on an equal basis, and whoever increases on this has involved in Riba -the giver and receiver are the same in terms of their involvement in Riba”.

Moreover, Ibn Rajab observed: “Bukhari reported, under the section of prohibition of selling alcohol in Masjid, a Hadith When the Verses of Surat Al-Baqara about the Riba were revealed, the Prophet went to the mosque and recited them in front of the people and then banned the trade of alcohol.”⁸²

Ibn Rajab commenting on this Hadith stated:

There was no mention of alcohol in the Verses that forbade Riba. How then can the prohibition of the sale and consumption of alcohol be classified as Riba? In response (Ibn Rajab added), it was said that ‘Aishah’s intention is that the Prophet’s mention of Riba connotes the prohibition of trading alcohol with Riba, although it (i.e. prohibition of selling of alcohol) has been mentioned before ... This implies that the Prophet’s mention of the prohibition of sale of alcohol with Riba was carried out to indicate that Riba, which was forbidden by Allah, includes all monies from forbidden transactions, as can be discerned in the Verse: “And Allah permits al-Bay’, but He forbids Riba”. Thus, whatever is a bay’ is permitted, and whatever is not a bay’ is Riba which is forbidden ... The prohibition of Riba therefore includes all transactions which are forbidden by Allah including Riba al-Fadl⁸³ ... Riba al-Nasa⁸⁴ ..., as well as earnings from certain forbidden commodities such as alcohol, dead animals, pork, idols and receiving gifts in lieu of service. Riba also includes invalid contracts such as Bay’ al-Mulamasah,⁸⁵ al-Manabadhat,⁸⁶ Bay’ Habal al-Habalah.⁸⁷ It also includes Bay’ al-Gharar; the selling fruits before it ripens, al-Mukhabarat,⁸⁸ al-Salaf (sale with credit terms) on the commodities over which are prohibited to sale with credit. The Prophet’s companions has been naming

these aforementioned transactions as Riba, as well as using the term Riba to describe al-Qabalat,⁸⁹ al-Najash,⁹⁰ two sale contracts in one contract, and the selling fruits before it ripens.⁹¹

Secondly, al-Bay', as an exchange-based contract involves all kinds of exchange. Excluding Riba (which is a comprehensive term as well) from the general exchange captured by al-Bay' signifies the connotation that the exclusion is based on. This meaning is captured by observing the contractual forms that the Shariah prohibited or permitted. However, there exist some scholastic discussions about the connotations of both permitted and non-permitted contracts as per Shari'ah.

Al-Qurtubi observed in this regard, that most of the forbidden contracts were forbidden because of Riba – either on the capital itself or interest-based payouts to the parties involved. He concluded by stating that “to refer to other contracts which were forbidden for other reasons beyond interest such as Gharar and business transactions after Jumu'ah's call for prayer as Riba-based is figurative and metaphorical.”⁹² According to this the prohibition of Riba is due to the increment. However, there are some other sales transactions that are prohibited not only because of increment. These transactions include: Al-Mahaqalat (selling of grains before knowing whether it is good or not.), al-Muzabanat (selling commodities of an unknown quantity such as selling dates while it is still on its tree), selling food stuff before taking possession of it, as well as including two transactions within one transaction, and other contracts that are not defined as Riba-based contracts. The reason for the prohibition in these transactions is beyond mere increment. In fact, risk transfer element in the mechanisms of these transaction is observed. This is why the Prophet forbade the sale of alcohol at the same time the Verses that prohibit Riba were sent down to him – in order to underline that all that are

forbidden are connected with Riba, which has been forbidden.⁹³ Selling alcohol denotes transferring the risk of harmful product from the seller to the buyer. We argue that what connect all is the risk transfer.

With regards to the prohibition of business transactions after azan (call to prayer) on Fridays, it is because Friday (Jum'ah) prayers are obligatory for Muslim men and Muslims should honor the time of the prayer. Time of Jum'ah prayer is an element that is outside the mechanisms of the sale or transaction.

Thirdly, the article "al" in every concept of al-Bay' denotes 'al-Jins', meaning it involves all the concepts of its kind or any transaction. This implies two fundamental tenets that form the basis of all transactions; one is called Bay' while the other is Riba. The former is allowed, given the need of the people, and the latter is prohibited, given its non-beneficial nature. The implication of 'al-Jins' in al-Bay' and al-Riba is that every Bay'-based is allowed while every Riba-based transaction is disallowed.

Furthermore, the statement "Allah has permitted Bay'" is a positive statement which denotes that al-Bay' connotes any kind of exchange or contract, because the "al" in al-Bay' is of 'al-Jins'. However, the "al" doesn't mean al-Istighraq al-Jins (to include all types of Bay'). This indicates that al-Bay' does not encompass all kinds of exchange and transactions, instead it comprises all kinds of **permitted** transactions. Therefore, the assertion that "al" in the term al-Bay' refers to al-Istighraq al-Jins does not hold water because there are certain transactions that have been forbidden for a host of factors.

2.2.3 Al-Bay' in the Context of Al Quran

The term al-Bay' can be found in numerous places in the Quran, and it is used in different contexts. This is depicted below:

Allah said: "O you who believe! Spend of that with which We have provided for you, before a Day comes when there will be no **Bay'**, nor friendship, nor intercession. And it is the disbelievers who are the wrong-doers." surah Al-Baqarah, Verse 254. Also, He said: "Tell My believing servants to establish prayer and donate from what We have provided for them – openly and secretly – before the arrival of a Day in which there will be no **Bay'** or friendly connections." surah Ibrahim, Verse 31.

The two Verses summarily have divided the factors of getting help in to three; one is Bay' or exchange and substitution on equal basis, the second is the factor that enhances friendship, and the third one is intercession.⁹⁴ The relationship between the definition in this section and the aforementioned definitions illustrate that al-Bay' generally means exchange. In the context of the Verses mentioned here, it denotes ransom and mutual bargaining. This indicates that there would be no mutual bargaining nor ransom on the day of judgment. The term al-Bay' was mentioned in the Verse because it denotes exchange and compensation.⁹⁵

Al-Raghib al-Asfahani commenting on the Verses: "This life is meant for labor and acquisition while the last day is designed for reward. Originally, human beings cannot achieve what will be of benefit to him on the last day except through means. The first exchange refers specifically to Bay' transactions, while the second are the things acquired out of love, such as gifts, and the third is what is acquired via the help of others such as intercession. Allah has explained that whosoever does not labor and acquire what will be of benefit for him on the last day will not achieve it on the day".⁹⁶

Among the places in which al-Bay' is mentioned in the Quran is His word in surah al-Tawbah, Verse 111 which reads:

Verily, Allah has purchased of the believers their lives and their properties; for the price that theirs shall be the Paradise ... It is a promise in truth which is binding on Him in the Taurah (Torah) and the Injil (Gospel) and the Quran. And who is truer to his covenant than Allah? Then rejoice in the Bay' which you have concluded. That is the supreme success.

The description of contract in the context of the Verse, is obviously highlighting the meaning of exchange. However, the concept of al-Bay' in this Verse refers to a common contract that we are familiar with today – called the social contract, which involves the state and the citizenry. Making an oath of allegiance to the Muslim leader is discerned from the Verse, as people of that time did make oaths of allegiance to their leaders, promising they would be obedient, sincere in giving advice, and that they put forth efforts in assisting the leaders; and the leader in turn, will be just to them and in steering their affairs.⁹⁷ However, the contract in the context of the Verse above has eschatological implication, and al-Mubaya'ah in this context denotes an oath of allegiance like that of the allegiance made by the people of Madinah for the Prophet.⁹⁸ The Verse talks about exchange and compensation in terms of striving in the cause of Allah with one's wealth and one's life, in which paradise is the reward. The usage of the contract here – although not of a financial nature, signifies the mechanism of the contract and the principles of exchange and compensation regarding one of the most important transactions called socio-political contracts.

Moreover, al-Bay' indicates the exchange of two subject matters that are equal in their financial worth (al-muqabala fi al-maliya). The transaction described in the Verse above is the exchange of what a man puts forth as effort for Allah's bounty.⁹⁹ A scholar commented on this by saying: "What a profitable agreement/contract Allah has engaged in with every believer! There would be none a believer on the surface except that Allah

has entered in to that agreement with him/her.” He added that: “There was a Bedouin passing when the Prophet was reciting the Verse. Then, he asked the Prophet: whose word is this? Then, the Prophet replied: it is Allah’s word. Then, Beduin exclamationly said: what a great profitable transaction which we would never repudiate!”¹⁰⁰ Furthermore, the Verse denotes that Allah has bought from the believers their lives, and that they should not spend their lives except in obedience to Allah, and their wealth should be spent in the cause of Allah.¹⁰¹

2.3 The Difference between al-Bay’ and al-Tijarah

This section will explicate the meanings of al-Bay’ and al-Tijarah, and the difference between the two concepts. Both concepts have been used interchangeably, most especially when the issue has to do with translation from Arabic to other languages. It is discerned, for example, that the translators of the Holy Quran translated the word al-Bay’ as al-Tijarah (or trade) in the Verse where Allah said: “But Allah has permitted Bay’ and forbidden Riba”.

TRADE = البيع

This is not correct linguistically and given the way it was used in the context of the Quran, it is not correct as well. In fact, the Verse that states thus: “Men whom neither Tijarah nor Bay’ diverts them from the Remembrance of Allah.” Surat Al-Nur Verse 37. Examining the Verse, two different factors were mentioned as a deterrent to the remembrance of Allah – Tijarah and Bay’. The mention of the two as separate factors indicates that one is before the other in terms of their effects, and both

are not one and the same. Hence, it is not correct to assert that both words are synonymous. The grammatical conjunction placed between the two concepts signifies their difference.

There are people who hold that both are the same in terms of usage, but al-Tijarah is a general term that embodies all kinds of tradeoffs while al-Bay' is a specific term. It is because of this fact that a person that deals in different kinds of transactions is referred to as Tajir (the one who perform Tijarah) while a person that deals in one kind of business transaction is referred to as Bai' (the one who perform bay').¹⁰² Even if it is correct linguistically, it is not contextually, because the usage of the two concepts in the context of the Quran indicates otherwise. Conversely, there are other people who hold different views in which al-Tijarah is held to denote buying, as discernible in His word: "And when they see some merchandise while Bay' denotes selling".¹⁰³ Also, it is held by some that Al-Tujar (the plural of Tajir) refers to people who deal in importing and exporting merchandise, who travel around for business while al-Ba'at (the plural for bai') are people who trade in the towns without moving from one place to another.¹⁰⁴ There are others who held that both are complimentary in which profit can be realized through al-Bay' and it is expected when al-Bay is patronized. They state that al-Tijarah means buying, with others arguing that it means importation.¹⁰⁵ The contexts in which both terms were brought about suggest that each one of them is a specific concept in itself.

2.3.1 Issues Regarding Synonymousness in the Context of Arabic Language and the Holy Quran

Synonyms, linguistically, refer to a number of different words that have the same meaning and similar connotation. The

controversy surrounding the synonymy of some words in the past may be traced to the inconsistency regarding what a synonym actually means – can two or many different words actually have the exact same meaning or it is connotative?¹⁰⁶ Ibn al-A'rabī's is among those that deny synonymy. He posited that in every two letters put together by Arabs to denote one meaning, each of the letters has its own distinct meaning; it may be sometimes known to us, and it may sometimes be ambiguous to us, but it doesn't necessarily imply that the Arabs do not know about them.¹⁰⁷ Tha'lab had looked into this and observed that each of the two terms: 'al-Insan' and 'al-Bashar, which are held to be synonymous, has a specific meaning different from the other. 'al-Insan' relates to 'nisyan' (i.e. forgetfulness) or 'al-Uns' (affability/familiarity), but 'al-Bashar is connected with bare skin.¹⁰⁸ Although the issue has, for long, been a controversial issue among the scholars who either belong pro-synonym perspective or anti-synonym perspective. Before we delve into the perspectives of the scholars on the issue, it is deemed imperative to point out here that the difference revolves around whether two or more different words can have actual same meaning or same connotative meaning, because there would always be mental conception and connotative perception of word. For example, there is mental conception of the words 'al-Sa'id' and 'Al-Dira'' that both are known parts of the body (the arm), although this mental conception may differ subject to differences in their usages in different environments. The issue of denying the existence of the synonymy of words did not come into existence until the third century of the Hijri calendar when scholars mentioned the synonymy of some words,¹⁰⁹ after some development in the language field of study. Those that deny synonymy of words include Ibn Tha'labi, Ahmad ibn Faris, Ibn

al-'Anbari, Abu Hilal al-'Askari, who authored a book on the issue, and others.¹¹⁰

Moreover, those that deny the synonymy of words grounded their claim with the following evidences:

Presence of different views in respect of synonym indicates that there is no absolute synonym except that it has been mentally conceived that every word will have additional meaning intended by the inventor of such word.

Among the points used to underpin this school of thought is that it is not permitted to have two different words with different vowels, but have the same meaning. The vowels of the same words when changed or additional letters are added, change the meaning of the word completely. For example, the verb fa'ala (do) when change to Fa'il (doer) changed the meaning.¹¹¹

Furthermore, the statement of Allah, in a surah in the Quran, was used to substantiate the viewpoint. The statement goes thus: "And He taught Adam all the names (of everything)". This statement indicates that language is based on 'tawqifiyyah' (i.e. something that has no room for innovation or creation). It is Allah alone that created those names, therefore, the claim that two different words have same meaning does not hold water. However, it has been asserted that this argument is weak.¹¹²

On the other hand, past scholars of language such as Ibn Sibawah, al-Asma'i, al-Qasim ibn Salam, and Ibn al-Sikkit support the synonymy of word.¹¹³ Also, the usul al-Fiqh scholars like al-Shafi'i, al-Razi, and their followers support the viewpoint. The scholars of usul al-Fiqh have strongly criticized those that deny synonymy of words, and they described their claim (i.e. denial of synonymy of words) as affectation. They gave the issue much attention, given its effect on logical reasoning, its connection with the Quranic text, principles of jurisprudence (usul al-Fiqh), Islamic theology, and most especially the aspect that has to do

with names and attributes with respect to the One who is the most High.

The argument is based on the fact that reality of synonym has been established by induction¹¹⁴ and its usage by the Arabs. Synonyms symbolize the richness of the language, its strength, and expansion of its words. It also depicts the spread of language speakers and the diversity of their dialects, their idiomatic expressions, and their need for formulation of poetry and stanza of poetry. Also, they ground the argument with the fact that synonyms are commonsensical, since there is no denial of the fact that a tribe can give certain things a name while another tribe can give it a different name. There are other authors who posited that there is no need for exposition establishing the reality of synonyms, because it is inevitable and necessary.¹¹⁵ Some scholars are of the view that synonyms are present in the language, but not in Shari'ah-based names. Among those that hold this view is al-Razi (in his book al-Mahsul). He posited that synonymy of words exists in the common names, but not in the Shari'ah-based names, because it may indicate meaning different from the original meaning.¹¹⁶

As a way of bifurcating the controversy, different methods of analysis and reconciliation of the scholars' views emerged. There among the scholars those that separate synonym from succession of word. According to them, synonym is applicable to sentences while succession of word is applicable words.¹¹⁷ This controversy is traceable to the controversy surrounding the fact that a word can absolutely have same meaning with another word or it can have mere same meaning with another word while, at the same time, has additional meaning which can be understood. Those who are in support of synonym hold that two or more words can have same meaning while those who are antagonistic to the synonymy of word hold that words have their

own additional meanings, this indicates that two or more words can be synonymous but different in terms of features.¹¹⁸

Therefore, it can be asserted that synonyms can be mentally conceived that it denotes word meaning same as another, but it doesn't deny the fact that a word can have additional meanings that can be deciphered from the word itself. This kind of additional meaning is the intended meaning in the Quranic words. Language experts have asserted that there is no absolute synonym in the language, thus if two words differ in terms of their pronunciations, they would definitely have different connotative meanings.¹¹⁹ Hence, synonyms, if at all it exists, could mean that a word has the same meaning as another, but there is an additional meaning that can be discerned from the base word. This has an effect in Shari'ah, since its (Shari'ah) origin is from the Quranic words and the words in the Hadith.

2.3.2 Synonyms in the Holy Quran

Since different words may be closer to each other in terms of meaning and usage, each and every word has its own additional meaning, different from the first one. It is of much eloquence to effectively use appropriate words in the appropriate contexts in which the real message will be conveyed. Al-Khatabi's exposition in this regard is very useful. He mentioned that the fundamentals of rhetoric is to effectively use appropriate words in the specific appropriate context in which if another word is used to replace, it would definitely distort the meaning or the rhetorical beauty and glamour in the speech is lost, because some words are closer in their meaning but people wrongly perceive that they have same meaning. There are successive words mentioned by the scholars in the language field, but each and every word has its own peculiarity which makes it different in some contexts while they can have same meaning in some

contexts.¹²⁰ For example, al-'Ilm and al-Ma'rifah denotes affirmation and knowledge which debunk ignorance. Specifically, al-Ilm is an antonym of al-Jahl (i.e. ignorance) while al-Ma'rifah (definite noun) is an antithesis of al-Nakrat (indefinite noun). Grammatically, it can be discerned that al-Ilm is a transitive word which require two objects and al-Ma'rifat is also a transitive word but requires one object.

If this is acceptable in the field of rhetoric, then it is more suitable and deserving to be much acceptable in the Quran. Al-Suyuti observed: "If a word is expunged from the Quran, and look for a better word in the Arabic language to replace it, it can never be found."¹²¹ Based on this, the claim that there is no synonymy of words in the Quran is valid, sound and reasonable.

Among those that belong to the school of thought which deny synonyms in the Quran is Ibn Taymiyyah. Ibn Taymiyyah held that synonyms can be found in the language but not in the Quran, given the latter's linguistic inimitability. He posited further that synonyms in the language are few while in the holy Quran synonym is either very rare or non-existent. It is very rare to find in the Quran a word expressed as synonym of another word; the fact is that both two words may be closer to each other in terms of meaning but they are different two words, they are not synonymous with each other, this indicates the inimitability of the holy Quran.¹²²

Regarding the issue of whether there is or there is no synonym in the language or in the Quran, the more acceptable and preferred view is that of its non-existence in the language. Both the subscribers and deniers of the notion regarding the existence of synonyms in the language are unanimous regarding the fact that two words cannot denote same thing. To some of them, this is what is termed 'al-Mushtarik (commonality), but each has its own different additional meaning. There is no controversy regarding the fact that two words can have

additional meanings, and at the same time denote same meaning.¹²³

2.3.3 Are al-Tijarah and al-Bay' Synonyms?

Both al-Tijarah and al-Bay' have been held to be synonymous with each other, and both are commonly used interchangeably, most especially in the translations of the holy Quran, as pointed out in the previous section. However, it has also been mentioned in the previous section that the notion does not hold water. One of the two words is conjunctive of the other, as discernible in His word, the Exalted, thus: "La tulhihim Tijarahun wala Bay'un" the conjunction between the two words indicates that each word has its own distinct meaning, although they may refer to same thing in some contexts such as the context of financial transactions.

Although al-Tijarah refers to something different, it contains the meaning of al-Bay' which is exchange. Both words have their own distinct meaning. For example, al-Tajir, a derivative of al-Tijarah, cannot be used for someone who went to the market to buy his needs, although he is exchanging his money or the equivalent of money with other things that he is in need of. Al-Tajir is the one who sells his commodity to the person who went to the market to buy his needs; in most cases, the former can be called al-Tajir, but the latter cannot be referred to as al-Tajir.

Morphologically, the word al-Tijarah is based on measure of 'fi'lat' which is used in the context of profession and vocation such as al-Biqalat (grocery), al-Khiyatah (dressmaking), al-Kitabat (writing). The measure 'fi'alat' indicates, based on it is being used in the words of Arab, inclusiveness, and this signified the reason behind adopting the measure 'fi'alat' to indicate profession. Al-Zajaj observed thus: "whatever that is inclusive in the words of Arab are measured using 'fi'alat'. For example, al-Ghishawat (covering), al-'Imamat (turban), al-Qiladat (necklace),

al-'Isabat (bandage). This also involves all the names of vocations because vocation signifies inclusiveness. This measure 'fi'alat' is also used for all that indicate domination or possession such as haircut and emirate (principality)."¹²⁴

Furthermore, al-Tijarah has some other meanings different to that of al-Bay'. Examining how it is used in the various contexts in the Quran indicates that it has various usages indicating and explaining the bases of the word, most especially in the aspect of risk and how to deal with it.

It is worth mentioning here that the difference between both concepts (i.e. al-Tijarah and al-Bay') can be deciphered more by looking at the context within which they are used. Also, the difference between the two can be discerned by looking at the intent of the parties to the contract. All these are discernible in the Quranic contexts, as presented below.

2.3.3.1 Al-Tijarah in the Context of the Holy Quran

The concept of al-Tijarah was mentioned in the Holy Quran in seven places. The contexts within which the concepts were used signify specific meanings and features as presented below:

1. **Al-Tijarah revolves around an exchange process involving two present things in reality or in the mind,** as discerned in the word of Allah that goes thus: "Tijaraton hadirah" (present TIjarah). Tijaraton hadirah refers to the exchange of two present commodities, on an equal basis. The Verse has exempted record-keeping and attestation as part of the condition of this transaction to lighten the burden of transaction (or to simplify things for people). However, in the case of al-Bay', record-keeping and attestation are two conditions that should be satisfied. The reason is that, in the al-Tijarah process, the exchanged

commodities are well known, as against what is obtainable in the al-Ta'jil (deferment) transaction where the exchanged commodity (its size, volume and other features) is not yet known at the time of transaction. Al-Shaukani observed that it implies the exchange of two present commodities in which the transaction is carried out on spot. The Quran also mention Idarah in the context of Tijarah. The word al-Idarat in the statement denotes 'give and take'. It is not wrong if no record is kept in this kind of transaction.

2. **The concept of al-Tijarah includes a known profits at the point of exchange.** This implies that in the al-Tijarah process, the profit is fixed and known, and the parties can take possession of it at the point of exchange, regardless of whether the transaction is a present transaction or deferred one. Thus, the concept of al-Tijarah was used with the aim of enticement, as represented in the word of Allah : "Shall I guide you to a Tijarah that will save you from a painful torment." [al-Saf: 10]. The mentioned Tijarat in the Verse indicates fixed profit and the Tijarat that would not perish. However, in a transaction in which the commodity is not known is conducted on a deferment basis, and relies on the two parties, the available capital, and that the intents of both parties are the same.
3. **Al-Tijarah is an instant activity in which the buyer and seller depart once the deal has been concluded – i.e. after the exchange of commodities.** This is possible if the sale transaction is a present transaction or defined future transaction. Al-Qurtubi observed, regarding an excerpt of the Verse that states: "Tijaraton hadirah", indicating the exchange and subsequent possession of the exchanged commodities, followed by the conclusion of the deal.¹²⁵ It also involves an exchange between the buyer and seller,

and should be conducted on the commodities that are transactional at all times.¹²⁶

This conclusion of the deal and departure after the commodities have been possessed exposes both parties to risks connected to the transaction, such as decline (in profit) and perish of the deal. As mentioned in the Holy Quran: “And openly, hope for a (sure) Tijarah gain that will never perish.” and “Tijarah in which you fear a decline”. If the profits for the transaction is pre-determined, there will not be any fear of decline and perish of the transaction.

1. **Outsmarting competition and disparity in the objectives.** The word ‘al-Mushahat’ is derived from al-Shuh, and it denotes competition or hastening to do something. It may also denote dispute.¹²⁷ Transfer of property rights is a subject matter of an al-Tijarat contract, and to depart with his or her own property right is the objective of both parties. Therefore, each party would strive to outsmart the other to get more by giving less – a natural occurrence in the transaction system, although Allah forbids this. However, the exception is for a present transaction which is carried out on spot, and according to Shari’ah rules. Allah said: “O you who believe! Eat not up your property right among yourselves unjustly except it be a Tijarah amongst you, by mutual consent.” Based on the derived meaning of the Verse, competition, outsmarting and disparity in the objectives are specific to al-Tijarat, but other investments and production goals can be achieved through al-Bay’, because in this context it means investment. Al Bay’ is a contract in which the parties involved have the same goals and mutual risk sharing. The

parties are aware that the profits and risks are on a proportionate basis.

Apart from the above means of transacting Al-Tijarah, the Quran mentioned two other terms of exchange – al-Bay' and al-Riba. To define these two terms is to distinguish them from al-Tijarah. This means the exchange of a present commodity for another present commodity, or a deferred form of transaction in which the terms of the transaction are defined and the profit is fixed. It is definitely another type of transaction or exchange. As indicated in the word of Allah: "Those who eat Riba (usury) will not stand (on the Day of Resurrection) except like the standing of a person beaten by Shaytan (Satan) leading him to insanity. That is because they say: "Bay' is only like Riba (usury)," whereas Allah has permitted Bay' and forbidden Riba (usury). So whosoever receives an admonition from his Lord and stops eating Riba (usury) shall not be punished for the past; his case is for Allah (to judge); but whoever returns [to Riba], such are the dwellers of the Fire – they will abide therein." (al-Baqarah: 275). The Verse makes a clear distinction between the two categories of contract; one which is allowed and another which is disallowed. The first category, which is allowed, includes al-Tijarah and al-Bay'. Al-Tijarah denotes a kind of transaction in which all the commodities to be exchanged for each other are present at the time of transaction, the profit is fixed, the goals of the parties are divergent, and the parties are competing with each other to gain more and give less. This kind of transaction negates al-Bay' which refers to an investment in which the goals of the parties are the same, and the risks are mutually and proportionately shared based on the individual share in the investment. The risk sharing in al-Bay' is signified in surah al-Taubah where Allah has informed about its outcome. This is the kind of transaction or contract that should be adopted in the

field of investment and modern finance. This will be expounded subsequently.

In conclusion, an exchange can involve either cash or commodity. If the commodity is the object of the transaction, then the commodity can be present at the time of the transaction or be available in the future. These different transactions fall under the so called al-Tijarah in the context of al-Quran. If the object of the transaction is investment (in cash or in kind), then the goals of both parties can be convergent or divergent. If both parties have different goals, it then becomes Riba, because a contract in which the parties involved have divergent goals is based on different expectations and different outcomes. However, if the goals of both parties are similar, then it becomes al-Bay'.

This does not mean that Nizam al-Bay' (Bay' system) or Riba system do not extend to the divisions of al-Tijarah. In fact, both systems and their mechanisms can be applied to all divisions of al-Tijarah. For example, al-Tijarah can fall under Riba if it involves risk-transfer elements. Whereas the Tijarah falls under al-Bay' if it is done through risk sharing.

Table 2.2: Illustration of exchange systems and transactions.

System	Mechanisms	Types of transaction
Al-Bay' system	Risk Sharing	Exchange of present commodity for another present commodity or deferred form of transaction in which the terms of transaction are defined and the profit is fixed through risk sharing.
		Investment (in cash or in kind), where the goals of both parties are convergent and the risk is shared
Riba system	Risk Transfer	Exchange of present commodity for another present commodity or deferred form of transaction in which the terms of transaction are defined and the profit is fixed with risk transfer elements.
		Investment (in cash or in kind), where the goals of both parties are divergent, and the risk is contractually transferred to one of the parties.

2.4 Definition of al-Bay' System and its Characteristics

A system (nizam) is defined as a framework or a structure that has a set of connected elements or parts forming a complex whole in a scientific field or a particular social setting. Tracing it down the linguistic line, it is derived from nazama meaning to collect something and organize it.¹²⁸

In this book, nizam al-Bay' is defined as the general framework under which transactions and financial contracts exist. It involves bast (exhibition), maqam (status), and natijat (outcome). Al-Bast connotes justice, al-Maqam connotes property rights, and al-Natijat connotes risk sharing. This signifies that the financial system is based on justice entrenched in the transaction, as defined by Shari'ah, and this basis or foundation is upheld by property rights. The property rights should only be in accordance with the dictates of Shari'ah, if the

ownership of something is valid, and if the thing is among what Shari'ah decrees can be owned. According to Shari'ah, ownership and property rights should be based on risk sharing covering either some contracts or all types of contracts.¹²⁹

The following pages examine the general characteristics of al-Bay' system, the antithesis of the Riba system.

2.4.1 Justice: The Foundation of the al-Bay' System

Al-'Adl is an antithesis of al-Jawr (Injustice/injustice/oppression). The word 'adl comes from 'adala.¹³⁰

'Adl is defined as application of things in its appropriate place, time, form and measure without extravagance or frugality, and without rush or lateness (application of things appropriately).¹³¹ Some believe that 'adl involves giving and taking what is required.¹³² 'Adl also refers to moderation, and moderation denotes righteousness of the soul, as oppression is the perversion of the soul. This is the reason why a person that commits any sin is believed to have wronged and oppressed his soul, and oppression is an antithesis of justice/justice.¹³³ Abu al-Baqae posited that al-'Adalat means firmness, and according to Shari'ah, it means steadfastness on the right path by moving away from what is religiously forbidden.¹³⁴

Given the fact that al-'Adl, as a comprehensive concept, denotes putting things in its appropriate place, and giving everyone his right, whether it is between two or more persons, male or female, old or young, rich or poor, ruler or ruled etc., it should be something concrete and tangible. Hence, al-'adl is connected with scales, and it means giving a person what he is entitled to and taking from him what he is liable to.

The difference between al-'adl and al-Qist is discernible in the fact that the latter involves a share from something, but the

former denotes giving everyone his/her right. Al-Qist is an element or mechanism of justice with which justice is implemented. It is held by some that al-Qist is an apparent justice. Peck (a unit of dry measure equal to 7.57 liters/8 quarts) is also referred to as al-Qist, so are scales, because they represent justice. On the other hand, there can be hidden justice. If we say: "al-Qist is a share from something taken on a just basis," as depicted in the example: taqsitu al-Qawm al-Shaye- meaning the people divided something equitably, then Al-'Adl is a concept and al-Qist is its mechanism with which justice can be dispensed among people. As a result, the Quran did not use the words al-Wazn and al-Mizan except with al-Qist. They are used side by side in the Quran. For example, Allah commands us to dispense and uphold justice as stated: "Verily, Allah enjoins Al-'Adl (i.e. justice and worshipping none but Allah alone) and Al-Ihsan [i.e. to be patient in performing your duties to Allah, totally for Allah's sake and in accordance with the Sunnah (legal ways) of the Prophet in a perfect manner], and giving (help) to kith and kin (i.e. all that Allah has ordered you to give them e.g., wealth, visiting, looking after them, or any other kind of help, etc.)" (al-Nahl: 90), and "Verily! Allah commands that you should render back the trusts to those to whom they are due; and that when you judge between men, you judge with justice." (al-Nisae: 58). Al-'Adl is one of the names of Allah and an attribute among His attributes. Allah, the most High, ordered the last messenger (Muhammad) to announce to the people of the books to uphold justice among themselves when it comes to making a judgement, as mentioned in the Quran: "And I am commanded to do justice among you." (al-Shura: 15). In addition, Allah has described the believers among the previous ummah that they are just. "And of the people of Moses there is a community who lead (the men) with truth and establish justice therewith (i.e. judge men with truth and justice)." (al-A'raf: 159),

“And of those whom We have created, there is a community who guides (others) with the truth and establishes justice therewith.” (al-A’raf: 181) In the Quran, believers are asked to dispense justice in their judgement: “And that when you judge between men, you judge with justice.” (al-Nisae: 58), “Indeed, Allah commands ‘adl (justice), Ihsane (grace), as well as courtesy to close relatives.” (al-Nahl: 90)

Al-Qist is a tool with which justice would be upheld among people. Allah said: “O you who believe! Stand out firmly for Allah and be just witnesses and let not the enmity and hatred of others make you avoid justice. Be just: that is nearer to piety, and fear Allah. Verily, Allah is Well-Acquainted with what you do.” (al-Maidat: 8), “O you who believe! Stand out firmly for justice, as witnesses to Allah, even though it be against yourselves, or your parents, or your kin, be he rich or poor, Allah is a Better Protector to both (than you). So follow not the lusts (of your hearts), lest you may avoid justice, and if you distort your witness or refuse to give it, verily, Allah is Ever Well-Acquainted with what you do.” (al-Nisae: 135). “And give full measure and full weight with justice. We burden not any person, but that which he can bear. And whenever you give your word (i.e. judge between men or give evidence, etc.), say the truth even if a near relative is concerned” (al-An’am: 152).

‘Adl has been considered a core value brought by Islam, and it is made an important constituent of life in its various manifestations; be it individual life, family life, social life, and political life. In fact, the Quran made upholding of justice among people, which can be achieved via al-Qist, the purpose of all the heavenly message. Allah said: “Indeed We have sent Our Messengers with clear proofs and revealed with them the Scripture and the Balance (justice) that mankind may keep up justice.” (al-Hadid: 25). It has been pointed out that ‘Adl is none other than the first purpose of sending the messengers by Allah

and revealing His book. With justice, scriptures were revealed and messengers were sent, and on justice heavens and earth stand.¹³⁵

For the scholars, justice is still the thrust in Shari'ah. Ibn al-Qayyim observed that: "When justice is entrenched and upheld; that's what Shari'ah and the religion of Allah represent, Allah is all-Knowing, the Best Judge, and the Most Just, as He doesn't specify any way, any method, and any sign as the only mean through which justice can be upheld, because if a particular method is specified, there can be another method which is more effective for upholding justice. Hence, Allah has explained that He permits all the ways through which justice can be upheld among people, and whichever way justice is dispensed and maintained, it is then permitted."¹³⁶

Similarly, scholars have made justice something with which the principles of financial contracts are maintained and its sanctity protected. Ibn Taymiyah observed that: "Those who prohibited Muzara'ah based their opinion on the Prophet prohibited in al-Mukhabarah, but what is prohibited by the Prophet is the injustice, because people used to (rent the land and) stipulate for the owner of the land to plant on a specified portion of land ... Whereas, according to Quranic and Hadith provisions, and consensus of the scholars, such a stipulation is invalid. The muzara'ah, however, is based on justice for both sides and it is based on partnership (not renting land) ... the just partnership implies that each party would have his own share. If one of the parties is the only one that has a share, then it is devoid of justice."¹³⁷

The main goal in transactions is justice and its mechanism which is fairness, including giving everyone his share. Share, from the perspective of Shari'ah, refers to what is known as property rights.

2.4.2 Property Rights: The Subject of al-Bay' System

Property right or milk refers to the ultimate and exclusive power and authority one has over something in which he/she can control as he/she likes.¹³⁸ It is commonly referred to as al-Malakiyyat, although the predecessors among the Fiqh scholars called it al-Milk.¹³⁹ Ibn al-Qirafi defined al-Milk as the permission conferred by Shari'ah on someone to enjoy and/or exchange an item or something beneficial.¹⁴⁰ In more than one Verse in the Holy Quran, there is mention of the nexus between human beings and ownership. This includes Allah's word which pointed out that the basis of justice is embedded in giving people what they are entitled to: "You shall have your capital sums. Deal not unjustly (by asking more than your capital sums), and you shall not be dealt with unjustly (by receiving less than your capital sums)." Al-Milk is connected with the right an owner has on his possession. 'Right' linguistically refers to one's share, fortune or something that should not be denied. Technically, al-Milk refers to all that is obligatory, including the rights of Allah and the rights of His servants.¹⁴¹ According to al-Zuhayli, al-Milk is the relationship between a person and the property rights which are recognized by Shari'ah in which the person has the right conferred by Shari'ah to enjoy, occupy, possess, rent, sell, use, give away, or even destroy an item of property, provided there is no any kind of restriction.¹⁴²

Islam has accorded property rights a great deal of importance, and it protects it from anything that can blemish it or eliminate it, based on justice. Islam also prohibits aggression (or battery) and taking over one another's property right unjustly and in any illegal way. Allah said: "O' ye who believe, eat up not one another's property right unjustly (in any illegal way e.g. stealing, robbing, deceiving, etc.)" In addition, narrated by

Abu Bakrat, the Prophet said: "Your blood, your wealth, and your honor have become haram among you"¹⁴³ The Imam of the two sacred mosques posited that ownership belongs exclusively to the owner, no one would contend with the owner over his property rights unjustly. However, human needs have made it necessary to engage in trade-offs. There is no doubt in the fact that usurping people's property rights unjustly is prohibited.¹⁴⁴ Ibn Taymiyyah observed that a man is more entitled to his property right than his children, his parents, and all the people.¹⁴⁵ Ownership has prevented any other person who is not the owner of a particular property right, to handle it and deal with it the way he likes.

This ability to exclusively possess something is, for a greater reason, an obligation from Allah to human beings, because the real owner of all the properties is Allah. He gives human beings the right to ownership (or property right), and makes him the trustee to administer the properties. Allah said: "And spend of that whereof He has made you trustees." Allah also said: "And give them something out of the wealth of Allah which He has bestowed upon you." Quranic Verses on this issue are abundant. The Verses imply that the property rights that human beings own belong to Allah. He made it for you to enjoy, and He makes you an administrator over it. The property right does not belong to human beings in reality – we are merely agents to administer it.¹⁴⁶ In addition, there are some issues and rules which are related to ownership of property rights among which is others' rights to one's property (e.g. zakat). This should be taken into cognizance in the trade-off process, so that justice would be upheld and applied on the basis of the sale system.

The concern of this study is the process of exchange of these property rights and all that relate to it. Hence, it has become imperative to discuss some aspects of property rights.

2.4.3 Ownership in Light of Fiqh Discussions on Dhaman

The term dhaman in the fiqhi deliberations has a close relationship to ownership. However, the term has multiple fiqhi usages. Dhaman is used to mean guarantee or Kafalah. Dhaman in this context refers to: "Joining the liability of the warrantor to that of the principal in claims regarding personal injury, debts or material assets".¹⁴⁷ The dhaman as kafalah is not directly relevant to ownership as the guarantor is benevolently bearing the liability.

Dhaman is also used to mean compensation for damage of a property (or its usufruct) as agreed by the legitimate owner and the compensating party.¹⁴⁸ dhaman in this context is not necessarily an outcome of exchange rather an outcome of legitimate ownership. This is because the right for a compensation for damage for example, is only justified if a legitimate ownership of the damaged property is proven.¹⁴⁹

The most relevant usage of the term dhaman to the discussion in this chapter is the dhaman that results from milkiyyah. Jurists in this context used the term dhaman to mean the bearing of a responsibility/liability or the readiness/willingness/entitlement to bear the responsibility/liability in a given transaction.¹⁵⁰ This means that the dhaman holder bears the responsibly/liability of damage/destruction/loss of a given property. This dhaman or liability bearing is what justifies and legitimates benefiting or profiting from a given property as per the legal maxim al-ghunmu bil ghurmi. Being closely associated with milkiyyah, dhaman in this context is often called dhaman al-milkiyyah.

2.4.3.1 The Implication of Dhaman al-milkiyyah

Al-Milk is the relationship between a person and the property which is recognized by Shari'ah in which the person has the right to enjoy, occupy, possess, rent, sell, use, give away, or even to destroy his property, provided there is no any kind of Shari'ah restriction.¹⁵¹ The recognized ownership is acquired through legitimate means such as an exchange transaction, gift, inheritance etc.¹⁵² Dhaman as a result of continuation of ownership (istimrar al-milk) over a property entitles the owner for any increment or benefit resulting from the property as per the following Hadith: "A man bought a slave ... He then found defect in him. He brought his dispute with him to the Prophet and he returned the slave to the buyer. The man said: Messenger of Allah! He (the buyer) has benefited from my slave (that I have sold to the buyer). The Prophet then said: al-kharaju bi al-dhaman (Entitlement to profit is dependent on responsibility for attendant expenses and possible loss and defects)."¹⁵³

Al-kharaj means the profit or the benefit of a given property. It also means wages or gift¹⁵⁴ as in the Quran: "Or do you, [O Muhammad], ask them for payment? But the reward of your Lord is best, and He is the best of providers." (Surah Al-Mueminun, Verse 72).

In addition to the above Hadith, the Prophet said: "It is not lawful to lend and sell, nor two conditions in a sale, nor to profit from what you are not liable for, nor to sell what one does not have."¹⁵⁵ The part of the Hadith that prohibits "to profit from what you are not liable for" or "ربح مالم يضمن" has been discussed by scholars and given a number of examples. All examples given by scholars go back to the following explanation that Shariah prohibits "profiting from a property or its utilities without being liable for its destruction and or its deficits".¹⁵⁶

Assuming the liability of a property takes place at two stages:

1. The right to the asset by owning it legitimately, but this ownership would be seen as incomplete till it is in hand; therefore, the second stage for assuming full liability is,
2. Having the property in position.

In other words, as long as an asset is with the ownership of a person he is by default assuming its liability and therefore he is entitled to its profit. However, the ownership will not be considered complete unless the property is in possession, which means that the property is in existence and the owner has it in hand. Once the ownership is completed and well-established,¹⁵⁷ the dhaman is also recognized. The implication of this in relation to the legal maxim is elaborated in the following examples.

2.4.3.1.1 Selling Something before Owning it

In the Hadith highlighted earlier, the Prophet prohibited “selling what one does not have”. Ijma’ is established that this sale is prohibited; however, Salam is exempted from this ruling. This is because the subject matter in Salam is not in existence so it is not in the liability of anyone specific but the seller to deliver in the future. The sale that is referred to in the above Hadith is the sale of an object that is under someone else’s liability.¹⁵⁸

Ibn Al-Qyim stated: “The liability (assumed in Salam) is established and the debt is created, and the prohibition of ‘selling what you do not own’ is because the seller in this case assumes no liability of the asset (as he does not own it), he is not indebted for it, and he does not even possess it. Therefore, the subject matter of the sale should be established in the hand of the seller or to be liable (indebted) for.”¹⁵⁹

2.4.3.1.2 Selling Before Taking Possession (qabdh)

Qabdh or taking possession to transfer the liability of an asset from one party to another. For an ownership to be well-established, one must take possession of an asset. Taking possession of an asset depends on the type of the exchanged asset. In general, qabdh depends on the common business practices prevalent in a specific market.¹⁶⁰ In some markets, the possession of a good is recognized as having taken place either through actual or constructive delivery of that good. However, for immovable assets, taking possession is known by what is called in Fiqh as qabdh hukmi, such as in the real estate business where qabdh is by takhliyah – which is relinquishing or abandoning the asset for the other party in a sale.¹⁶¹

In a given exchange contract, only when recognized qabdh takes place, the liability of the asset it would be transferred. However, if the contract is concluded but there was no taking of possession, the scholars are of these following opinions:

First, the opinion of Hanafis, Shaf'is and one of the opinions of Hanbalis,¹⁶² that the liability is assumed by the buyer only after taking possession of the exchanged item. Among their evidences is the Hadith of Prophet: "Do not exchange something before you take it in possession".¹⁶³

Second is the opinion of Malikis, Hanbalis¹⁶⁴ whereby the buyer assumes liability by contract only and without a need to take possession, except in some cases.¹⁶⁵ They have argued that once the contract is concluded, the seller has no right to drop back in the sale or refuse to give the exchanged item to the buyer; therefore, even other schools of Fiqh hold the seller abusive. If this is the case, then the exchanged item is under the liability of the buyer and he has to assume full liability.

It can be argued that forcing the seller to deliver the asset is evidence that the ownership of the asset is only concluded when

delivering it to the other party. If the seller fails to do so, he has no right over the paid price and he cannot enjoy its benefits.

Ibn Taymiyah in trying to bridge the two opinions has concluded that the dhaman is transferred when the buyer is enabled to take possession of the asset. If the buyer while being enabled for possession fails to take possession, he is considered liable for the asset.¹⁶⁶

2.4.3.1.3 *Assuming Liability during the Al-Khiyar Period*

Khiyar is an option granted to contracting parties to rescind an exchange by either party within a certain period after the conclusion of a bargain.¹⁶⁷ Khiyar can be a condition that is stipulated in a contract like in Khiyar Al-Shart or can be granted as default from the contract Khiyar Al-'aib, Khiyar Al-Rueyah, and Khiyar Al-T'ayin. Khiyar can revoke a contract after being concluded. There are many issues and deliberations among the scholars regarding different types of Khiyar; however, what is intended here is to see an implication of that on dhaman. In fact, scholars have debated who is among the contracting parties that should assume ÌamÉn during khiyar period if the khiyar is the right of the buyer.

Hanafis, Shafi'is and Hanbalis¹⁶⁸ opined that the liability of the subject matter in an exchange with khiyar is to be assumed by the seller before the buyer takes possession, and by the buyer after taking possession. They reasoned their opinion by stating that taking possession is what concludes a contract and therefore liability is transferred to the buyer not prior to that. In addition, the liability is transferred to the buyer after taking possession. Therefore, if the subject matter was destroyed during this period, the buyer is liable by paying the price if he

chooses to conclude the contract or to replace it by similar item for replaceable objects.

Malikis¹⁶⁹ opined that the subject matter is under the liability of the seller regardless of taking possession or not, unless there is a probability or an evidence of the buyer's negligence. They have reasoned their opinion by stating that the seller is the legal owner of the asset during the khiyar period so he should assume full liability unless there is negligence from the buyer's side.

2.4.3.1.4 *Dhaman Implications in Void Contracts*

Contracts can be either valid or invalid.¹⁷⁰ This depends on the contract being compliant with the conditions of contract (e.g. the permissibility of the subject matter) and the existence of the contract pillars (e.g. one of the parties of the contract is insane). Unlike an invalid contract, a valid one can give rise to legal consequences. In other words, a valid contract has the legal effects whereby the contract is binding upon the parties with immediate effect after the contract has been concluded.¹⁷¹ The Hanafi School of law however, adds one more category – which is voidable contracts. The voidable contract, according to Hanafi School is when a condition in the contract is defective. This defects should be in something other than the pillars of the contract. In fact, the essence of a fasid contract is sound, but some conditions that have no implications on its essence are imbalanced. This imbalance can be corrected and re-balanced, and the contract can be validated thereafter. In this case, Hanafi hold this kind of contract as acceptable and can be discontinued by one of the parties before the nullifying or invalidating factor is removed.¹⁷²

An invalid and voidable contract has no implication on the ownership and therefore the dhaman of the subject matter. This

is because the contract is not valid and incomplete. However, if the possession of the subject matter in the voidable contract took place with consent from the seller, there are differences of opinions among the jurists on whether transfer of ownership and therefore dhaman results.

The majority of scholars opine that ownership is transferred only by a valid contract.¹⁷³ Hanafi School hold the opinion that the voidable contract transfers the ownership of the subject matter of exchange.¹⁷⁴ Some Malikis have opined that only when the subject matter is destroyed or disbursed will the transfer of ownership of a voidable contract take place.¹⁷⁵

Regardless of their differences in opinion on ownership validity in voidable contracts, a majority of scholars link dhaman or the liability of the subject matter to taking possession.¹⁷⁶ This means that taking possession of the subject matter in a voidable contract would hold the buyer liable.

2.4.3.2 Dhaman and Risk Sharing

Dhaman as a result of continuation of ownership (istimrar al-milk) over a property entitles the owner for any increment or benefit resulting from the property. This concept is strongly related and attached to the area of risk sharing intended in this book. It can be stated that the concept of dhaman is one of the building blocks of risk sharing. However, the two concepts are different, and the following are some of the differences:

While the term risk sharing lacks any direct usage in the literature, dhaman has multiple usages in Fiqh. However, the closest usage of dhaman to a risk sharing concept is the dhaman as a result of continuation of ownership. Dhaman in this context serves as a tool to examine true ownership, solve disputes over destroyed assets and hold one of the parties accountable for it. Risk sharing on other hand, is what is should transpire from the

overall transaction. It serves as a mindset that can be used by product developers in Islamic finance who may not understand the complexities of Fiqh, as a guide to come up with Shari'ah-based products. Therefore, the two concepts are part of the equation but serve different attributes.

Furthermore, the work defines risk sharing as "a result of applying al-Bay' where the contracting parties share the risk associated with transactions in accordance to their ability and willingness to share the risk." The two parameters the book highlights are ability and willingness. Dhaman comes under the parameter of ability. This is because someone should not hold himself liable for something that is beyond his ability.¹⁷⁷ In fact, the prohibition of selling what one does not have goes beyond the liability part to more of his inability to deliver. This is because someone may own a stolen object and he is liable for its destruction but he still cannot exchange it because of his inability to deliver it. In addition, dhaman touches upon the ability aspect without touching upon willingness, which is an important part of exchange legitimacy. Risk sharing parameters introduce a more holistic approach to contract legitimacy and does not intend to replace any other fiqhi concepts or to give rise to fatwas. Instead, it is meant to serve as a mindset and guide for industry players.

2.4.4 Definition of Al-Mal (Property Rights/Estate)

Linguistically, al-Mal refers to all that which can be possessed.¹⁷⁸ Technically, al-Mal, as specified by some scholars, refers to things. The Hanafi School defines it as that which can naturally be inclined and which can be spent or held.¹⁷⁹ They consider property as something that can generally be acquired, owned, and made use of. Therefore, two features should be considered before something can be regarded as property. The first feature

is possession/ownership. Something that cannot be owned or possessed such as abstracts (e.g. knowledge, health, dignity, and intelligence). Also, those things that are beyond human control, such as open air, heat of the sun, moonlight, cannot be considered property. The second feature is the ability to generally enjoy or make use of the object. Whatever that cannot be enjoyed, such as dead meat (although it is not considered a necessity to mention it here), poisoned food or spoiled food, cannot be referred to as property. It cannot also be considered a property right that which can be enjoyed or made use of but generally its usefulness is not considered real, such as a seed of wheat, a drop of water, a handful of dust. What can be considered as property rights is that which can serve as money or its equivalent among all people or among some people. Alcohol and pork for instance can become property rights for non-Muslims, because have use for both.¹⁸⁰ Restricting the definition of property rights to those that can be made use of negates the definition of property rights given by the majority of scholars. According to the majority of scholars, property rights involve all that which has value and whose destruction should be secured. They also regard all that which can be made use of as property rights, because the purpose of acquiring anything is to make use of it, and it is not the real thing that is important. This then, by definition will enable ownership of such assets, because ownership is the basis of property rights without which people would not have interest in such assets or property. This is a sound view that can be adopted. Imam al-Shafi'i observed that a property right is the value on which a transaction can be conducted, and destruction should be guaranteed. It also involves that which is valuable to people such currency units (e.g. fils) and the likes.¹⁸¹¹⁸²

Fiqh by definition, be it the definition of the majority of scholars or by the Hanafi School revolves around property rights

being tangible assets and it is considered a reference for the property right, as its benefits can be defined as the advantage gained from a thing/asset such as residential house, car, clothing etc.¹⁸³ However, the Fiqh application of this definition can sometimes be more comprehensive or broad, such in the case of hiring/leasing contracts which involves the exchange of ownership/benefits of an asset for a service, and it involves the employee's know-how which has value when it is used to render a service. There have been discussions and debates regarding this kind of well-established relationship.

Contemporary authors have defined property rights as the benefit that has monetary value which is protected by the law. It is also defined as the benefit owned within the confines of Shari'ah. Some have also defined it as the administrative authority which can be used by the owner of the property within the confines of the law and under the protection of the law. In addition, it is also defined as the authority one has over something or something necessary to achieve a certain benefit.¹⁸⁴

2.4.4.1 Division of Ownership: Complete and Incomplete Ownership

Complete ownership refers to the ownership that involves al-Riqbat (relating to inheritance) and al-Manfa'ah (usefulness/benefit/utility), but incomplete ownership involves either only al-Raqbah or only al-Manfa'ah¹⁸⁵ or only al-Intifa' (usufruct).¹⁸⁶ The al-Raqbah aspect of complete ownership means enjoyment and usage of the property right in terms of making it an object of a sales transaction or giving it out as gift or inherited by their heirs. The al-Manfa'at aspect of complete ownership indicates enjoyment of the property right in terms of

loaning/leasing and usage of the property right.¹⁸⁷ Scholars have made complete ownership the basis of ownership of property right while incomplete ownership is not considered the basis. The main objective of the ownership is to derive benefit from it. This is the rationale behind making ownership that involves only al-Riqbat without al-Manfa'at an incomplete ownership. It is an incomplete ownership if one has al-Riqbat aspect of ownership while has the al-Manfa'at aspect of the ownership. One aspect without the other is incomplete ownership. Ibn Rajab al-Hanbali divided ownership into four categories: Ownership of an asset with benefit, ownership of an asset without benefit, ownership involving benefit without assets, and ownership involving usage of the asset but without ownership of benefit.¹⁸⁸

This division of ownership was made based on its relationship with the real asset/property right and its ancillaries and guided by the definition of ownership. Hence, the asset is made on the basis of the complete ownership, while the incomplete ownership is just an ancillary of complete ownership. The main point here is that assets are considered the basis, because the ownership of an asset can be complete ownership which includes all the rights of enjoyment and benefiting from the asset. Complete ownership allows full enjoyment and utilization of the asset, and it also allows creating all kinds of permitted enjoyment and utilization of the assets within the confines of Shari'ah. However, incomplete ownership does not allow full enjoyment and utilization of the asset, as the enjoyment and utilization are conditioned within the limit of usage and benefit only, because incomplete ownership does not involve both al-Raqbat and al-Manfa'at.¹⁸⁹ Among the peculiarities of complete ownership is that it is enduring and continuous and it doesn't end except for an absolute legal reason. Hence, it is not allowed to fix a duration for it. Likewise,

there should not be a fixed duration for contracts with respect to complete ownership such as sales contracts and the likes. However, there should be fixed duration for contracts of incomplete ownership that involves benefits such as leasing and loaning; thus fixing a time, selecting a place, and specifying its utilization for contracts with respect to incomplete ownership are allowed.¹⁹⁰

2.4.4.2 Valuable and Non-valuable Property Rights

Valuable property rights refer to that which can be actually acquired, that which its usage is allowed by Shari'ah such as real estate, movable property rights, food items, and the like. Some examples include fish in the sea, birds in the sky, minerals underground, and other things that are permitted but not conventionally valuable such as hunting and planting grass. However, non-valuable property rights are those that cannot actually be acquired or that which is not allowed by Shari'ah except in a situation of necessity. Some examples of this include alcohol and pork, which are of no value to Muslims, given the Shari'ah opinion on both things. Muslims are not permitted to make use of the two except if a circumstance warrants it (darurah), such in the case of severe hunger or quenching serious thirst which, if not quenched, can cause death. In this situation, either of the two can be consumed based on the level of need.¹⁹¹

Based on this reasoning, many issues have cropped up, among which are:

1. **Validity:** Some contracts can be valid while others can be invalid. Valuable property rights are valid to be object of the contract such as sales contracts, lease contracts, endowment, loans, guarantee, wills, business partnerships,

and the likes. Transactions cannot be conducted on non-valuable property rights. Buying and selling of alcohol or pork by Muslims is not considered a valid transaction. The major criterion that distinguish between the two scenarios is the commodity, because it is the **basis** for every sale transaction, and the value of the commodity is the **condition** of transaction, but consideration (price) is the **means**.

2. Guarantee: If a person destroys a valuable property right that has been secured, it will be replaced with a similar property right. Regarding non-valuable property rights, it should not be secured. For example, if a Muslim pours away alcohol there should be no guarantee on it, but if the alcohol belongs to a non-Muslim living under the protection of a Muslim state, then it, according to the Hanafi School, it should be secured, because it is a valuable property right to them.¹⁹²

2.4.4.3 Property Rights that Can and Cannot be Possessed

Property rights are naturally possessed, although there can be a situation that can prohibit possession of a particular property right. Property rights in respect of ownership are divided into three:

1. The property right that cannot be acquired and owned, given the current situation of the property right. This includes public utilities such as public roads, bridges, etc.
2. The property right that cannot be owned, based on Shari'ah regarding the non-permissibility of the ownership of such property rights. Some examples include endowment funds, landed property rights, financial property rights and an orphan's property right. These

properties cannot be enjoyed or utilized except for a necessity or for a benefit.

3. The property right that one can absolutely own or made to own (i.e. through inheritance) without any restriction. It includes other types of property rights besides the two types of property rights previously mentioned

From these definitions, it can be concluded that the required criteria for considering something as mal (property right), in the view of the majority of jurists, are as follows:

- It should be considered a source of wealth
- It should be something that can be benefited from
- It should be something for which compensation can be taken
- It should have value¹⁹³

2.4.4.4 Towards a More Comprehensive Definition of Property Right

The definition of milk and mal that was previously mentioned has been the guide of fuqaha and contemporary Shari'ah scholars in their juristic opinions and analogies. Islamic finance has been perceived as more stable as its transactions are based on assets.¹⁹⁴ Fiqh has also expanded and continues to expand in the transaction space where physical assets play a major role. However, this focus on physical assets and physical asset creation may have hindered Islamic finance from tapping into more innovative investments and businesses. Contemporary finance on the other hand, has accommodated innovation and widened its reach to support industries that previously did not exist, such as social media platforms and technology such as Artificial Intelligence – amongst others.

It could be argued that for Islamic finance to play a bigger role in supporting innovation and development, two points have to be thoroughly discussed:

- First, it is important to explore the Fiqh definition of property rights in the light of the asset categories that the market recognizes.
- Second, the fiqhi approach to investing in those assets must be ascertained.¹⁹⁵

Property rights as defined by the majority of fuqaha is:

كل ما له قيمة يلزم متلفه بضمانه¹⁹⁶

Anything that has value and gives rise to liability if someone destroys it, or whatever that has value should be guaranteed/secured.

Al-Shatibi observed that property right is owned by the owner who defend their right if it is taken from him unjustly¹⁹⁷ Ibn al-'Arabi defined it as something that can be desired and longed for, and fit for usage conventionally and legally.¹⁹⁸ Al-Zarkashi defined it as that which can be used for investment or business, and can be traded or exchanged.¹⁹⁹ According to Hanbali school, a property right is something that can be acquired without need and can be made use of and benefitted from in all situations.²⁰⁰

The above definitions suggest a broad scope for property rights, as it includes anything that brings value to its holder/owner. This can transcend physical assets and its usufruct. In fact, what creates value to an asset is its desirability. Apart from the asset being Shari'ah compliant, and being free from Gharar as well as to be subject to ownership, there is no restriction on what constitute a property right/asset.

In Fiqh, property other than physical assets have been recognized and exchanged in a number of contracts. Here we delve deeper into the types of properties that are tradeable and investable.

2.4.4.5 Intangible Properties

AAOIFI, in its Shari'ah Standard 42, defines intangible assets as "property rights that apply to intangible matters, entitling their owners to the exclusive right to any proceeds arising from them" (→ AAOIFI, 2012: Article 3/3/1). The International Islamic Fiqh Academy of The Organization of Islamic Cooperation (IFA-OIC), in Resolution No. 43 (5/5), listed some of examples of intangible properties: "Business name, corporate name, trademark, literary production, invention and discovery are rights belonging to their holders and have, in contemporary times, financial value which can be traded. These rights are recognized by the Shari'ah and should not be infringed".²⁰¹

As for the possible rejection of the identification and initial recognition of the intangible asset due to the non-physical nature of its existence, it would be the obvious implication of an established fiqhi opinion that rejects the consideration of a usufruct as property right. However, contemporary scholars, AAOIFI and the IFA-OIC have adopted the definition of property right (mal) that includes usufructs and services. They have also considered intangible assets as real property rights, as the previously quoted IFA-OIC resolution clearly establishes: "Business name, corporate name, trademark, literary production and invention or discovery are rights belonging to their holders and have in contemporary times, financial value which can be traded. These rights are recognized by the Shari'ah and should not be infringed" (→ IDB & IFA, 2000: 89, Resolution no. 43 [5/5]).

AAOIFI adopted the IFA-OIC resolution using the exact same words (→ AAOIFI, 2012, Article 3.3.3.1).

Ibn Mas'ud narrated that the Messenger of Allah said: "The feet of the son of Adam shall not move from before his Lord on the Day of Judgment, until he is asked about five things: about his life and what he did with it, about his youth and what he wore it out in, about his wealth and how he earned it and spent it upon, and what he did with what he knew."

The above Hadith lists some types of granted properties to individuals which are:

1. Time (life)
2. Physical capital (wealth)
3. Intellectual capacity (knowledge)
4. Physical capacity (body).

The Prophet considered intellectual property rights as an asset more than once. In a historical reference, a lady came to the Prophet and declared that she had decided to offer herself to Allah and His Messenger. The Prophet said, "I am not in need of women." A man said (to the Prophet) "Please marry her to me." The Prophet said (to him), "Give her a garment." The man said, "I cannot afford it." The Prophet then said, "Give her anything, even if it were an iron ring." The man apologized again. The Prophet then asked him, "What do you know by heart of the Quran?" He replied, "I know such-and-such portion of the Quran (by heart)." The Prophet said, "Then I marry her to you for that much of the Quran which you know by heart."²⁰² The Prophet recognized the intellectual property right as asset that allows someone to marry. The Quran also reveals the story of the Prophet Moosa with the Shuaib (peace be upon them) that he gives a 10 years Ijara contract as dowry/Mahr. The Quran states:

He said, "Indeed, I wish to wed you one of these, my two daughters, on [the condition] that you serve me for eight years; but if you complete ten, it will be [as a favor] from you. And I do not wish to put you in difficulty. You will find me, if Allah wills, from among the righteous." (Surah Al-Qasas, Verse: 27) In this instance, the physical capacity to serve for 10 years is what has been given as dowry.

In addition, the intangibility of properties and their exchange have been extensively discussed by fuqaha. In fact, there are number of contracts that are built on the basis of recognizing various types of properties/abilities such as physical ability (services based Ijara), skills and professionalism (Mudharib in Mudharabah), and even reputation (Wujuh partnership).

The above properties have been employed through existing contract of exchange and partnership. For example, in an Ijarah contract, an exchange takes place by exchanging physical capital with physical capacity or only time (making oneself available to serve in a specified time). In partnership-based contracts like Mudharabah capital contribution is in the form of physical capital from one party and knowledge and time from another. Reputation can also be treated as capital in one of form partnership, which is Sharikat Alwujuh.

Shari'ah has safeguarded individuals' properties and capacities and imposed rules to serve as protection of each person's property rights and capacities. The Prophet said in the Hadith: "All things of a Muslim are inviolable for his brother in faith: his blood, his wealth and his honor."²⁰³ Another Hadith states that: "Verily your blood, your property right and your honor are as sacred and inviolable as the sanctity of this day of yours, in this month of yours and in this town of yours. Verily I have conveyed this message to you." Shari'ah also imposed a number of punishments that serve as protection of each of the above property right and capacities.

There is a need today, especially in the Islamic finance arena, to reconsider human capacities as properties and assets that can be exchanged and financed and invested in the same way physical capital is treated. This can be implemented by securing risk sharing and avoiding any risk transfer by the means of Riba and Gharar (uncertainty).

Today's markets recognize assets other than physical assets as possessing financial value. The Shari'ah issues with any exchange of recognized assets continue to be the same. Every exchange ought to be free from Riba and Gharar. The two main requirements actually serve as one from a risk point of view as there is a contractual risk transfer in both of them.²⁰⁴ The moment the risk transfer is eliminated; there should be no issues with exchanging the assets.

It is with no doubt that there is a great amount of uncertainty in this contract, and Gharar is commonly defined as excessive uncertainty of the business outcome. The International Shari'ah Research Academy (ISRA) has defined Gharar as "something for which the probability of getting it and not getting it are about the same".²⁰⁵ It can be argued that all businesses carry out this amount of uncertainty. What makes uncertainty a cause of prohibition is when it is contractually shouldered on one of the contracting parties. This issue would be taken care of when the exchange is done on the basis of al-Bay' through the mechanisms of risk sharing.

The emphasis of Shari'ah on property rights and entitlement along with the al-Bay' means of exchange will result in risk sharing. This is sufficient to serve as guidance for more creativity and innovation in the Islamic finance industry.

While contemporary Islamic finance has yet to explore outside the box of physical asset centrality by introducing very complex and costly structures, the Quran has provided us with the means that would elevate this industry to its fullest potential.

Al-Bay', in fact provides the means to do so. Islamic finance and Fiqh of transacting is well established and provides a comprehensive and well-articulated framework on the transaction and the exchange of existing or known assets. Contemporary Islamic finance has also tapped into some development projects by introducing more complicated structures that have resulted in bringing into the picture physical assets which in most cases have nothing to do with the project itself but serve as a means to secure financing. Islamic finance has also expanded its boundaries in the Tijarah framework by tapping into the wider scope of al-Bay'.

2.4.5 Other Al-Bay' system characteristics

1. **Al-Muqabalah fi al-Maliyah or Equivalency:** This implies that the exchange should be in a way that the exchanged items to be considered equivalent financially. Exchanging money for more money is not equivalent financially, however, exchanging commodity for money indicate the equivalency in the eye of the parties or the market. "Riba is prohibited to safeguard equality and mutual closeness among people in terms of financial power, because Riba is an earning without a material substitute, and it connotes extortion. It is also tantamount to immorality and bad behavior, and it is susceptible to natural losses, as obtainable in trade, farming and properties."²⁰⁶
1. **Al-Mu'awadah or Compensation:** The exchange should be based on the agreed compensation.
2. **Risk sharing** emerges from these two characteristics and serves as a measure for them (i.e. the two things). Without this risk sharing measurement, al-Murabi (Riba dealer) would have been correct in his claim that interest is

exchanged (transacted) for a substitute or consideration (like money or its equivalent). In fact, an al-Bay' based contract, which is considered valid under Shari'ah, is based on certain arrangements and systems. In this system, risk should be shared amongst the two parties based on two measures- taradhi which is consent and wos'. Taradhi and wos' are determined by the nature of the work and the capital.

3 Risk Sharing as a Mechanism of the Al-Bay' System

Risk sharing is a term that has no direct equivalent in Fiqh literature. The fuqaha have discussed the foundation of this term and developed its intended meaning. The history of the theory has been tracked all the way to the Prophet and the emergence of Islam, with more development ever since. The concept has been recently deliberated in the writings of Abbas Mirakhor as a Shari'ah principle that requires financial and economic agents to share the risk among themselves.¹ Some have linked the concept with the well explained principle of profit and loss sharing. It has also been claimed that profit and loss sharing is the true form of Islamic finance.² The risk sharing theory goes beyond being summarized in one form of exchange. It is a concept that can be applied to all types of contractual arrangements as long as its parameters are observed. In this book, risk sharing has been defined as: "The result of applying the al-Bay' system, where the risks associated with transactions are shared between the parties in accordance to their ability and willingness to share the risks."

For al-Bay' that is built on justice and formed on the basis of property rights, the mechanisms of exchange in this system are done through the basis of risk sharing. As defined earlier, risk sharing is the result of applying such a system. The parameters that result in risk sharing are the ability and willingness to share the risk. The centrality of risk in this concept is evident. The concept and founding pillars of risk sharing will be further explained.

3.1 Risk and Shari'ah Treatment

Risk emerges from two sources; uncertainty and ambiguity. Uncertainty and ambiguity give rise to the discomfort experienced in thinking about any missing information with regard to either outcomes or probabilities.³ This discomfort can be resulted from the unknown future outcomes or the behavior of the counterparty.⁴

Risk can be defined as the uncertainty and ambiguity of meeting the contracting parties' expectations. It is beyond what is commonly perceived as the probability of loss, as the contract of wadi'ah (selling at discount) implies that the seller expects to lose a certain amount given as a discount to the buyer. However, this expected "loss" cannot be viewed as risk as it is expected by the seller who is willing to bear it for certain reasons. The risk in this case is that there is the possibility that the seller can lose more than expected, which is something that is not directly related to the contractual arrangement and is based on market conditions.

Shari'ah recognizes the problem of uncertainty. Shari'ah has also introduced solutions to the two types of risk (uncertainty and ambiguity). The effect of ambiguity; for example, is reduced and managed by having precise contracts that govern the behavior of the parties in the transaction. A contract acts as a constitution for the parties who would refer to it in event that they face any kind of disputes. Allah in the Quran states: "O you who have believed, fulfill [all] contracts." (Surah Al-Ma'idah, Verse 1) And in another Verse: "And fulfill [every] commitment. Indeed, the commitment is ever [that about which one will be] questioned." (Surah al-Israe, Verse 34) The Hadith of the Prophet stated that: "And the Muslims will be held to their conditions (commitments), except the conditions that make the lawful

unlawful, or the unlawful lawful.”⁵ Al- Bukhari narrated in his Sahih, the book of good manners, that the Prophet said: “The signs of a hypocrite are three: Whenever he speaks, he tells a lie; and whenever he promises, he breaks his promise; and whenever he is entrusted, he betrays (proves to be dishonest)”.⁶ Therefore, Shariah stresses that the contracting parties should keep their obligations as per the contract and they have to state their expectations and the outcomes of the contract very clearly. In addition, the contract has to clearly state the expected behavior of each one of the parties involved in the transaction and it is their responsibility to ensure that no ambiguity shall arise from or by the contract. It will be regarded as Gharar and cheating if the contract is not clear.⁷

The Prophet said: “He who took up arms against us is not one of us and he who acted dishonestly towards us is not one of us.” Another narration of Muslim states that the Prophet happened to pass by a heap of corn, and he placed his hand in that (heap) and his fingers felt the wetness. He said to the owner of that heap of corn, “What is this?” He replied: “O Messenger of Allah! These have been drenched by rainfall.” He remarked, “Why did you not place this (the drenched part of the heap) over the corn so that people might see it? He who deceives is not one of us.”⁸

Some literature refers to this type of uncertainty as an endogenous uncertainty resulting from the economic agents’ decisions that is related; for example, to the uncertainty about the suitability of the seller, or the quality of the commodity he buys or the terms of the trade, that will take place. Individuals who take the trouble to conduct a more extensive search can reduce this type of uncertainty to a certain extent.⁹ The Shari’ah obliges everyone contracting in the Islamic market to have their

aims and expectations, at least on the matters related to the contract subject matter, to be stated clearly.

While the ambiguity and uncertainty of the parties' behaviors seem to be manageable by contracts, the uncertainty related to the future outcome seems to remain problematic. More often than not, parties manage the risk arising from this by considering different possible scenarios and try to take as little risk as possible. Shari'ah governs this part by two general parameters, by assuring the desire to take the risk and the ability to take it.

3.1.1 Risk Arising from Contract

Uncertainty can be a result of contractual arrangements (the conditions in the contract) and can be related to the future outcomes of the transactions. Shari'ah treatment of the contractual arrangements ensures that uncertainty is kept to a minimum by creating strict parameters surrounding the uncertainty; to a point where any uncertainty regarding the contract's terms and conditions render the agreement void and the transaction impermissible. This is what the fuqaha have termed as Gharar Fahish.¹⁰ In fact, scholars discussed the permissibility and the impermissibility of Gharar and identified a number of aspects where Gharar or the uncertainty in the contract would make it void. These aspects are as follows:

1. Uncertainty related to existence, for example, buying or selling something that is not in existence, as in the purchase or sale of a cow calf that is yet to be born. This Gharar is evident in a Salam contract. However, Shariah has replaced this uncertainty with a certainty of knowing the quality and quantity of the product which is to be

stated in the contract, thus binding on the contracting parties.

2. Uncertainty related to ownership, for example, the purchase or sale of a stolen car.
3. Uncertainty related to quantity, for example, a sale contract in which the quantity of the sold item is unknown or the price is unknown.
4. Uncertainty related to quality, for example, uncertainty related to the type or specifications of the goods which are the subject of a contract.
5. Uncertainty related to the time of delivery, for example, a sale for deferred payment when the date is not fixed.¹¹

Looking at the types of Gharar, we can observe that they are related to the actual contractual arrangements and conditions. In other words, it is harder for the parties to predict or estimate the actual risk they will be taking in the transaction itself. However, Shari'ah requires that the agreement between both parties clearly define the roles and expectations, creating a sense of accountability and positive prediction of future behaviour on both sides.

Another type of uncertainty is one resulting from not meeting future expectations in a transaction. This uncertainty or risk must also be treated and mitigated.

3.1.2 Risk Arising from Future Uncertainty

Risk is not something that is absolute. Risk is fueled by the uncertainty of the outcome of the actions that are taken. Uncertainty of the outcome is derived from the desires of the contracting parties to transfer the risk based on their assumptions that may defer from one to another.¹² The different assumptions and speculations of the future outcome of a

transaction leads to the contracting parties behaving differently towards an asset, and an exchange happens as a result of that (the differences in wants, needs and expectations). In this regard, we can view the set of Shari'ah rules concerning an exchange as conditions to promote cooperative behavior and avoid conflicts of interest.¹³ Therefore, Shariah promotes the sharing of risk among the parties involved in a given transaction.

For example, in a normal house sale, a seller will likely initiate a sale under the assumption that the price of the house has reached its peak and it is time to sell, whilst a buyer will purchase the house with the assumption that the price of the house will accrue further. In this very simple example, both parties enter this exchange with different assumptions and a differing level of risk given their different objectives. The Shari'ah requirements for this simple transaction are for both parties to own the exchanged items, to be exchanged on the spot and to exchange the full ownership of the subject matters permanently. These Shariah requirements do not have any links to the expectations of the parties.¹⁴ The question that arises is, what if one of the assumptions was wrong?

Shari'ah considers the outcome risk of the transaction as irrelevant in this case as long as the parties have owned the exchanged items. If the house is valued at US\$100,000 at the time of transacting and if the value decreases, then the house is equivalent to US\$80,000 in the next exchange that takes place. This is often referred to in Fiqh as financial equivalence (*muqabalah fi al-maliyah*). The risk of price fluctuation in the future has no effect on the legality of the contract.¹⁵ What is very important in Shari'ah is that the exchange has to be based on mutual agreement and according to the risk analysis of the parties at the time of the exchange, thus determining their ability to take risk.¹⁶ However, there should be no contractual

risk transfer of the uncertainty in future outcome of the transaction to any one of the parties.¹⁷ In addition, there shall be no condition or clause in the contract which states that in case of a price change, party “B” would bear that risk, or a clause stating that party “A” will only pay the price of the house if the price rises. This does not indicate that one should not manage the risk. Risk management is allowed by any means possible other than transferring the risk to the other parties.¹⁸

This rule becomes clearer when the exchange takes the form of a partnership. The contracting parties exchange money for of the enterprise’s shares. The future outcome of the enterprise should be irrelevant to the format of the contract and to the distribution of risk. The parties, however, may assess their situation and determine their level of involvement and the amount of capital they are interested to inject. In other words, there is a need to have their own analysis on how the venture should be priced.¹⁹

It can therefore be concluded that:

- The risk is relevant and is to be considered in the decision-making process for each one of the parties in a given transaction.²⁰
- The risk affects the pricing of the exchange by the parties at inception.
- The risk should not affect the contractual terms and its conditions; the only transfer of risk should be on how everyone prices their involvement or exchange.
- No risk shall arise from the contract itself (having ambiguity on some of the terms).

3.2 Treatment of Risk

The treatment of risk means to manage it in a way that reduces its effects or possibility of it occurring.²¹ Rather than accepting risk, people tend to avoid it. In fact, most people are risk-averse. It is also true that risk and returns are positively related, where people will take less risk if possible and try to get the most out of the possible outcome. It also means that higher returns are legitimized by higher risks.²² It is well perceived that the profitability and stability of an individual or institution depends on how the risks are managed. The desired high rates of return can be achieved by increasing the appetite to benefit from the opportunities offered by risk taking and avoiding the associated downsides.²³ This desire to benefit from the upsides of risk taking and to “manage” the downside of risk taking is not left without limits. Shariah prohibits contractual risk transfer and sets parameters on how best to manage risk in a given transaction.

While risk aversion is preferred, Allah has promised the Muminin (believers or those who entered the century of the safety and security of Allah) that they are going to be tested (Ibtilae) with difficulties and they are going to be subject to trial (Fitnah). Allah said in Verses 2 and 3 of Surah al-'ankabut: “Do the people think that they will be left to say, We believe and they will not be tried? But We have certainly tried those before them, and Allah will surely make evident those who are truthful, and He will surely make evident the liars.” These trials and tests are necessary to examine the reactions of people towards risk, and through these tests it would be known who is truthful to not transfer the risk to others, and those who change the reality and transfer the risk to other. Succeeding in these tests is conditioned by following the Shariah requirements and exchanging in the 'adl way. Dealing in the 'adl way requires as per the Quranic Verse two things: Taqwa (constant consciousness about the rules) in exchange and Sabr (being

patient). There is a tendency to transfer risk to others which goes against the rules of Shari'ah, which is why continuous and constant consciousness is required and this is surely difficult without patience. Allah stated in Surah al 'imran, Verse 186: "You will surely be tested in your property rights and in yourselves. And you will surely hear from those who were given the Scripture before you and from those who associate others with Allah much abuse. But if you are patient and conscious – indeed, that is of the matters [worthy] of determination." He also said in Surah Al-Baqarah, Verse 155: "And We will surely test you with something of fear and hunger and a loss of wealth and lives and fruits but give good tidings to the patient." Risk and its treatment is what gives sense to all of the tests Allah bestows upon his creation, and it is how they manage this risk that differentiates them and brings them forward to success in this life and in the hereafter.

Furthermore, Allah empowered humanity with the gift of free will and said: "Indeed, We guided him to the way, be he grateful or be he ungrateful." The gift of choice forces risk taking upon humans on a daily basis. Therefore, humans are obliged to take the risk of their choice, in line with Shariah compliance or otherwise.

In fact, the property rights bestowed to individuals in which they execute their choices upon are based on trust (Amana). Humans, in their function as Khulafae (agents), know that they are only managing the resources gifted to them by Allah. Their choices related to the provision and the requirement of risk aversion can lead them to transfer risk. This transfer of risk can then lead to Riba, Gharar, gambling and unsubstantiated speculation – all of which are zero-sum games, in which the gains of one person is the loss of another. Allah said: "Indeed, We have made that which is on the earth adornment for it that We may test them [as to] which of them is best in deed." (Surah

Al-Kahf, Verse 7). The Quran teaches us that when exact future outcomes are unknown but are instead known on a probable basis, individuals should avoid risk. In addition, humans are reminded through Shari'ah requirements to treat risk and manage it in the 'adl way. Prophet Solomon's statement: "This is from the favor of my Lord to test me whether I will be grateful or ungrateful." (Surah Al-Naml, Verse; 40) Quran also encouraged ta'awun (cooperation) which is effective in facing risk and uncertainty. Allah said: "Cooperate with one another in goodness and righteousness, and do not cooperate in sin and transgression. And be mindful of Allah. Surely Allah is severe in punishment." (Al-Maidah, Verse 2)

Since individuals are not allowed to manage the risk freely in the exchange, there arises the question of how the risk may be treated in such cases. The solution can either be to share the risk with other parties or choose not to enter into the transaction entirely based on the risk assessment and ability to undertake the risk. Under the risk sharing option, parties have to take part of the risk as per the general rule of ta'awun and Al-Ghurm Bi Al-Ghurm. Hussein Hamid outlined three Shariah pre-conditions for managing this type of risk:

1. The instrument or approach used to manage risk must not contravene the Shari'ah principle of Al-Ghurm Bi Al-Ghurm.
2. The instrument employed to manage this risk must not involve excessive ambiguity (Gharar jasim). For example, it cannot be used to manage a product which contains the element of Gharar jasim from the beginning, such as a futures product, or products that involve short selling, options, etc.
3. The instrument or approach to be used must comply with Shariah principles and only be used to avoid or manage

risk allowed by Shari'ah.²⁴

The principle of Al-Ghunm Bi Al-Ghurum referred to by Husain Hamid is the core of the discussion and the principle for all financial dealings. Ghunm means profits or benefits and ghurum means liability-undertaking. This legal maxim states that no profits or benefits are to be enjoyed without bearing the liability that is associated with it.²⁵

The gain that is the result of risk taking as understood from this legal maxim is derived from the Hadith of the Prophet "Alkharaju Bi Al-Dhaman",²⁶ which means, "Gain follows liability". It is also based on the wordings of the Prophet when he ruled that, when the rahn (pledge) with a creditor is destroyed, the debtor is liable. It was phrased: "Lahu Ghunmuhu Wa 'alayhi Ghurmuh,"²⁷ which means he who receives its benefits, if any, also has to be liable for it. The risk taking principle is widely used by jurists and strongly recommended within the business Fiqh framework as it leads to justice and fairness.²⁸ Ibn Taymiyah stated: "The later jurists from the School of Ahmad (Hanbali School), along with Abu Hanifah and Shafi'i, uphold the interdependence of the right to benefit from something and bearing the liability for it. Thus, in their view, whatever becomes the liability of the buyer can be sold by him and whatever does not enter into his liability cannot be sold by him."²⁹ In fact, the applicability of this legal maxim has gone beyond financial transactions to affect all contractual arrangements. This rule is applicable to marriage, inheritance, and other aspects of contracting.³⁰ Hence, since each contract requires at least two parties, and since each one of the parties are obliged to take risk, mutual risk taking is the ultimate result. This means the risk associated with any given transaction ought to be shared among the contracting parties. Each one of the

contracting parties should assume certain liability and mutual risk-taking. Profits earned by the contracting parties must correspondingly reflect the responsibilities and the level of risk borne by each party.

3.2.1 Risk Aversion

While Shari'ah calls for risk taking, it has been established that risk that will lead to hardship is not desirable. Therefore, risk taking for the sake of it is not encouraged. Allah stated in the Quran: "And spend in the way of Allah and do not throw [yourselves] with your [own] hands into destruction [by refraining]. And do good; indeed, Allah loves the doers of good." (Surah al-Baqarah, Verse 195). The Prophet stated: "Give up what is doubtful to you for that which is not doubtful."³¹ A legal maxim has been developed based on the observation of the Shari'ah way in treating hardship and difficulty that "if one affords certainty he may not resort to conjecture." The risk aversion is in line with the Maqasid- al-Shari'ah (objective of Shari'ah) approach on preserving wealth.³² Ibn Ashur who has categorized transactional Maqasid into five categories said: "The Shari'ah purposes in wealth are five; which includes wealth is to be percolated, clear, protected, stable and has justice imposed upon it".³³

Risk taking becomes desirable only when it is based on productive efforts and value-adding activities.³⁴ "Even in that case, risk should not be taken blindly and without measures."³⁵ According to the Quran, risk should be taken based on wos' (ability/capacity).³⁶ Allah said in several Verses: "We do not ask any soul more than its capacity" (Surah al-Baqarah, Verse 233). And said: "And has not placed upon you in the religion any difficulty" (Surah al-Haj, Verse 7). The ability and capacity are the

level of risk bearing.³⁷ The concept of ability in a financial transaction is one of the parameters of risk bearing/taking.

The Prophet has required his companions not to spend their money or expose it to reduction even for good deeds. For instance, the Prophet Muhammad visited one of the companions while he was ill. Prophet Muhammad said: "Do you have a will?" the companion said: "Yes." The prophet said: "For how much?" he said: "All of my wealth, for the cause of Allah." The prophet said: "What did you leave for your children?" The companion said: "They are rich in goodness." Prophet Muhammad said: "Will a tenth." The companion said: "He (the Prophet) continued decreasing it until he said: 'Will a third, and a third is too great.'"³⁸ When al-'Abbas bin 'Abd Al-Muttalib handed over his assets [camels] for Mudharabah to his partner, he stipulated conditions that he should not take the assets across the sea, nor take them down to the bottom of a dry river bed, nor trade them for live animals. If he were to do any of these, he would have to bear the compensation. These stipulated conditions were reported to the Prophet and he allowed it.³⁹ Muslims are required to be moderate in their spending and risk bearing. Allah said: "And do not make your hand [as] chained to your neck or extend it completely and [thereby] become blamed and insolvent." (Surah al-Israe, Verse 29). But this risk aversion should also not lead Muslims to become too averse to spending for fear of poverty or risk. Similarly, Muslims should not transfer the undesirable risk to others because of the same concern. This is because of the following Verses in which Allah said: "Indeed, your Lord extends provision for whom He wills and restricts [it]. Indeed He is ever, concerning His servants, Acquainted and Seeing." (Surah al-Israe, Verses 30-31)

While Shari'ah does advocate that risk be avoided as much as possible, it also encourages us to care about our fellow human beings. Shari'ah does not permit the avoidance of risk by

shouldering it on other fellow Muslims.⁴⁰ This is applicable in wealth and other areas of dealings. A party in a transaction does not deserve profit or benefit from a transaction unless he is ready to be exposed to risk. This is based on the general ruling and the legal maxim, Al-Gunm Bi Al-Ghurm. Therefore, avoiding risk in a transaction does not give the right to a party to transfer it to the other party.⁴¹

In addition, the treatment of risk fueled by the tendency to avoid risk can lead to the following scenarios with regard to one of the parties involved:

1. Not to participate in the transaction
2. To transfer risk to the counterparty in the transaction
3. To share the risk, of which this mitigates the risk

3.2.2 Risk Transfer

Transfer of risk happens when the risk associated with a transaction is passed from one party who does not wish to bear this risk, to another party who is willing to take on the risk for wishful returns, fees or premium.⁴² It is understood from this definition that there are two parties involved, the risk transferor and risk taker. In legalizing the hedging instruments and other risk transfer mechanisms, the assessment is made from the point of view of only one party, i.e. the risk transferor.⁴³ For the risk transferor, his objective is to replace the uncertainty of one transaction with a certain specific outcome by foregoing part of the revenue and by paying a premium or fees.⁴⁴ There is another risk transfer in the form of passing the risk to the other party without foregoing any return or bearing expenses. For example, Riba contracts transfer the risk to the borrower without foregoing any actual benefits.

Shari'ah prohibits contractual risk transfer in exchange transactions⁴⁵ stipulated above as per the legal maxim Al-Ghunm Bi Al-Ghurm. The Prophet stated: "Don't nurse grudges and don't bid him out for raising the price and don't nurse aversion or enmity and don't enter into a transaction when the others have entered into that transaction and be as fellow-brothers and servants of Allah. A Muslim is the brother of a Muslim. He neither oppresses him nor humiliates him nor looks down upon him. The piety is here, (and while saying so he pointed towards his chest thrice). It is a serious evil for a Muslim that he should look down upon his brother. All things of a Muslim are inviolable for his brother in faith: his blood, his wealth and his honor."⁴⁶ Harming someone by transferring the risk to him and securing oneself is an act of selfishness that is included in this Hadith.

In addition, Shari'ah only allows risk transfer only on the basis of benevolence. The contract of kafalah for example, is a guarantee of an outcome granted by one party in favor for another without any benefits whatsoever for the guarantor. Hawalah is also another form of risk transfer when a party undertakes a liability for a benevolent loan. Furthermore, Shari'ah scholars allow the insurance concept to be applied Islamically only if the underlying contract used is not based on mu'awadhah (exchange), instead they apply the mutuality-based concepts using tabaru' based contracts e.g. waqf.⁴⁷

The Riba form of transferring the risk of the underlying business that needs financing is another form of prohibited risk transfer.⁴⁸ While there are a number of explanations on why Riba is prohibited, one of the causes is contractual risk transfer. In Riba al-duyun specifically, the lender will have the return from his venture guaranteed while the borrower undertakes the whole risk associated with the deployment of the money. The

lender is guaranteed, contractually at least, of his capital plus the nominated return on capital without taking part in the risk.

One may argue that the lender has taken the risk of not being able to recoup anything from the borrower should the latter lose the money or disappear for some reason. There is certainly the possibility of loss for the lender arising from the credit riskiness of the borrower. However, the *thimmah* (liability) of the borrower is not cleared as the lender still has the right to claim the overall amount from the borrower.

In fact, the common phenomenon over prohibited transaction is risk transfer. As stated earlier, Prophet, his companions as well as the *fuqaha* have used the terms *Riba* and *Gharar* interchangeably.⁴⁹ Both terms are prohibited due to the element of risk transfer. *Riba* becomes an exchange of a known price (interest) for an unknown quantity (foregone profits), which is a perfect example of *Gharar*.

3.2.2.1 Risk Transfer and the Prohibition of Gharar

Gharar is one of the main prohibited elements in transacting. The Hadith prohibiting *Gharar* is narrated by Abu Hurayr, in which the Prophet prohibited the *Bay'* of *Gharar*, and the *Bay'* of *Hasah*.⁵⁰⁵¹ The definition of *Gharar* varies based on the examples it is drawn upon.⁵² *Gharar* in general was termed for transactions that concluded over unknown or uncertain objects. It has been defined as: "The uncertainty over the existence of the subject matter of sale." Ibn Hazm defined *Gharar* as: "When the purchaser does not know what he has bought and the seller does not know what he has sold."⁵³ For example, Shafi'i said: "A *Gharar* sale includes selling fish that are in the water, selling a slave that has escaped, selling birds that are in the sky, and similar type of sales."⁵⁴

Gharar is generally related to contractual ambiguity and uncertainty in issues that relate to the pricing, delivery, quantity and quality of the exchanged items that may affect the consent of the contracting parties. To a certain degree, some of these unknowns may be overlooked, and these are called and called minor Gharar (Gharar Yasir). On the other hand, massive Gharar (Gharar Fahish) is strictly prohibited. This refers to the Gharar that concerns the existence of the subject matter; the possession or the ability to take ownership of the asset; the quantity of the object of exchange; the quality of the object of exchange; and the time of payment or delivery.⁵⁵

Gharar, one may argue, is not prohibited for itself, it is Gharar treatment in the contract may render the contract as void. If the Gharar results in the risk being passed to one of the contracting parties, it would be deemed as prohibited. This is because in some situations, Gharar or uncertainties in transactions do not give rise to prohibition. In Musharakah for example, the parties come into agreement to conduct business and share the risk of the unknown outcome in the future. The aforementioned types of prohibited Gharar could also be extended to this contract as the outcome is not existent, and its quality and quantity unidentified. However, the fuqaha are in consensus that Musharakah is permissible. The prohibiting effect of Gharar will however be passed on to this transaction if one of the parties secures himself from the unknown and transfers the risk to the other party.⁵⁶ The uncertainty of the future outcome cannot be eliminated by transferring it to one of the parties as that would be deemed as an unlawful act.

Gharar is therefore a contractual ambiguity and uncertainty that is passed on from one party to another. The undertaking of the contractual uncertainty is prohibited as it leads to transferring of risk, which is referred to as mukhatarah.⁵⁷ In Imam Malik's statement that comments on the Hadith that

forbade the sale of Gharar, he stated: "An example of one type of Gharar and risk taking is that a man intends the price of a stray animal or escaped slave to be fifty dinars. A man says, 'I will take him from you for twenty dinars.' If the buyer finds him, thirty dinars goes from the seller, and if he does not find him, the seller takes twenty dinars from the buyer. There is another fault in that. If that stray is found, it is not known whether it will have increased or decreased in value or what defects may have befallen it. This transaction involves a great amount of Gharar and mukhatarah."⁵⁸

Imam Malik has also referred to a situation where a man who sold goods to another man on the provision that there was to be no loss for the buyer, (i.e. if the buyer could not re-sell the goods they could be returned to the seller). He said: "This transaction is not permitted and it is part of risk. The explanation of why it is so, is that it is as if the seller hired the buyer for the profit if the goods make a profit. If he sells the stock at a loss, he has nothing, and his efforts are not compensated. This is indeed not a desirable situation. In such a transaction, the buyer should be given a wage according to the work that he has contributed. Any form of loss or profit in those goods is for and against the seller. This is only when the goods are gone and sold. If not, the transaction between them is deemed null and void. As for a man who buys goods from another man and upon concluding the sale, and the buyer asks to have the price reduced but the seller refuses and says, 'Sell it and I will compensate you for any loss.' There is no harm in this because there is no mukhatarah. It is something that he has proposed and their transaction was not based on that. That is what is done among us."⁵⁹

Mukhatarah in Imam Malik's statements above refers to a prohibited example of risk taking; that is the risk taking by one of the parties while the other party has secured a certain outcome. The absence of contractual risk sharing is what made

the above examples a prohibited transaction. This would be clearer when we refer to some of the definitions of mukhatarah by some of the scholars that deemed mukhatarah or risk taking as a permissible and an encouraged act. It has also been stated as one of the conditions of the validity of the contract to have the uncertainty undertaking.⁶⁰

Ibn Muflih for example has stated that: "Risk taking (Mukhatarah) in exchange is to buy a commodity with the aim to sell, and he depends on Allah in that, this is what Allah has permitted."⁶¹ Similar statements are found in the work of Al-Qurtubi and Ibn Taymiyah and others.⁶²

Risk taking that is prohibited, such as those referred to in Imam Malik's statement and others involves ambiguity, uncertainty, Gharar, or risk is passed on contractually to one of the parties. In supporting this understanding, Ibn al-Qayyim stated that "Risk taking is of two types: Business risk, which is to buy a commodity for the purpose of selling it and to gain profit, and to put his trust in Allah. The second is gambling, which includes acquiring the money of others unlawfully, where this is the type of risk that has been prohibited by Allah and his Messenger peace be upon him, such as a Bay' al-Mulamasah, and Bay' al-Munabadah."⁶³

Gharar has been viewed as an example of a zero-sum game situation where one party wins and benefits from the losses of the other party. When both sides compete with the intention to obtain profit and not to perform charity, this transaction is more akin to obtaining wealth in a harmful way, which is strongly condemned in the Quran. It is also seen as a form of gambling which will foster a feeling of hatred, as is mentioned in the Quran.⁶⁴ The harmfulness that is referred to occurs when one party passes on the risk to the other party in order to secure oneself.

This situation is exactly what has been prohibited by the Quran and termed as (al-Batil) as stated in Surah Al-Baqarah: "And do not eat up your property right among yourselves for vanities" (2:188). And Surah Al-Nisae: "O ye who believe! Eat not up your property right among yourselves in vanities" (4:161).

As a continuation to this discussion, Ibn Taymiah stated that "There is no Shari'ah evidence to categorically prohibit all forms of risks. In fact, Allah and His Messenger do not prohibit all types of risks, or all activities which are doubtful in terms of whether it is profitable or loss-making or safe (neither profitable nor loss-making). Instead, the type of risk which is prohibited in terms of consumption of property rights is risk in an unjust or wrongful manner. The main reason for prohibition from a Shari'ah viewpoint is mainly concerned with the unjust consumption of property even without the element of risk. Risk alone does not constitute prohibition."⁶⁵ To avoid this prohibition or the argument of identifying what can be constituted as Gharar and what is not, one should look at the positive side of the equation in finding the risk sharing elements. "Islamic law does not allow risk transfer but allows sharing it. Islam has prevented the purchase and sale of risk because it involves massive ambiguity (Gharar jasim), such as in the trading of impermissible debt. However, it allows the purchase and sale of currencies by observing the Shari'ah parameters of spot payment and delivery."⁶⁶

3.2.2.2 Trading Risk

Risk cannot be the subject of exchange. Only insurance contracts based on the concept of Takaful and mutuality is risk allowed to be the subject of the contract. In the conventional space, risk can be a subject matter of trade for speculators whose intentions are not to manage the risk but to benefit from those who aim to

manage it.⁶⁷ In fact, risk-transferring techniques include, among others, use of derivatives for hedging, selling or buying of financial claims and changing borrowing terms. It is important to note that most of the conventional derivative instruments do not conform to Shari'ah.⁶⁸ They are often used for speculation purposes, and as speculation is perceived as a form of gambling, it is forbidden in Islam.⁶⁹ Risk in transactions can be managed through it being shared. In fact, risk management is often confused with risk sharing. Despite the seeming disregard towards risk sharing as risk management tool, it can in fact be a proactive tool to manage the risk of a transaction through mutual sharing amongst the parties in a contract. Risk management here takes the form of dissipating risk as opposed to merely taking on risk.⁷⁰

3.2.3 Risk Sharing and its Parameters

While risk associated with transactions cannot be avoided contractually as all parties must bear the risk, risk sharing is the only Shari'ah-permissible way to manage the risk in a contract.⁷¹ Risk sharing in an exchange occurs when the risk associated with the transaction is shared between the parties involved. Unlike risk transfer, risk in this case is shared between the parties in accordance with the specifications in the contract. Even though risk sharing may not be intended by the parties, the Shari'ah requirements would eventually lead to risk sharing. Hence, risk sharing is the phenomenon observed from the contractual arrangements in a Shari'ah compliant exchange. By applying this concept to the current economic system, risk sharing will serve as a contractual or societal arrangement whereby the outcome of a random event is borne collectively by a group of individuals

or entities involved in a contract, or by individuals or entities in a community.⁷²

It is worth noting that in Kuala Lumpur declaration in 2012 by prominent contemporary Shari'ah scholars and Islamic economists, it was proclaimed that: "Shari'ah emphasizes risk sharing as a salient characteristic of Islamic financial transactions. This is not only exemplified in equity-based contracts, like Musharakah and Mudharabah, but even in exchange contracts, such as sales and leasing, whereby risk is shared by virtue of possession. Risk transfer and risk shifting in exchange contracts violate the Shari'ah principle that liability is inseparable from the right to profit."⁷³ Therefore, it has been agreed, at least by the participating Shariah scholars, that risk sharing is a significant characteristic that has been observed from the Shari'ah rules that are applicable to transactions. It has also been agreed upon that risk transfer is prohibited. Hence, there is a need to derive the mechanisms and parameters from the rules that govern exchanges.

It has been perceived that parties can only do so when entering into a partnership contract. However, Shari'ah rules suggest that all types of transactions, regardless of a partnership or normal sale, would lead the parties to be clear on the mutually agreed risks that are associated with the transaction. In a normal sale for example, the parties should eliminate any uncertainty or ambiguity regarding the exchanged items. Since each one is fully entitled to the future risks and benefits of the exchanged items, they are granted the right to know all the characteristics of the items that are sold or exchanged and to consequently build their own risk appetite on whether or not to take on the risks. Even though it is not an ongoing risk-sharing relationship, the risk sharing in other than partnership contracts takes place on the exchange when it happens, since the

exchange follows the parameters of risk sharing, and parties assume part of the risk of the exchange/transaction.⁷⁴

The essence and mechanisms of al-Bay' can thus be observed through the Shari'ah rules that govern just exchanges. As stated earlier, al-Bay', which is the system that governs transactions is executed through the mechanisms of risk sharing. Through an observation of the rules that govern exchanges and by applying al-Manhaj al-Istiqrai (deductive approach) and al-Manhaj al-Tahleeli (analytical approach), as well as Muqtadayatu Al-'Uqud or legal consequences of the contracts as well as the pre-conditions for transacting, the book has observed two parameters on which risk sharing operates, which are:

1. The willingness to take risk,
2. The ability to bear it.

It is also worth noting that risk sharing is structured based on the underlying business of the transaction, as each type of business may require more or less conditions to secure the above two parameters.

3.2.3.1 Taradhi

The element of taradhi or willingness⁷⁵ to participate in a given transaction is one of the main parameters to secure risk sharing. In transacting, the contracting parties have to arrive to a mutual agreement on how and what risk that they are sharing. Both parties need to have a clear picture on the risks to be shared.

In addition to willingness, the risk in a transaction is borne based on the ability (al-wos') of the parties to bear the risk. The ability is translated into possessing "property rights" in terms of wealth or knowledge and effort. For example, in a pure

Mudharabah, the risk associated with the transaction is borne by both parties based on their abilities, which are in terms of capital and work. The moment a situation arises where one party is taking an additional risk alone (such as in qardh), more risk should not be placed on his shoulder (in the form of interest) that is beyond his ability. For business-based transactions that are structured by Shari'ah, the associated risks would be according to the ability of each one of the parties to bear such risks. This is also in line with the concept of 'adl that rightly positions things and gives everyone his genuine rights, as transferring risk is viewed as a way of placing risk in unjust places. The concept of property rights that was deliberated earlier further supports this reasoning.

Taradhi or willingness, plays a significant role in legalizing a contract. Allah said in the Quran: "O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent ... Indeed, Allah is to you ever Merciful." (Surah al-Nisae, Verse 29). The Prophet said: "They (the two) are not separate from a sale except in agreement."⁷⁶ Abu Sa'id al-Khudri (Allah be pleased with him) reported that: "The Prophet forbade us (from), two types of business transactions and two ways of dressing. He forbade Mulamasa and Munabada in transactions. Mulamasa means the touching of another's garment with his hand, whether at night or by day, without turning it over except for this much. Munabada means that a man throws his garment to another and the other throws his garment, and thus confirming their contract without the inspection of mutual agreement."⁷⁷

Taradhi or willingness is not tangible or seen. Therefore, the Shari'ah has required signs to express such intention. Hence, taradhi can be defined as the signs or words that are used to express the willingness of two parties. By doing so, the contracting parties are showing that they are willing to enter

into the agreement and exchange without any arising ambiguity. The inspection of mutual consent or taradhi is secured by knowing what is going to be exchanged, and granting the freedom to the contracting parties to analyze and determine the amount of risk that they undertake. The Shari'ah requirement that the contracting parties must be mature (bolugh) and sound ('akil) is to ensure that they are able to intelligently analyze the risk and express sound mutual consent.

Supporting free taradhi requires the parties to define the terms of an agreement in a definitive and unambiguous manner. The contract may become void due to the lack of clarity or uncertainty regarding the exchanged item in terms of its delivery, quantity, quality and the terms of payments involved therein.

The fuqaha paid tremendous attention to the form of mutual consent and the language used as a precondition for it to exist in a contract. It has been termed as Sighah, a formal exchange between contracting parties that signify their willingness to enter into a contract. It is necessary for the language of the contract to be standardized and approved by the legislator.⁷⁸ The evolution of technology in business has however led contemporary scholars to go beyond the traditionally known forms. Nevertheless, contracts undertaken via the internet, vending machines, ATMs and other means of contemporary transactions have been recognized as valid means of transaction.⁷⁹

3.2.3.2 Wos'

Al-Wos' in Arabic is the wealth of a man and his capacity to spend it – i.e. to spend in accordance to one's own wos' and ability or capacity.⁸⁰ Wos' or ability or capacity is one of the main concepts in Islam. Allah in a number of Verses has expressed

that no soul should bear more than its capacity or ability – whether in worship or in a transaction. This is actually a general rule that governs all aspects of Shari’ah as Allah said: “Allah does not charge a soul except [with that within] its capacity. It will have [the consequence of] what [good] it has gained, and it will bear [the consequence of] what [evil] it has earned.” (Surah al-Baqarah, Verse 286)

In the contractual context, for example in a marriage contract that ends in divorce, the father is the one that bears the liability of maintaining the child, if any. Even though the liability is borne by the father, Allah does not ask him to spend on the child more than his ability.⁸¹

Allah also stated that in the context of a divorce, the man involved should compensate the woman based on his ability or capacity. The rich shall compensate based on his ability and the poor person shall compensate based on his ability.⁸² Allah said: “There is no blame upon you if you divorce women you have not touched nor specified for them an obligation. But give them [a gift of] compensation – the wealthy according to his capability and the poor according to his capability – a provision according to what is acceptable, a duty upon the doers of good.” (Surah al-Baqarah, Verse 236)

Ability, as a parameter in financial treatment or obligation is also found in a Verse where Allah asked the guardian to treat the money of the orphans fairly, and to be just in its measuring and dealings. No guardian or man shall bear more than his capacity or ability nor shall ask someone to bear more than his capacity. Guided by the qist (please provide, the ability is the parameter to do so).⁸³ Allah said: “And do not approach the orphan’s property right except in a way that is best until he reaches maturity. And give full measure and weight in justice. We do not charge any soul except [with that within] its capacity. And when you testify, be just, even if [it concerns] a near relative. And the covenant of

Allah fulfills. This has He instructed you that you may remember.” (Surah al-An’am, Verse 152)

The ability as parameter in an exchange is further stated and explained in the Verse where Allah said: “Let a man of wealth spend from his wealth, and he whose provision is restricted – let him spend from what Allah has given him. Allah does not charge a soul except [according to] what He has given it. Allah will bring about, after hardship, ease.” (Surah al-Talaq, Verse 7)

The guidance from this Verse can be broken down into the following:

- The infaq or spending in the Verse and in the Quran refers to all types of utilization of wealth, including for investment, consumption, etc.⁸⁴ Therefore, the Verse also governs the aspect of exchange and investment.
- The Verse requires the individual to consider his capacity and limitations when engaging in an act of spending. In the exchange, no one should go beyond his ability or capacity in incurring himself or by participating in a venture. This implies that in order to share the risk in a given transaction, the parties should analyze the amount of risk that they can take. Consequently, no one shall exchange something that is beyond his ability. This is in fact applicable throughout the exchange and transaction rules in Shari’ah.
- Those with limited ability should spend from whatever is made available to him and what is given by Allah. There is no requirement to overstretch one’s ability except in a lawful way. For example, if someone is planning to invest in a venture and his financial capacity is limited, he should not go beyond his means and take up debt. Instead, he should look for a partner, as Allah does not ask from a soul more than what He has given.

- The Verse guides us to wait and trust in Allah that ease will come in a natural way if we follow what Allah has asked us to follow, and to not go beyond our abilities. Allah said in another Verse: “Satan threatens you with poverty and orders you to immorality, while Allah promises you forgiveness from Him and bounty. And Allah is all-Encompassing and Knowing.” (Surah Albaqarah, Verse 268). Therefore, Muslims should not stretch their ability by unlawful means of transferring risk to themselves or to others.

Having stated that, ability is a parameter that is observed and governs all aspects of Shari’ah. Ability and willingness, when come together stand as the parameters of risk sharing as the risk in transaction is shared between the parties in accordance with their ability and willingness. Risk sharing as such is structured differently based on various underlying businesses. The following part will examine how these two parameters are applied in an exchange and how different business models can alter the structure of risk sharing. This implies that risk sharing in contemporary finance has to take into consideration the nature of the business and therefore be structured based on its nature by applying the two parameters – willingness and ability to share the risk.

3.3 Risk Sharing and Contract Legitimacy

The contract of a sale is one of the initial contracts in the Islamic financial system. Traditionally, jurists begin with the matter of sale in discussing Islamic financial transactions. In discussing a sale, jurists often highlight issues with respect to the contract and its legitimating conditions. The conditions of the legitimate contract are not specific to the contract of sale; in fact, they are

universal for all contracts with certain modifications according to the nature of the underlying business of the contract.

In addition, jurists consider sales contracts as the benchmark of a legitimate transaction, partly because a sale contract is the most common contract in everyday life. In benchmarking the legitimate contract with the sale contract, jurists have made a general rule that the other contracts also have to be in line with this requirement. This provides an explanation as to why certain contracts like Salam and istisna' have been viewed as exceptions given that they are not in line with the conditions of a normal sale.

In viewing the condition of the legitimate contract from the risk perspective where the parameters of risk sharing are applied, a new perspective is brought into these requirements. It is observed that different conditions are required to secure the parties' willingness and ability to share the risk of transaction. It could thus be stated that risk sharing can be achieved when the conditions of contract of sale are observed and the prohibited elements are avoided in the transaction.

3.3.1 The Conditions of a Legitimate Contract

According to the majority of opinions,⁸⁵ the contract of a sale, as any other contracts, must have a strong foundation that is based on three pillars.⁸⁶ The book, through mapping the conditions of these contracts against risk sharing parameters, suggests that the ability and willingness to take different forms of risks are the parameters used to secure risk sharing. The three pillars are:

1. The contracting parties,
2. The subject matter,
3. The form or Sighah.

Each pillar is assigned with certain conditions to be fulfilled and each pillar has a role to play in the contract, with the conditions being imposed according to the role of each one as illustrated in → Figure 3.1.

- Conditions related to the contracting parties: The contracting parties are the parties involved in the transaction, in which their interest would be affected by this transaction. The risk can be shared between the parties where they are eligible and capable of conducting the contract in the first place. There are two signs of the capability or the legal capacity of the contacting parties, which are “the contractors must be sane and able to run his own affairs, so no contract may be concluded by an insane person or a child who cannot run his affairs.”⁸⁷

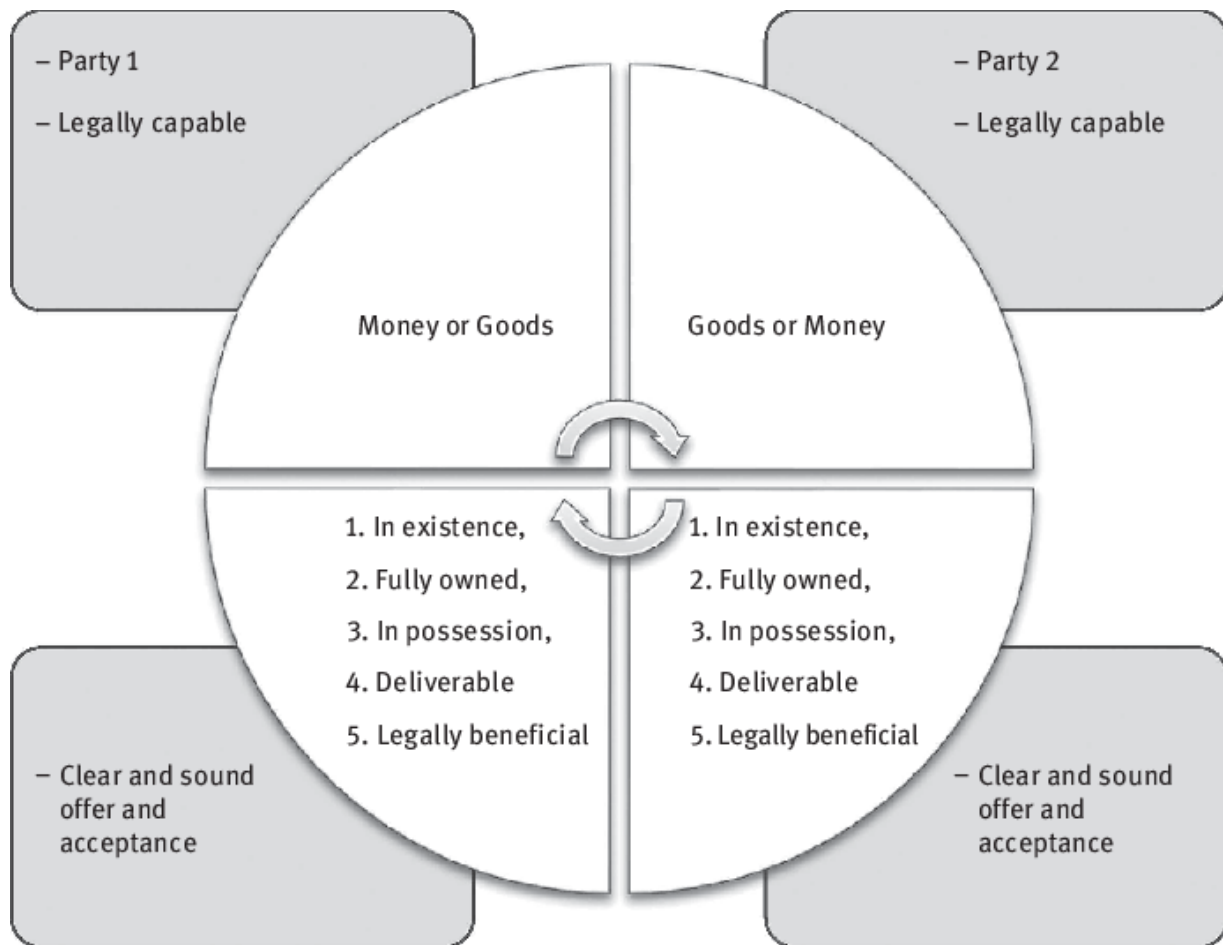


Figure 3.1: The Pillars of the Contract and their Conditions.

Having this in mind, the condition is to ensure that the contractors are able to look after their interests. The Hanafi School of Law requires the person to be sane as a condition, as they view that as long as the contractor is aware of the consequences of his doings and can manage them, then he is deemed as an eligible person.⁸⁸ Therefore, the focus is whether the contracting parties are capable of deciding for themselves and to analyze the risk associated with the transaction. The ability to make a sound judgement and to analyze the risks associated with the transaction have been the requirement for handing over property rights of the orphans. Allah said: "And

test the orphans [in their abilities] until they reach marriageable age. Then if you perceive in them sound judgement, release their property right to them. And do not consume it excessively and quickly, [anticipating] that they will grow up.” (Surah al-Nisae, Verse 6).⁸⁹

Fuqaha have illustrated ways and means to test a person’s ability to analyse the risks and to make decisions regarding his wealth. This implies that the ability to make a sound decision is indeed crucial. If this ability is lost, the judge (or other government institution) has the obligation to take over the property right and to manage it in accordance to sound measures of dealings. This is known in Fiqh as Al-hajr ‘ala Safih (distrain property right of the weak-minded). Allah said: “And do not give the weak-minded your property right, which Allah has made a means of sustenance for you, but provide for them with it and clothe them and speak to them words of appropriate kindness.” (Surah al-Nisae, Verse 5).

- Condition related to the subject matter: Even if the contracting parties are capable of conducting contracts, the subject matter of the contract has to fulfil certain conditions. The object of the sale is what is to be exchanged between the parties, which are assets and prices (Thaman and Muthman). Some of the conditions are as follows⁹⁰:
 1. The object of the sale must be in existence. Shari’ah emphasises the ability of the parties to enter into the contract.⁹¹ This ability is presented in the form of owning the exchanged item. By imposing this condition, none of the parties involved are taking advantage of the uncertainty in the contract and both parties are on equal footing.

2. The object of sale must be presented with full information. This includes knowing its quality, quantity and any other aspects that would affect the decision making process of the parties involved.
3. The object of sale must be owned by the parties and in possession at the time of the contract. As a result of this condition, pure speculation is hard to take place.
4. It has to be privately owned to avoid any uncertainty borne by the common property right where some of the owners may not be aware of the sale, or where the property right is publicly owned.
5. The object of the sale must be delivered at the end of the contract as a legal consequence of the contract. This implies that full ownership has been transferred from both parties in terms of goods or money.
6. Above all, the properties or goods to be exchanged have to be legitimate under the requirements of Shari'ah, therefore wine or pork or any other harmful products are not to be exchanged.

Generally, ability is ensured through ownership of the property right, subject to its full exchange, the capacity to deliver it, and that both parties are presented with full information that influence their assessments on the transaction.

- The Offer and Acceptance (SIghah): In the final stage, after ensuring that the parties are capable of concluding the sale and that the objective of the sale fulfills the condition for the exchange, an important factor in validating the sale is taradhi or mutual consent, in which its absence would make the contract invalid. Offer and acceptance are the forms that express this consent. These occur when the contracting parties express their acceptance of the

stipulations in the contract and their agreement on the legal consequences. As a result, the offer and acceptance **must clearly** indicate the intended motives of the contracting parties.

Having stated that, jurists have discussed the issue from various aspects with the aim to reduce disputes that may arise from the unwillingness or disagreement on the stipulations in the contract. Issues such as Majlis Al-'aqd (the contract session) and correspondence of the acceptance to the offer are usually discussed to ensure that the contracting parties are accepting of the legal consequences of the contract (Muqtadha Al-'aqd). "If the contracting parties do not meet the condition of eligibility and capability of expressing their mutual consent, then the sale is considered as non-existent. This is because when the condition of tamyeez (being capable to conclude a sale) is not fulfilled, the contract cannot be concluded as its essence does not exist, and the essence of the sale does not exist because no evidence on the existence of the mutual consent ... so, it is necessary to have a recognised mutual consent which cannot exist from the one who is not eligible".⁹² In fact, if the sale is not concluded by the parties with full capacity, Gharar will arise.

According to the following scholars, a transaction is only valid upon mutual consent by both contracting parties. Khalil said: "The sale is concluded with what assures taradhi (mutual consent)". Al-Khirshi explained: "The essence of the sale is proven and brought unto existence with what shows taradhi by expression or signs".⁹³ Imam Shafi'i said: "All sales are lawful if they were based on the mutual consent of the contracting parties that are eligible to conclude the sale".⁹⁴ For the risk associated with the transactions, the contracting parties have to be eligible and capable of expressing their mutual consent.⁹⁵

Any exchange is actually based on Mushahhah or Mukayasah,⁹⁶ which means each one of the parties aims to maximize his benefits and lower his cost, hence the Shari'ah requirements is to assure that the parties are able to make such a decision and the burden of risk would not be on the shoulder of only one party.

3.3.2 Risk and Risk Taking as Part of Fuqaha Consideration

Risk and risk taking was part of Fuqaha Consideration while examining in particular contract.⁹⁷ Risk sharing is structured differently for each contract. The risk is structured based on the nature and the legal implications of a contract. For contracts that are benevolent in nature for example, the risk depends on whether or not the contract results in transfer of ownership. If the contract results in transfer of ownership, the liability and risk of the subject matter is borne by the borrower as he has legal ownership of the subject matter and thus the ability to dispose it as he wishes.⁹⁸ Since the borrower enjoys the benefits of the borrowed money, he is held liable for it. No liability is assumed by the creditor and therefore he enjoys no benefits. This is one of the reasons why Riba is prohibited as the creditor enjoys interest on the loan without assuming any liability.⁹⁹

Another example that contributes to the notion that risk is structured based on the nature and the legal implications of a contract, as in a wadi'ah contract. In wadi'ah contract one party deposit of funds or assets with another for safekeeping and custody. It is one of the Amanah-based contracts where the keeper is not held liable except in the case of negligence.¹⁰⁰ However, if the keeper uses the asset for his own benefit he should assume the risk of the asset. In case of any increment

resulting from the asset itself; e.g. milk from a cow, the increment is the right of the owner of the asset not the keeper.¹⁰¹ However, jurists differ with regards to the increment resulted from the employing the asset. Some scholars have opined that it is right of the owner as he assumes the risk of the asset, whilst others state that it is the right of the keeper since he put in the work and thus is liable in case his employment of the asset resulted in its destruction. Some scholars state that both parties share the benefits based on Mudharabah as both took part in the risk, and a minority believe that the increment in this case does not belong either of the parties and thus should be disposed of.¹⁰² One of the bases of fuqaha reasoning and difference of opinion is risk taking. Al-Nafrawi states: "This is because – the asset at the time of employment- is under the liability of the keeper and if it was destroyed he would have been liable, and the legal maxim states al-kharaju bi dhaman, which means whoever is liable enjoys the profit."¹⁰³

One more example is in lease-based contracts. In a lease contract, the contracting parties exchange the usufruct of an asset for rent.¹⁰⁴ The liability of the asset in a lease-based contract is with the owner; however, the leasee is liable for the usufruct that he received from the contract. Based on this, fuqaha have differences of opinions on the much-debated matter of sub-leasing. The cornerstone of this is the Hadith and the maxim that no one should benefit from what he does not hold liability of.

The Hanafi School disallows this transaction unless additional work has taken place. Al-Kasani argues by saying: "If the leasee sub-leased the asset for a higher rental, the additional profit is not permissible for him unless he adds something to the leased asset by building or maintaining the asset. This is because the usufruct is not under the liability of the lessee; for instance, if

the leased asset was destroyed in a way that the usufruct cannot be derived from it then the liable person is the original lessor; therefore, the profit is generated from what he is not liable for. However, if there was a value added by the sub-lessor, the profit would be generated from that added value".¹⁰⁵

Some of the contracts have similar structures like, Salam and istisna', or Mudharabah, muzaraah and musaqah, but they have been given different conditions because of the underlying business structure. The following part tries to examine how risk and its treatment is one of the main concerns of fuqaha in Salam, Istisna' Ijarah, and Mudharabah.¹⁰⁶

Salam and istisna' are designed to allow selling of goods with deferred delivery of the sold items.¹⁰⁷ Both contracts are viewed by jurists as exemptions from the general rule that requires both exchanged items to be in existence at the time of transaction. Shari'ah in this case has replaced the strict condition of exchanging a property right to be in existence with strict conditions on the quality, quantity and date of delivery of the property right. The risk structure of the above is different in each of the two contracts. The parties bear the risk of the exchanged item, e.g. to exist at the time of delivery, the price to be as expected, and to have a market for it when the goods are delivered. The contracting parties are clear on what they are gaining from the transaction but they face the risk of having their expectations unmet. The seller may suffer from a price drop or non-delivery by the seller. The buyer on other hand may suffer from not being able to receive the goods at the stated date and may have to buy the goods from the market at higher price and perhaps have no liquidity to do so. It is therefore important to examine what are the treatments according to the Shariah and fuqaha on such risks faced by the contracting parties.¹⁰⁸

It has been stated earlier that Shariah does not look at the future expectation of the parties and the associated risk, as long as the parties are eligible to understand and assess the risk related to the transaction. One of the main differences between Salam and istisna' is the payment system. In Salam, the price should be paid in advance, while for istisna'¹⁰⁹ the price can be paid in advance or at the time of delivery. The main difference between Salam and istisna' that leads to this difference in treatment lies in the underlying business and the exchanged goods.

Shari'ah has put a number of conditions for Salam to be lawful and compliant. Majority of scholars agree that Salam is valid when it satisfies these six conditions; where the object of sale is known in terms of its (i) genus; (ii) characteristics; (iii) amount; and (iv) the term of deferment is known; (v) the price is known; and (vi) the place of delivery is specified if the transportation is costly. All of these conditions clear the contract from any ambiguity or uncertainty with regard to the exchanged items. The contracting parties would thus have the clearest view on what is exchanged.

Another condition that all scholars have agreed upon in a Salam contract is that the price has to be delivered during the contract session, although the Maliki School of Thought has a different view in allowing payment to be delayed for two to three days, as such delay would not classify the contract to not be a forward sale.¹¹⁰ The scholars have also debated upon other conditions, including the condition for the deferment of the delivery of the object of sale.

3.3.2.1 Deferment of the Object and the Risk

The Hanafis, Malikis, and Hanbalis¹¹¹ opined that deferment of the object of Salam is a condition for validity. The proof provided

is the saying by the Prophet: "Whoever participates in a forward contract should buy a known volume or weight for a known deferment term." The Hadith refers to deferment as a condition, the same way it deems measurement by weight or volume a condition. Moreover, they argued, the legalization of Salam was meant to relieve the people of unnecessary burdens, and such relief is only effected by deferment. Thus, if there is no deferment, there is no relief, and the contract is not valid. In this regard, viewing the permissibility of Salam as a license requires that it be restricted only to the circumstances for which it was permitted.

Al-Shafi'i¹¹² ruled that forward contracts are valid whether or not the object of sale is deferred. His reasoning is: "If Salam is permitted with a deferred object of sale, then it must be permitted with an immediately delivered object of sale, since the latter case eliminates Gharar. Therefore, he argues that the statement in the Hadith of a known term of deferment necessitates knowledge of that term and not the deferment itself. He further argued that Salam still serves a purpose in this case, that is not served by regular sales, in that the former permits the contract while the object of sale is absent at the contract session. In this regard, the Shafi'i render as invalid the sales of items that are not present and seen at the contract session."¹¹³

From the risk point of view, it can be stated that part of the Salam legitimacy is the deferment of the delivery, hence the risk taking by both parties. The risk arises from the possibility of not meeting the expectations by the parties. Sale with immediate delivery eliminates a huge part of the risk taking as rightly stated by Shafi'i.¹¹⁴ This shows that jurists are aware of the risk taking in the contract and majority of them consider it part of its legitimacy.

3.3.2.2 The Length of Deferment

Furthermore, jurists have disagreed over the length of deferment in a forward sale. The Hanafis and Hanbalis ruled that the term of a Salam should be approximately one month, since that is the earliest for an item to be considered deferred, and the shortest for it to be considered forward. While Hanafis and Hanbalis took custom as their basis for defining the length of deferment, the Malikis ruled that the shortest period for a deferment is half a month. Their rationale is that this period is sufficiently long for market conditions to change,¹¹⁵ which may make it possible for the seller to obtain the object of the forward sale. An exception to this rule is considered when the object is imported from another city where the distance between the two cities is two days or more. In this case, the distance between the two cities gives sufficient reason to expect differences in markets in the two places. The risk taking in these two cases are evident and is part of the deal as the length of the period and the distance should be what made it possible for the market to change, hence the risk to be considered by the parties. It is perceived that the shorter the period, the less risk is to be considered or mitigated. In this regard, jurists want the parties to take the risk and to engage in such contracts only when the risk is more probable.

Thereafter, the Shari'ah conditions in Salam are to eliminate the ambiguity or the uncertainty in the contract itself. The uncertainty of the future outcome or the expectation of each party is not covered or mitigated based on the form of this contract. In the ensuing discussion, we will map out the likely expectations of each contracting party and if the contract in any way has secured this expectation.

3.3.2.2.1 *Likely Expectations of a Seller in Salam*

A seller considers engaging in a Salam contract based on the cheap cost of financing and non-obligation to share the profit or revenue with others. The seller's likely expectation is that the price of the products sold through a Salam contract is not going to be far from the selling price and thus getting immediate cash for the sale will offset any additional foregoing that he may face. Therefore, the seller wants to secure X amount for the products that he is expecting to obtain or cultivate in the future. With the assumption that the seller is well versed in his area of trade and able to make the right decision, the seller considers the following scenarios when considering the selling price:

- Regardless of the price that he is committed to, the seller has to deliver the product (taking into consideration the cost of production)
- The seller takes into consideration the worst case scenario that he would be able to obtain the product from the market at the market price on the delivery date if he fails to produce it by himself
- The delivery date will take into consideration all possible scenarios to give him enough time to obtain the product from the market if he failed to produce the product

The fact that the sold product is under the ownership of the buyer and there is a possibility of not being able to deliver, the seller may take into consideration the scenario of returning the amount paid by the buyer.

The above scenarios may restrict the amount of products sold in the market in this way (via Salam contract). The seller cannot manage the risk arising from this transaction by stipulating conditions in the contract. He has to manage it by using external risk management tools. This may be an impulse for the seller to diversify his finance portfolio to offset some of

the above risks. Salam contract as per the stated conditions does not allow the seller to mitigate any of the above risk in the contract, he may mitigate it by (a) charging a higher price; or (b) taking an amount of risk that he is able to take in accordance to his financial ability and appetite.

The buyer on the other hand would like to engage in such contract with an expectation of a higher return as compared to buying it on the spot. He pays the money in advance, taking into consideration the following scenarios:

- The X price he pays in advance may be higher than the market price in the future and there is likelihood to commit to loss. The seller may fail to deliver the product as per the specifications in the contract. Even though the buyer is secured by the contract that he will receive his money back in case of a default, it may become an opportunity cost for him for using the capital in this venture and the risk of not meeting his expectation and the desired profit.
- The strategy that the buyer may take is to seek the lowest price as possible and to have his business portfolio diversified.

The conditions listed by the jurists did not give solutions to the above risk from the contractual structure itself. Instead, jurists understand that the risks in this contract are meant to be in this form. Based on what has been stated above, the majority of scholars require the deferment to be part of this transaction regardless of the fact that the longer the deferment is, the more uncertain is its future outcome.¹¹⁶

From the above, we can conclude that risk (the future uncertainty) undertaking is part of the Salam and therefore, the seller as well as the buyer have to make their decisions based on these uncertainties and have to share the risk of its outcome in

the contract. It is thus imperative to put in place risk management techniques that will allow both parties to predict the risk and take only the amount that they can actually bear. They may also use different contracts for the rest of their investment portfolio.

3.3.2.3 The Subject Matter of Salam

One more lesson to be learnt from the Salam contract is with regards to the underlying object of the sale. Jurists have long debated a list of objects that could or could not be the subject matter of the Salam contract, based on their characteristics. Once the object does not fall under these characteristics, the contract of Salam cannot be concluded. It is beneficial to state the types of objects that can be 'salamable', but more importantly to know why an object can be deemed 'salamable' or not by looking at the risk characteristics of the object. We argue that 'salamability' is based on the fact that an object can fit into the risk characteristics of the Salam contract. In this regards, fuqaha ruled out that the 'salamable' objects are those that are available in the market at all times and would not vanish from the market in normal circumstances. This has a huge impact on the risk assessment of the contracting parties and their ability to bear the risk.

3.3.3 Istisna' and Risk

Unlike the Salam contract, istisna' brings a slightly different but profound structure. Although they are both categorized as the sale of non-existing goods; the main difference between the two are the payment system and the bindingness of the contract. The following introduction to istisna' aims to shed more light on its concept, defining features and risk structure.

Istisna' as a separate contract from Salam is only defined by the Hanafi School of Law. Majority of scholars are of the view that istisna' is part of the Salam contract, hence the conditions of Salam are applicable to it as well. These scholars therefore do not recognise istisna' as a contract and thus ruling it invalid since it is not in line with Salam contracts. istisna' can be defined as: "A contract to purchase now, for a definite price, something that may be manufactured or constructed later according to agreed specifications." The object of istisna' is often not available for the present moment, but will be made later by the manufacturer or contractor.¹¹⁷ The Hanafi School on the other hand opined that istisna' is a valid contract and has its own rules and conditions that are different from the Salam contract.

A unique feature of istisna' is that nothing is exchanged on the spot or at the time of contract. It is the only forward contract where the assets from both parties are exchanged in the future. The buyer makes a payment for the price in parts over the agreed time period or in full at the end of the time period. Muslim jurists, in general, however do not approve of a sale contract where both the goods and sale price are deferred to a future date.¹¹⁸

Furthermore, it has been clearly stated by a majority of Hanafi scholars that both parties have the choice or options over the exchanged items until the physical exchange takes place. Both parties can therefore cancel the contract at any time, unless the physical exchange has taken place.

- There are many scenarios of how istisna' can actually be mobilized. However, in this book we will highlight a scenario where the parties are entering into a contract and the buyer orders X amount of goods to be manufactured and delivered at a specified time and place, and the seller or manufacturer agrees to undertake this sale contract

and have the goods ready at the specified date for X amount of money. Based on istisna' contracts, the parties have the option to not exchange any amount at an agreed time until the delivery date and each party can cancel the deal at any time. The expected action of each party may vary according to various reasons and market conditions. There are however a number of uncertainties in these contracts with certain expectations from the parties that:

- The goods are to be delivered according to the specifications and at the stated time, should the contracting parties choose to conclude the contract
- The price would be as agreed without any changes, should the contracting parties choose to conclude the contract

The uncertainties in an istisna' contract from the perspective of the seller are as follows:

- The buyer may not want the goods anymore and the demand for such goods by the market may drop
- The market price of the goods may drop lower than the manufacturing cost or increase higher than the selling price

The uncertainties from the perspective of the buyer are:

- The market price of the goods may increase and there is the unlikelihood of the seller to conclude the contract (opportunity cost)

The only mitigation of risk available in this contract lies in the price and the amount of production. We can assume that based on the fact that the contracting parties are sound in mind and able to assess the risk in the transaction, they would undertake the following:

- The seller:
 - Would raise the price as high as possible to cover any unexpected fluctuation or drop in the price
 - Would agree to produce an amount of goods similar to the amount that he would be able to re-channel to the market. For example, if the market capacity is to absorb 100 pieces of goods, then based on his risk assessment, the seller may undertake the manufacturing of only 120 pieces, with 20 pieces considered as the risk taken.
- The buyer:
 - Would offer a good and competitive price to the seller in order to ensure that the seller delivers the goods and not sell at a price higher than the market price

Given the above scenarios and all the arising risks, such contracts are deemed very risky and would not be chosen as the main business drivers and tools of exchange.

This arrangement may seem as non-Shari'ah compliant at first, and the majority of jurists are of this view. Nonetheless, this contract stands as an exception from the general rule. In fact, this contract is valid due to its underlying business and subject matter. In discussing this contract, the Hanafi scholars commonly highlight the following conditions:¹¹⁹

- That the specification of the genus, type, amount and characteristics of the object to be manufactured have to be clearly stated and the object to be specifiable
- That the object to be manufactured is to be commonly traded among people. They ruled that it is impermissible to commission the manufacturer of dress or other goods that have not been customarily commissioned to manufacture other types of goods. These type of goods

can nonetheless be traded via Salam, bearing in mind all conditions are to be honored.¹²⁰

- That no term of deferment is to be specified. According to Abu Hanifah, specifying the term renders the contract to be Salam unless the specification of time was to rush the delivery and not to bind the seller, which then deems the contract to be valid. The term of deferment in this matter is one month or longer. Thus, if a specified term of deferment is less than one month and if the object of sale is customarily commissioned to manufacture, then the contract is valid. Abu Yousuf and Muhammad opined that the contract is valid whether or not the term of deferment is specified as it is customarily the practice.

The non-binding characteristic of this contract and the risk that arises from it are offset by the fact that the goods or the assets are commonly traded and available in the market, allowing the seller especially, to channel the goods in the market. In fact, the seller has the right to sell the goods at any time without notifying the buyer unless the seller shows the goods to the buyer. Then, only the latter would get the option to take the goods or to cancel the contract. However, if the buyer's ownership and rights of the manufactured goods and the exchanged item or price for the seller are established, any cancellation has to be with clear terms. As long as there is no cancellation, the exchanged items are viewed as the liability of the two parties.

3.3.3.1 Application of Risk Sharing Parameters

3.3.3.1.1 Risk Sharing Parameters in Salam and Istisna'

Although Salam and istisna' contracts are an exception to the general rule, several conditions are incorporated to eliminate or reduce uncertainty in such structures. The strict conditions on the exchange under these two contracts share certain commonalities but they also differ substantially in terms of risk exposure. While Salam has stricter conditions in terms of payment advancement and terms of delivery, istisna' allows more freedom to the contracting parties. The question here is what makes it possible for istisna' to be exempted from the conditions of Salam, particularly with regards to the conditions of time of delivery and advancement of price?

It is the nature of the business that governs istisna' that allow for these exemptions. As repeatedly mentioned by Hanafi scholars, only goods that are customarily and commonly traded with this type of contract are allowed to be the subject matter of an istisna' contract. This highlights the ability of the contracting parties to deliver and to fulfill the contract. If they are unable to do so, they cannot transfer the risk borne by them, and can either walk away or choose another mode of financing that spreads their risk, such as Musharakah, Mudharabah and Muzara'ah.

Based on the above discussion, not all goods can be the substance of these two contracts. The 'salamability' or 'istisn'ability' of goods are based on their ability to meet the characteristics and the conditions stated above, as well as to make sense in terms of risk vs benefit. The risk sharing is structured based on the characteristics of the underlying businesses that are only suitable for specific goods or subject matters.

3.3.3.1.2 *Risk Sharing and Mudharabah*

Al-Jurjani in his Ta'rifat describes "Mudharabah as derived from dharb, which is traveling in the land. Technically, it is a contract for partnership in profits with wealth (mal) contributed by one person and labor ('amal) by another."¹²¹ In fact, Mudharabah is a form of partnership where some of its juristic rules are derived from Musharakah, Wakalah, Qari and Ijarah.¹²² Its unique structure involves a partner (Rab-ul-mal) who provides capital and another partner (the Mudharib) who contributes to the venture with his experience, effort and management. The profit is shared between them according to the terms agreed upon. Jurists accept the legality and permissibility of Mudharabah as an exceptional dispensation or on the basis of istihsan where in this case is the preference of a hidden analogy over a clearer one.¹²³

This unique contract has facilitated and accommodated a special market need. According to Al-Sarakhsi this contract serves a special purpose because "the owner of the wealth may not have the opportunity for a profitable investment, while the person who has such an opportunity may not have wealth, and profit is acquired through both, that is, wealth and the ability to transact. In permitting this contract, the goals of both are achieved"¹²⁴

Mudharabah in its application results in equitable distribution of wealth, avoiding excessive concentration and corresponding deprivation. Through the contract of partnership, the Shari'ah facilitates equity participation in trade and other undertakings that help the real fruits of the venture to spread among a larger segment of the society while distributing the inherent risk.¹²⁵

3.3.3.1.2.1 Risk Sharing Parameters in Mudharabah

The notion of risk sharing is evident in the contract of Mudharabah as both parties share the risk of the outcome of the venture. The contractual aspects of Mudharabah and the conditions put together by jurists assure sharing of risk in this unique structure. Any changes in the structure or the conditions of Mudharabah may lead to transferring risk to one of the parties involved and therefore the contract is then deemed void. Mudharabah is very important in this context since it is a unique contract with similarities in the number of contracts as illustrated in → Table 3.1.

Table 3.1: Similarities between Mudharabah and other Contracts.

	Similarities with Mudharabah	Differences with Mudharabah
Musharakah	<ul style="list-style-type: none"> Partnership is based on profit sharing 	<ul style="list-style-type: none"> The capital loss is borne by Rab-ul-mal unless the Mudharabahis proven negligent Profit is shared after returning the capital Management is the sole responsibility of the Mudharib
Wakalah	<ul style="list-style-type: none"> Both are based on trust and the Mudharib acts on behalf of the venture/capital provider in their best interest. 	<ul style="list-style-type: none"> Wakalah can be for free or at a specified/guaranteed fee, while the Mudharib cannot enjoy a specified or guaranteed return, as it is based on the actual performance and a share of the profit of the venture The principal in Wakalah has the right to interfere and manage the venture at any time
Ijarah	<ul style="list-style-type: none"> Both contracts are based on delivering a service for a return 	<ul style="list-style-type: none"> The return from Ijarah is a specified/ guaranteed fee, while the Mudharib cannot enjoy a specified or guaranteed return, as it is based on the actual performance and a share of the profit of the venture The principle in Wakalah has the right to interfere and manage the venture at any time

	Similarities with Mudharabah	Differences with Mudharabah
Qardh	<ul style="list-style-type: none"> The capital is to be paid back to the capital provider (lender or Rab-ul- mal) 	<ul style="list-style-type: none"> The capital is to be paid to the lender in Qardh is guaranteed and paid back regardless of the performance or the losses that may occur In Mudharabah, the capital is not guaranteed. In fact, the Rab-ul-Mal may recoup his capital at the end of the venture or project after deducting the expenses related to the venture Since the lender does not take the risk related to the venture, it is prohibited for him to enjoy any profits or returns. The Rab-ul-Mal in Mudharabah enjoys the profit as he shares the risk of the venture

The risk associated with Mudharabah is actually shared by the parties in accordance with their abilities and willingness to bear the risk. The ability in this regard resembles the form of capital from one party, and work, effort, and experience from the other. Both parties put their abilities in this regard in employment, and therefore are at risk of not getting the preferred outcomes. If one of the parties tried to contractually safeguard his interest beyond the ability that the other party put at risk, the whole contract will be invalidated. This is elaborated more in the following examples.

3.3.3.1.2.2 Guaranteeing the Capital

It is the responsibility (dhaman) of the investor (Rab-ul-Mal) to deliver the capital to the Mudharib (entrepreneur). It is required that the capital provider own the contributed capital and retain full ownership (milkiyyah) of it and liability for it. The capital cannot be absent because the Mudharib cannot commence his work until he takes possession of it.

In fact, the majority of jurists with the exception of the Hanbali ruled that the capital must be delivered to the entrepreneur for two reasons: (i) to enable him to work, and (ii) to establish the capital as a trust in his possession, which requires delivery in analogy to deposits.¹²⁶

The capital provided by Rab-ul-Mal is to be paid back to him after deducting the venture-related expenses before distributing profits to anyone of the parties. This feature of Mudharabah makes it similar to a loan which will have an impact on the other requirements, because if this capital is guaranteed, will make the contract void as it would be considered part of the prohibition highlighted by the Hadith that states "It is not lawful ... to profit from something for which one takes no liability."¹²⁷ The ability that was willingly contributed to this venture by the Mudharib is his knowledge, effort and experience, and he is therefore liable for that only. If the capital provider requires additional liability beyond that, especially if to transfer some of his liability to the Mudharib, the contract would be invalidated due to this risk or liability transfer. Jurists stated that: "The liability (dhaman) of the Mudharib does not include a guarantee of the capital."¹²⁸

In addition, if the capital in his possession is lost without any negligence or misconduct on his part, the Mudharib is not liable. If the Rab-ul-Mal requires the Mudharib to guarantee the capital and to bear the liability for loss, this arrangement would entitle the Mudharib to the entire profit.¹²⁹ This is because of his dhaman of the capital; as the Prophet ruled, profit entitlement

goes with liability. A guarantee to return funds can be taken from him but can be enforced only in two situations: if he is negligent in the use of funds, or if he breaches the stipulated conditions of the Mudharabah.¹³⁰

3.3.3.1.2.3 Intervention in the Management

In a Mudharabah contract, the capital provider is considered to be a silent or sleeping partner. The capital provider has the right to monitor and oversee the activities of the Mudharib throughout the contract period. However, the Mudharib is not allowed to work for the business without the capital provider's consent if the Mudharabah is a restricted one. The Mudharib must have full flexibility in using the capital, which must be in possession.

Mudharabah is based on Amanah or trustship. The capital after the commencement of Mudharabah becomes the property of the partnership and it is held in trust by the Mudharib on behalf of the Rab-ul-Mal. Even if the venture suffers losses without any negligence or misconduct from Mudharib, the capital provider shall assume the losses.¹³¹ This is because the ability contributed and the liability assumed by the Mudharib shall not be complete if the Rab-ul-Mal interferes in the management. A clear distinction between the two different contributions from the partners shall be observed.

3.3.3.1.2.4 Claiming Salary

A very important aspect of the Mudharabah contract is that the Mudharib is not allowed to claim any periodical salary, fee or remuneration for the work done under the Mudharabah contract apart from the Mudharib's share of the profit. However, if the Mudharabah contract turns out to be void, the Mudharib is entitled to compensation for the exerted efforts. The Mudharib in a partnership agrees that his compensation will be a part of the accrued profit, which means that those profits cannot be fixed since there is no guarantee that a profit will be generated. Ibn Al-Mundir stated that all the jurists ruled that it is invalid in Mudharabah if either party is guaranteed a fixed monetary compensation. In fact, Mudharabah and other forms of partnerships are favored by jurists since they represent the true spirit of Islamic finance and its essence that is justice. This is based on the famous legal maxim: "The fundamental principle in every contract is fairness ('adl)".¹³² This is what called for the statement of Ibn Taymiyyah, "One who deliberates on the basic principles would easily conclude that musaqah, muzara'ah and Mudharabah are nearer to justice than Ijarah."¹³³

Contemporary scholars have made similar statements. Taqi Usmani stated: "It should never be overlooked that, originally, Murabahah is not a mode of financing. It is only a device to escape from "interest" and not an ideal instrument for carrying out the real economic objectives of Islam. Therefore, this instrument should be used as a transitory step taken in the process of the Islamization of the economy, and its use should be restricted only to those cases where Mudharabah or Musharakah are not practicable."¹³⁴¹³⁵ Bearing that in mind, this book attempts to study how risk sharing is constructed and embodied into the named contracts (al-'uqoud al-musammah) and learn from them in order to be able to draw the lines and develop products that carry the DNA of risk sharing and are accommodative to contemporary finance.

3.3.3.1.3 Risk Sharing in Ijarah

Jurists, especially from the Maliki School of law, consider contracts of lease as part of the contract of sale as the subject matter of this exchange is the usufruct.¹³⁶ Some scholars stated that since the usufruct is not received at the time of the contract, but are derived over time, the lease constitutes the sale of a non-existent good, which is not permitted.¹³⁷ Ibn Rushed discredited this argument by stating that while the usufruct did not exist at the time of the contract, their future existence is extremely likely. In this regard, the legality of the lease is derived from the part of the usufruct that is almost surely derivable, or where it is equally likely that the usufruct be derived or not. Like any Bay'-based contract, risk sharing is built up over two parameters of ability and willingness. Ijarah is a contract of exchange of the right to usufruct for a consideration. In an example where a person rents a house for a specified rental, it is necessary that this contract comply with Shari'ah conditions to secure the elements of risk sharing. The ability of the parties involved and the risk to be taken have to be clearly established when initiating the contract. If there is any risk transfer element found in the contract where one of the parties does not assume the full responsibility on the exchanged items or transfer some of his inherited responsibilities to other party, the contract will be invalidated. As an example, the lessor has to own the asset. In fact, ownership of the asset is necessary. This denotes the ability as a primary condition in this contract. The lessor is liable and responsible for the asset that derives the usufruct to the lease. Therefore, the lessor is responsible and liable for the maintenance of the asset and shall bear the consequences in case the asset is destroyed, as per the legal maxim.¹³⁸

The leased asset is a trust in the hands of the lessee. Therefore, it is not permissible to stipulate that the maintenance should be carried by the lessee as this would result in risk transfer, because the lessee will have to undertake some responsibilities beyond his ability.¹³⁹ The same ruling is observed if the asset is damaged without misconduct or breach of contract by the lessee. In addition, lessee is not compelled to repair any leased asset in general. They have the option to live in the house and pay the full rental or leave.¹⁴⁰ In light of the above discussion, jurists allow the charging of higher rental in the case of a sub-lease. A sub-lease is an agreement between an original lessee and a new lessee, where the sub-lessor will lease the whole or part of the subject matter of lease contract to the sub-lessee. The sub-lessee, thereafter, will be responsible for payment of the rental to the sub-lessor and sub-lessor will make the payment to the original the owner of the asset. All schools of Fiqh agree on the permissibility of sub-leasing with the stipulated conditions that the sub-lease rental is equal or less than the original rent and the asset is used for similar purposes.¹⁴¹ In the event where the sub-lease rental is higher than the original rent, the jurists have different opinions.

The Hanafi School opined that it is not allowed for the sub-lessor to charge higher rent unless he gives the surplus money to charity or the original lessor, or if the sub-lessor adds to the leased asset an element that would increase its market rental price. For example, the sub-lessor can increase the rental and claim it if he furnished the property.¹⁴²

Al-Kasani stated that If the sub-lessor leases it for more than the first rental fee ..., the increase is not right for him unless he makes an addition to the house; for example, by construction, excavation, plastering or painting. If he adds nothing to it, there is no good in the additional profit for him. [In the case of a

markup] the sublease is valid, but he has to give the additional profit to charity because he profited from something for which he bore no liability. This is because the usufruct does not fall under the liability of the lessee [who is sub-leasing it]. If, for instance, the leased asset was destroyed in a way that usufruct cannot be derived from it, the original lessor will bear the burden of the destructionThus, the increase is profit generated without liability, which was prohibited by the Prophet. However, if [the sub-lessor supplied] an additional usufruct, the profit is justified based on the additional usufruct.¹⁴³

The majority of jurists on the other hand, permits increasing the rental in the sub-lease.¹⁴⁴ Their opinion was based on the fact that, the lessee owns the usufruct after signing the lease agreement and then bears the risk of this usufruct in terms of deriving the desired benefits. Sub-leasing the asset will not change the fact that the original lessee is liable for the rent to the original lessor regardless of whether the property is sub-leased or not.¹⁴⁵ Therefore, this is considered part of his ability to enter into a sub-contract.

3.4 Conclusion

Risk taking is part of risk sharing. In fact, the sharing element suggests that each one of the parties take part in the risk. Fuqaha in Salam and istisna' are concerned with the risk occurring from their transactions. As these contracts are perceived as exceptions to the general rules, fuqaha have replaced these conditions with other conditions that ensure the risk of any future outcome is not transferred to one of the parties. For example, stating that the goods to be sold either in Salam or istisna' have to be commonly traded and available in

the market at all times, will prevent the parties from shouldering the risk on the seller or the buyer alone.

Shari'ah recognizes the importance of risk management in financial transactions. While it grants freedom to the contracting parties to analyze the risk to determine their decision on the level of their engagements, it allows ways and means to manage the risk and puts strict conditions that eliminate any ambiguity in the contract. Shari'ah prohibits the management of risk by shouldering it on one of the parties. In addition, Shari'ah strictly prohibits some modes of transaction as they result in risk transfer. In return, Shari'ah promotes risk sharing and sets rules and conditions that encourage this to take place. This is evident in the rules and conditions that govern the sale aspects of a transaction which is perceived as the main contract. By observing the conditions placed by Shari'ah, one may conclude that these conditions can be categorized into two: Conditions that ensure taradhi and conditions that ensure the required ability of the parties to engage in the contract.

Risk sharing and its parameters are simple Shari'ah-based methods of innovation in the contracts and are linked to real economic development. This study puts together an innovative structure to finance a growing and promising asset class. Through the application of risk sharing to the structure, we will subsequently discuss the Shariah issues that may be attributable to it.

4 Applying Risk Sharing to Intangible Asset Financing

Our creativity is boundless with regard to innovating new ways to satisfy our everyday needs and wants. We are currently living in an era where creativity and innovation affect many aspects of our daily lives, but such innovations will not materialize without the financial support and recognition by investors who believed and took part in these innovations, as well as provided the financial means to support them. However, not all of these investment means are legitimate and able to contribute to the collective well-being of humankind and the surrounding environment. This is why rules and regulations have been introduced to limit the effects of these evolving means.¹ The recurring financial crises have proven the ineffectiveness of the current regulations, merely delaying its effects instead of preventing future crises.

Islamic rules and regulations as understood in the Quran and the Sunnah of the Prophet extend beyond the specific time of their revelation period. The limited amount of Shari'ah texts are structured in a way that would serve the problems and issues of any time and era. Therefore, the Islamic rules of Shari'ah are accommodative to this new creative economy we currently live in. The simple rules of Shari'ah support the creativity and innovation in today's day and age without being in conflict with the needs and wants of others and their surrounding environment. Such a system would have been thought to be very complicated, however, its simple rules and limited regulations suggest otherwise.

The Fiqh has expanded, and continued to expand on the area of transactions where physical assets play a major role. The focus on physical asset and physical asset creation may have hindered Islamic finance from expanding into a wider role of development with more innovative investments and businesses. In fact, contemporary finance has accommodated innovation and extended its reach to support industries that were never thought to exist. Social media platforms, services, arts, and technology are living examples of what contemporary finance has supported.

While contemporary Islamic finance has yet to venture beyond the physical asset centrality by introducing very complex and costly structures, the Quran has provided us with means that would elevate the industry to meet its full potential. Al-Bay' in fact provides the means to do so. In fact, Islamic finance and Fiqh of transacting are well established and provide a comprehensive and well-articulated framework on the transactions and exchanges of existing or known assets. Contemporary Islamic finance has also tapped into some of the development projects by introducing certain complicated structures that incorporated physical assets that have, in many cases, nothing to do with the projects but would serve as a means or security to provide financing. Islamic finance has also further expanded its boundaries in the Tijarah framework as compared to tapping into the wider scale of al-Bay'. This chapter highlights the Fiqh issues pertaining to new avenues of investment and introduces possible Shari'ah structures that are based on the al-Bay' framework.

4.1 Innovation and Contract Creation

Shari'ah grants freedom to the people by allowing them to innovate in matters concerning their livelihood and financial

affairs. Unlike 'Ibadat (worshiping acts) that have been associated with specific rules (tawqifiyyah), Mu'amalat (dealing matters) is presented with principles rather than specific rules and is open for innovation (tawqifiyyah). Anas reported that the Prophet happened to walk past a group of people who had been busy in grafting trees. Thereupon he said: "If you were not to do it, it might be good for you. (So they abandoned this practice) and there was a decline in the yield. He (the Prophet) happened to pass by them (and said): What has gone wrong with your trees? They said: You said so and so. Thereupon he said: You have better knowledge (of a technical skill) in the affairs of the world."² In another Hadith, the Prophet explicitly said: "If it is a matter of your livelihood you are to decide on it and if it is one of the matters of your religion, then refer to me."³ This actually opens up the door for innovation and allows people to be creative on economic matters that would bring about greater economic welfare.

The rules governing these economic aspects should be viewed as facilitative of such innovation. Thus, economic agents are free to organize their deals and exchanges in a way that brings them benefit as long as they abide by Shari'ah principles and are guided by what this book has argued to be the ultimate mechanisms of al-Bay', that is risk sharing.

Having in mind today's challenges that are faced by businesses in terms of capturing the creative revolution and innovation in the market, Islamic finance ought to assist businesses and the growth of the real economy by expanding its creativity and to go beyond its traditional focus on physical assets and products that mimic conventional finance.

Fuqaha Stand on Contract Innovation: The legal maxim that governs the aspects of dealing matters states: "The origin of things is permissibility".⁴ This implies that contracting parties are free to form new contracts and to establish conditions as

needed. However, jurists have debated this position and are divided into two opinions. The Dhahiri School of Law held the opinion that there should be no innovation in contracts.⁵ The Dhahiri School further discussed specific conditions that are the only conditions to be stated in the contract.⁶ They concluded that any other conditions are void.⁷ The Dhahiris based their opinion on Hadith that 'Aisha that when she bought a slave-girl (Burairah), the previous owners stipulated a condition that they would have the right over the inheritance from the slave,⁸ "The Prophet came to me and I told him about the slave-girl (Buraira) he said, "Buy and manumit her, for the *Walae*⁹ is for the one who manumits." In the evening, the Prophet got up and glorified Allah as He deserved and then said, "Why do some people impose conditions which are not present in Allah's Book (Quran)? Whoever imposes such a condition that is not in Allah's Book, then that condition is invalid even if he imposes one hundred conditions, for Allah's conditions are more binding and reliable." They also based their arguments on the Hadith that the Prophet said: "If somebody innovates something which is not in harmony with the principles of our religion, that thing is rejected."¹⁰ Shafi'i has also stipulated that any condition that is tied to the future outcome is not permissible and makes the contract void.¹¹

The majority of scholars however are in the opinion that the parties are free to stipulate conditions and choose the contracts that best serve their interest, as long as they stay away from Shari'ah prohibitions. However, most of the scholars granted this freedom differently. The Hanafi School for example, said that custom is the parameter for creating new contracts.¹² They have stipulated that based on the Hadith "Whatever is deemed as good by Muslims, it is good by Allah."¹³

The Maliki and Hanbali School of Law granted more freedom and related more to the legal maxim that the origin of things is permissibility.¹⁴ The scholars that explicitly deemed the contracting parties to be free to create and stipulate conditions in the contracts are Ibn Taymiyah, Ibn al-Qayyim and Shatibi.¹⁵ They have based their opinion on the general rules of promoting ease in Shari'ah and the Verses in the Quran that oblige people to fulfill contracts. Allah said: "O you who have believed, fulfill [all] contracts." (Surah al-Maidah, Verse 1). They have also stated that, granting freedom to people to stipulate conditions and to create contracts would allow flexibility for people to innovate in economic matters when transacting with each other.

This opinion supports innovation in Islamic finance to keep up with the expectations and challenges faced by businesses by introducing new contracts that are both facilitative and have the essence of risk sharing.

4.2 Investing in Intangible Assets

Investment can be defined based on the al-Bay' framework as: "Investing money today for more money tomorrow by means other than Riba or risk transfer." This simple definition shall lead us to discuss and open the gates to innovative means of investment that go beyond Tijarah, where assets are already produced, or at least are known and well-articulated to suit more innovative and creative businesses and ideas that solve daily issues and challenges. As discussed earlier, intangible assets that are often defined as assets that do not have a physical or financial embodiment are an avenue of investments that should be given due care. The intangible assets are considerably broader than copyright, business name, corporate name, trademark, etc. or any other innovative assets that may not be

tangible in the traditional sense. One classification of group intangibles define them into three categories: Computerized information (such as software and databases); innovative property rights (such as scientific and nonscientific R&D, copyrights, designs, trademarks); and economic competencies (including brand equity, firm-specific human capital, networks joining people and institutions, organizational know-how that increases enterprise efficiency, and aspects of advertising and marketing).¹⁶ There is an increasing focus on the measurement of intangible assets and for these assets to have considerable value alongside the so-called tangible assets. This is evident in the recent regulations of the International Accounting Standards (IAS) and the International Financial Reporting Standards (IFRS).¹⁷

The Fiqh parameters of ability and willingness are applicable to investments in these types of assets. It is important to highlight the Shari'ah issues in such investments and discuss the possible solutions. Here we apply the parameters of investing in one of the intangible assets, which is intellectual capacity.

4.2.1 The Fiqh Structure of Investing in Education

Education is indeed a driving force of economic growth. In fact, it is vital to the economic well-being of individuals to have educational fulfillment that has a positive impact on the nation. Access to and completion of education is a key determinant in the accumulation of human capital and economic growth.¹⁸ However, the tuition fees for a good education is rising and there is a lack of support for the less fortunate yet brilliant students to gain access to a good education. A research published by the Organization for Economic Co-operation and Development (OECD) suggests that "charging a moderate level of tuition fees – while simultaneously giving students

opportunities to benefit from comprehensive financial aid systems – is an effective way for countries to increase access to higher education, make efficient use of limited public funds, and acknowledge significant private returns that students receive from higher education.”¹⁹ Islamic finance can also play a major role in granting access to students and to benefit financially from their intellectual assets. Higher education and good education when translated into financial terms mean better jobs and higher income.²⁰ There is a higher tendency for companies to hire candidates with better education and skills as this strategy would reduce their costs in grooming them into well-functioning employees. Having a stake in the financial potential of these students is similar to any other assets that have its own worth. The following part shall draw the contractual structure of financing or investing in education.

4.2.2 Overview of the Investment

The investment is structured upon the intellectual capacity of individuals where the investors would finance the education of the students until their graduation. This may include other costs as agreed upon by the contracting parties (investors on one side and the intellectual capacity owner on the other). The venture is to develop the intellectual capacity further to make it commercially valuable and marketable. In return, the contracting parties would share part of the income generated from employing the developed intellectual capacity.

In recognizing intellectual capacity as an asset that is also based on the market pricing mechanisms, investors may take part in this investment and may exit by selling their shares in the market to new investors. The earnings from such investment can be a share of the income generated by the intellectual property right holder or developer for a number of years as willingly and

mutually agreed by the parties. The evaluation of the intellectual capacity can be undertaken by the issuers of the shares and due diligence and proper follow up can be put in place in order to eliminate or reduce the effect of Gharar. No risk shall be transferred to any one of the parties as all share the risk of investing in this intellectual property right. Risk can be diversified by investing in a pool of students by partnering with the university to provide scholarships in the form of investments.

4.2.3 The Product Structure

Like any other contract, this contract involves contracting parties that are the partners and assets owners, subject matter (in terms of physical asset or money and the intangible asset or intellectual capacity), and the form of willingness or taradhi. The modus operandi as per → Figure 4.1 explains the mechanisms of exchange in this investment:

First: The contracting parties agree to enter into an agreement of investing in the intellectual capacity of individual/individuals and share the outcome of the investment. The parties shall assure that each one of the party has the necessary ability to enter into such contract and fully own the exchanged items. Risk transfer via Gharar shall be eliminated by ensuring that the intellectual capacity is measurable.²¹ No output shall be guaranteed by either party as that goes beyond their invested abilities and what they possess at the time of contract.

Second: The contracting parties shall contribute to the venture as per the agreement. Investors can be represented by a trustee who manages the investment on their behalf. The intellectual capacity owner shall

contribute to the venture via a detailed description of the input from his side.

Third: The partnership is then formed and the contracting parties shall behave in accordance to the detailed contract to avoid any transfer of risk via Gharar.

Fourth: The contracting parties own the outcome of this venture. The outcome can be in the form of the salary of the intellectual capacity owner, innovation, final marketable product, etc.

Fifth: The contracting parties share the profit as per the pre-agreed ratio (e.g. 30%–70%) and losses will be as per their contributions.

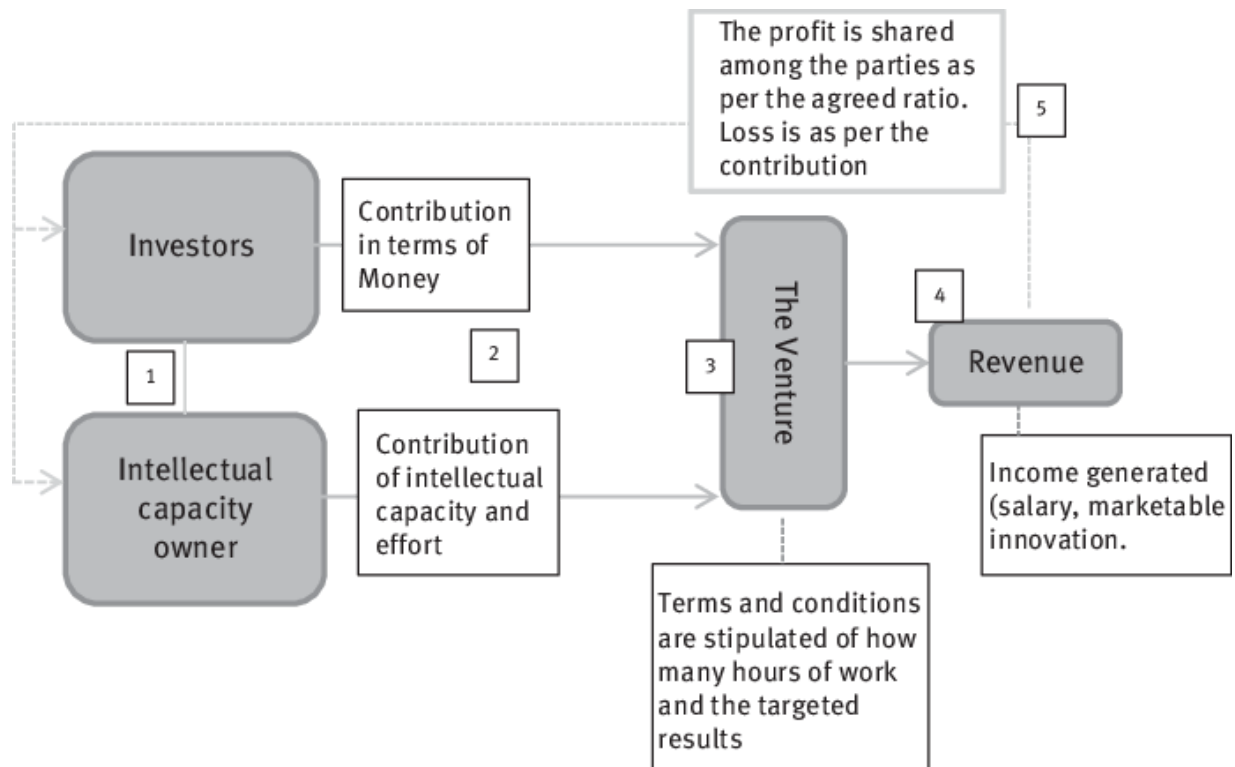


Figure 4.1: The Structure of Financing Education and the Modus Operandi.

The contracting parties in the above structure share the risk associated with this investment in accordance to their abilities – presented in the form of monetary and intellectual capacity and no party bears the risk or guarantees anything more than his ability – and willingness to bear the risk. This is because the parties know in details what to expect from the others by stipulating clear input from both parties.

The long-term nature of such investment enables it to be securitized and investors can sell their shares in the market. It is also possible that multiple intellectual capacity owners can join under one pool of investment. This will diversify the portfolio and reduce the collective risk shared by the contracting parties.

4.2.4 The Fiqh Issues

The above contract may present a number of potential Fiqh issues. These issues are not definite, and it is through effective measurement and clear stipulation in the contract that they can be resolved. The study, via deliberated discussion and research identified the following potential issues.

The issue of risk transfer via massive Gharar: Intangible assets are usually not favored by Shari'ah scholars as they are concerned with uncertainties that are associated with such assets. The issues of concern include Gharar in the identification and determination of the intangible assets due to their non-physical nature and the probabilistic nature of their future benefits.²² AAOIFI allows exchanging intangible rights and transferring any of them for monetary compensation as long as the exchange is free from any ambiguity, fraud and deception. The AAOIFI standards have also stipulated that financial rights can be acquired by contracts, stipulated conditions, inheritance or court order. At times they are the result of precedence, which occurs when all the required Shariah conditions for any cause

resulting in a right are fulfilled.²³ The AAOIFI standards however refer to rights that are in existence and are attached to physical assets. Hence, the issue of Gharar is nevertheless still a concern. The intangibility in our case is not attached to any physical assets. An ISRA research paper adopted the International Accounting Standards, IAS 38 on intangible assets to serve as a tool for the recognition and measurement of intangible assets.²⁴

Two Gharar-related issues are the issue of identification and determination; and the probability of its future benefits. While the issue of identification can be solved by following the recognized standards in each field, further identification can be resolved by stipulation of conditions in the contract. Given that the risk sharing-based contract that was discussed is not a Tijarah-based transaction where exchanged items are passed on so that it has to be in existence and identifiable, there is no need to identify the outcome of the contract. In this contract, what is to be identified is the input by each party. For that, Gharar can be reduced or eliminated by stipulating the details on what are the contributions of each one of the parties. For example, the intellectual capacity owner shall clearly identify and stipulate what he is going to contribute in terms of time to be spent, intellectual development initiatives to be taken, etc. The contribution from the capacity owner is further detailed in → Table 4.1. The outcome expected in terms of salary or products is not to be identified since it is not guaranteed.

Table 4.1: Example of the detailed input by the intellectual capacity owner.

Input	Description
Time spent in the development	An explicit timeframe set by the expert that would allow the capacity owner to develop it further
The development schedule	Courses, workshops, labs, soft skills, and other intellectual development programs that should be followed by the intellectual capacity owner
Attendance	A percentage of attendance by the intellectual capacity owner to classes, lab, seminars, workshop, etc.
Research	Publications by the intellectual capacity owner in recognized journals

The Gharar contributed to the future outcome is not a Shari'ah concern since this risk is not transferred to one of the parties. In fact, both parties are affected and would bear this risk. This is a financial and commercial concern that can be taken care of during engagements done at the time of investment analysis, diversification of the underlying assets, follow-up and continuous assessment of the investment. Other than that, the issue of probability that the capacity owner is not able to perform or the probability of losing capacity are not considered as issues since these probabilities are also attributable to the physical assets. In addition, the legal maxims state that "certainty is not overcome by doubt", "whatever is expected to occur cannot be treated like that which has already occurred", and "rare possibilities are not to be considered".

In conclusion, the Gharar issue in this case is not absolute; it can be resolved by having proper identification of input and reasonable assessment and valuation. When risk sharing is evident in a contract, there would be less incentives of Gharar to

occur since the parties have some skin in the game and both will benefit from the outcome.

Tradability of this investment: One of the main concerns of this investment is the ability to sell the investment before the term ends. This depends on the ability to sell from the Shari'ah perspective and to have a market for this investment. In the earlier example, it has been stated that the securitization of such contract is possible. A concern may be raised that since this contract is based on intangible assets, the outcome or the income generation has yet to be determined especially at the initial stages where intellectual capacity is yet to be employed in the market. This study argues that the securities are tradable because of the following:

1. The securities to be sold in the market represent a venture that constitutes intangible assets. These assets, similar to any other assets have their market and can be valued and priced based on the market analysis of the future needs of the expected outcome of these assets, the solid knowledge and commitment of the intellectual capacity owner, the advancement of research and findings (in the case of pharmaceutical research and similar investments), and other factors as deemed by the market.
2. The issue of debt or receivables is not the case since the venture is equity based and the expected outcome is jointly owned.
3. The investor, when buying the security is replacing a partner (security holder), and since there is no Gharar involved in the transaction, he should be allowed to buy and sell his share. In fact, the security buyer would have a clearer picture to analyse the investment and to track the work and the contribution of the intellectual capacity owner.

4. Based on the earlier deliberation, treating intellectual capacity the same way as treating any tangible asset will conclude that the tradability of such investment or assets shall not be an issue.

In fact, the Fiqh technicalities developed over the years have secured that only risk sharing in a transaction can be reread and relaxed if the same objective is met under the framework of al-Bay'. In the case of this contract, risk sharing is achieved and risk transfer is eliminated.

In conclusion, the IFA-OIC and AAOIFI allow the financing of intangible assets as long as there is no element of Gharar, fraud or cheating. Dallah al-Barakah, in its twentieth seminar on Islamic economics, on 3–5 Rabi' al-Awwal 1422/25-27/6/2001, allowed the financing of intangible assets and proposed appropriate methods for financing intellectual products at the development phase of the idea, before completion and after completion. The attending scholars allowed the use of either Musharakah or Mudharabah to finance, at the development stage, intellectual work that ends in a product that generates a moral right.²⁵

4.3 Conclusion

The Shari'ah requirements other than the prohibition of Shari'ah repugnant products (e.g. pork, liquor, etc.) are to secure risk sharing. Risk sharing presents the Shari'ah and Fiqh rules in a simple and logical way that makes it easy for investors and financial institutions to develop new contracts and to enter into innovative businesses and investments. This is what the study has concluded as the understanding of the saying of the Prophet that stated: "You have better knowledge (of a technical skill) in the affairs of the world".²⁶ This goes in line with the opinion of

the majority of scholars that grant freedom to the parties to create contracts as they deem beneficial. What is to be secured out of this is the element of risk sharing and compliance with risk sharing parameters.

The above investment is only one example of how this concept can open the doors for innovation and equip professionals with a mindset that would help them to solve their investment challenges and issues. For overcoming the Shari'ah issues of these "innovations" one must look at the substance of Shari'ah requirements and their purposes. If those Shari'ah requirements can be secured by technology, structured disclosure, or any other tools, they should make way for innovation once the risk is shared and the economic benefits are recognized.

5 Conclusion

The attempt to highlight the concept of risk sharing within Shari'ah principles and suiting it to contemporary finance applications have been the main objective of this book. We have built our case through the new position on al-Bay' system, the Fiqh discussion on dhaman al-milk, the Fiqh deliberation on risk taking, and the risk treatment in Shari'ah.

The findings showed that the usage of the concept of al-Bay' in the Quran, prophetic traditions, in the sayings of the prophet's companions, and in the field of Fiqh is broader than just "buying and selling". The concept attracts different meanings that are far-reaching. In addition, it was originally an essential part of an integrated financial system and philosophy summed up by the concept of risk sharing or what the jurists referred to as "al-ghunmu bil ghurmi", which means "gain is justified with risk taking" or "gain is subject to undertaking liability and risk undertaking". Among the evidence of this is the narration of 'Aisha may peace be upon her whereby she stated that: "When the Verse "But Allah has permitted al-Bay' and has forbidden Riba" was revealed alcohol was prohibited". The relationship between alcohol impermissibility and the prohibition of Riba, and the permissibility of Bay' becomes obvious if we consider al-Bay' as being the foundation for the financial system and the basis for the prohibition approach in all kind of transactions. There are some other contexts in which the Prophet and the companions used the word "Riba" to denote Gharar or vice versa, they also used the word "Bay'" to denote, among others, Musharakah (partnership) or Ijarah (leasing). Furthermore, Fiqh scholars mention the concept of contract,

under the section of Bay', as a general concept upon which different kinds of transactions are based.

In addition, the concept of al-Bay' has its own position in the Quran, as it is made a replacement/alternative for the Riba-based financial system. The Quran made a distinction between the two, as mentioned in His word thus: "But Allah has permitted al-Bay' and has forbidden Riba". We have proposed that the concept of al-Bay' is the antithesis of the concept of Riba. Although the two concepts are equal in terms of implementation and comprehensiveness, they are different in terms of processes involved and the outcomes. Hence, we present the following theory:

In the Riba-based system, risk would be transferred to the other parties (the borrowers), which they would bear because of their needs or because of their expectations of market fluctuations, in which they believe that it would occur. Nevertheless, in the al-Bay' system, there exists risk sharing. If this is true, then creating new contracts and monitoring their compliance with Shari'ah would originally depend on the accomplishment of the desired outcome even at the minimal level. This theory is different from al-Maqasid theories, because it is based on the mechanisms of the contract itself, not on externalities of recognizing best interest and the welfare which is subjective and attract different views.

It has been observed that the meaning of al-Riba is much wider than has been perceived and read in literature, since al-Riba linguistically means increase, and not every increase is forbidden. If it is perceived that every increase is forbidden, then every profit on each investment or business transaction is forbidden. However, the said increase is specific, and contrary to the profits (increase) accrued in the business transaction. Al-Qurtubi and Ibn Kathir noted that the scope of Riba in Shari'ah is broad.

Another confusion that has been discussed and clarified in the book is on the differences between al-Tijarah and al-Bay'. Both terms are viewed as synonymous, and are commonly used interchangeably, most especially in the translations of the holy Quran. It has been proven and discussed that no Taraduf (synonymity) shall take place in the Quran. In fact, one of the two words are conjunctive of the other, as discernible in His word, the Exalted: "That light shines through houses of worship which Allah has ordered to be raised, and where His Name is mentioned. He is glorified there morning and evening by men who are not distracted – either by Bay' or Tijarah" Surat al-Nur 24:36–37. The conjunction between the two words indicates that each word has its own distinct meaning, although they may refer to the same thing in some contexts such as in financial transactions. It is crucial for Islamic finance today to distinguish between the two concepts and open the door for the Bay' system to flourish.

The contexts within which the concept of Tijarah was used signifies that the concept revolves around two things; al-Tabadul (exchanging) and al-Ta'aqud (contracting). It also has specific meanings and features as presented below:

1. Al-Tijarah revolves around the exchange process involving two present things in reality or by way of description, as discerned in the word of Allah that goes thus: "Tijaraton hadhiraton" i.e. present Tijarah. Tijaraton hadhiraton refers to the exchange of two present commodities. The Verse has exempted record-keeping and attestation as a condition of this transaction to lighten the burden of transaction (or to simplify things for people). However, in the case of al-Bay', record-keeping and attestation are two conditions that should be satisfied.

2. The concept of al-Tijarah involves profits at the point of exchange. This implies that in the al-Tijarah process, the profit is fixed and the trader can take possession of it at the point of exchange, regardless of whether the transaction is a present or deferred.
3. It is a fact that al-Tijarah is commonly occurring. It is an instant activity in which the buyer and seller depart once the deal has been concluded following the exchange of commodities. This is possible if the sales transaction is present or a defined future transaction.
4. Outsmarting or competition and disparity in the objectives. The word 'al-Mushahat' is derived from al-Shuh, and it denotes competition or hastening to do something. The transfer of property rights is a subject matter of the al-Tijarah contract, with the objective of both parties being to depart with their respective property rights. Thus, each party would strive to outsmart the other in order to get more and give less. This is a natural occurrence in the transaction system.

Furthermore, an exchange can involve either cash or commodities. If the commodity is the object of the transaction, then it can be present at the time of transaction or be available in the future. These different kinds of transactions fall under al-Tijarah in the context of the -Quran. If the object of the transaction is investment (in cash or kind), then the goals of both parties can either be convergent or divergent. If both parties have different goals, it then becomes Riba, because a contract in which the parties involved have divergent goals is based on different expectations and different outcomes. However, if the goals of both parties are similar, then it becomes al-Bay'.

This does not mean that Nizam al-Bay' (Bay' system) or Riba do not extend to the divisions of al-Tijarah. In fact, both systems and their mechanisms are applicable to all divisions of al-Tijarah. This is because the Quran has specifically highlighted al-Tijarah and refers to al-Bay' and Riba in more general terms. Furthermore, al-Tijarah would fall under Riba if it involves risk transfer elements, and under al-Bay' if it was done through the means of risk sharing.

The linguistic and technical meaning of the concept of al-Bay' affirms and indicates its comprehensiveness. Being a comprehensive system that encompasses contracts and the financial system, we explored its characteristics and mechanisms. The contractual system that is guided by specific rules within the Islamic financial system is the antithesis of the forbidden Riba, which is also a contractual system on its own. If the mechanisms (or parameters) of these systems are observed, they can then facilitate the adoption of innovative and suitable Islamic finance contracts and facilities that are in line with contemporary financial dealings.

Nizam al-Bay' (al-Bay' system) is defined as the general framework under which transactions and financial contracts exist. It involves *bast* (exhibition), *maqam* (status), and *natijah* (outcome). *Al-Bast* connotes justice, *al-Maqam* connotes property rights, and *al-Natijat* connotes risk sharing. This signifies that the financial system is based on justice entrenched in the transaction, as defined by Shari'ah, and this basis or foundation is upheld by property rights. The property right should only be in accordance with the dictates of Shari'ah, with its ownership valid – if it is allowed to be owned under Shari'ah. Accordingly, ownership and property rights should be based on risk sharing covering either some or all types of contracts.

In this book, risk sharing has been defined as: "The result of applying the al-Bay' system, where the risks associated with

transactions are shared between the parties in accordance to their ability and willingness to share the risks.”

For al-Bay’ that is built on justice formed on the basis of property rights, the mechanisms of exchange in this system are done through the basis of risk sharing. As defined earlier, risk sharing is the result of applying such a system. The parameters that result in risk sharing are the ability and willingness to share the risk. The centrality of risk in this concept is evident.

The applicability of this system goes beyond mere financial dealings to the livelihood of people and helps to enhance the decision making process. For investments for example, a risk sharing mode of financing should be preferred over other modes of financing that may result, directly or indirectly, in risk transfer. In addition, debt-based contracts could also be discouraged by observing this principle. It should be in accordance with one’s ability without desiring what belong to others, as this can lead to burdening oneself beyond one’s economic ability. Allah said: “O you who believe! Eat not up your property right among yourselves unjustly except it be a Tijarah amongst you, by mutual consent And do not kill ‘each other or’ yourselves. Surely Allah is ever Merciful to you ... And wish not for the things in which Allah has made some of you to excel others. For men there is reward for what they have earned, (and likewise) for women there is reward for what they have earned, and ask Allah of His Bounty. Surely, Allah is Ever All-Knower of everything.” (Surat al-Nisae 29–32) Harming oneself is prohibited in Islam regardless of the cause, and in this context through overcommitment beyond one’s financial ability. It was reported in the al-Tafsir al-Wasit which was authored by al-Wahidi (vol. 1, page 402), that the messenger of Allah observed morning prayer (one day), and he said: someone from among the sons of somebody was detained at the door of the paradise because of unrepaid debt.

In addition, Shariah encourages the believers to be risk averse. However, as stated in the famous Hadith that: "No one is a true believer till he likes for his brother what he likes for himself". Therefore, no risk transfer should take place in the believers' transactions and they shall, therefore, be risk averse by sharing the risk among themselves.

Risk taking is part of risk sharing. In fact, the sharing element suggests that each one of the parties take part in the risk. Fuqaha in Salam and istisna' were concerned with the risk occurring from their transactions. As these contracts are perceived as exceptions from the general rules, fuqaha have replaced these conditions with other conditions that ensure the risk of any future outcome is not transferred to one of the parties.

Shari'ah recognizes the importance of risk management in financial transactions. While it grants freedom to the contracting parties to analyze the risk to determine their decision on the level of their engagements, allows ways and means to manage the risk and puts strict conditions that eliminate any ambiguities in the contract, Shari'ah prohibits the management of risk by shouldering it on one of the parties. In addition, Shari'ah strictly prohibits some modes of transactions as they result in risk transfer. In return, Shari'ah promotes risk sharing and sets rules and conditions that encourage this to take place. This is evident in the rules and conditions that govern the sales aspect of a transaction which is perceived as the main contract. By observing the conditions put in place by Shari'ah, one may conclude that these conditions can be categorized into two – conditions that ensure taradhi (willingness) and conditions that ensure the necessary wos' (ability) of the parties to engage in the contract.

Furthermore, risk sharing and its parameters are simple Shari'ah based methods of innovations in the contracts and are

linked to real economic development. This study puts together an innovative structure to finance a growing and promising asset class. Through the application of risk sharing to the structure, the book discussed the Shari'ah issues that may be attributable to it. The book has applied al-bay' system and its parameters to a contemporary mode of investment.

The deliberated example of risk sharing-based investment is evidence of the applicability of this concept and opens the door for innovation. Al-Bay' system and risk sharing equip professionals with a mindset that would help them solve their investment challenges and issues. To overcome the Shari'ah issues related to these "innovations" one must look at the substance of the Shari'ah requirements and their purposes. If those Shari'ah requirements can be secured by technology, structured disclosure, or any other tools, they should make way for innovation once the risk is shared and the economic benefits are recognized.

5.1 Policy Recommendations

Establishing the proposition that the Bay' system and risk sharing are the way forward for Islamic finance does not end here. To foster the applicability of the concept in Islamic finance, a few policy issues and recommendations need to be highlighted and addressed. Amongst these are:

1. Creating awareness about the concept centrality in Islamic finance and educating Islamic finance professionals and the public about the importance and the mechanisms of the concept. This shall ease the way towards wider applicability and positive perception of risk sharing
2. Regulatory and supervisory policies are to be issued waving the obstacles for such concepts to be applied, while

creating proper and effective incentives for Islamic finance institutions and the public to take part of the risk sharing modes of investments

3. Legal frameworks should support the risk sharing mode of investment by issuing laws and regulations that go in harmony with the concept of risk sharing
4. Shari'ah scholars shall take the lead in strengthening the framework of risk sharing on their respective Shari'ah boards and to communicate its importance and benefits to the stakeholders, especially the investors and shareholders in their respective institutions
5. Risk sharing parameters have to be embodied in the product development processes of Islamic financial institutions. The simplicity observed in the concept shall be communicated throughout the relevant departments within Islamic financial institutions and structurally included in their standard operating procedures.
6. Education and research should serve as a platform to accommodate, produce, and strengthen innovative ideas such as risk sharing-based investments such crowd funding, venture capital investments, etc.
7. The effective collaboration amongst regulators, researchers and industry is key to the successful transformation of the Islamic financial industry towards a risk sharing system. Islamic finance infrastructure organizations (IFSB, AAOIFI, CIBAFI, IIFM, IDB and others) and leading research institutions (INCEIF, ISRA, IRTI and others) are to lead the way towards creating awareness and sharing best practices of risk sharing.

5.2 Limitations of the Study

Some limitations of this study are as follows:

- There is no time frame that binds this research. However, given that the Fiqh literature is enormous, the study took into consideration the sources up to the fifth century of Islam when the gate of ijtihad (independent reasoning) was still open. This research focused and tracked the ijtihad which took place in this era, by looking at the basic reasoning and the causes of rules in the financial transaction.
- This research focuses on the theoretical aspect of the fiqhi approach as well as the theoretical examination of the Fiqh approach of risk sharing. The financial part is not part of this study; hence, no financial examination took place.
- The application part of this research on contemporary finance focuses on the risk sharing approach for financing talent or any other similar intangible asset only. It was intended to show an example but not to limit to this avenue of investment. The Shari'ah issues highlighted in the application of the concept risk sharing to investment in intangible assets are intended to be inclusive of all Shari'ah issues. Different applications may raise different issues that need to be closely examined and sorted out.
- The study, having the time and the scope limitations, did not examine the existing Islamic finance products and services against the risk sharing concept.
- This study and its results are not intended to replace any Shari'ah sources, as the Shariah is superior to any understanding of Fiqh deliberation including this study.

5.3 Future Research

Further research can take place through:

- Applying risk sharing to other modes of financing and investment, especially venture capital, crowd funding, and SME financing. Such research may shed light on other issues and challenges of the applicability of risk sharing.
- Although the Fiqh angle of risk sharing is important; it is only one part of the overall framework. Further research on the other aspects of the study should be undertaken, especially on the areas of regulatory and legal framework.
- Research should also expand on establishing contracts based on the respective jurisdiction in which risk sharing investments intends to expand into. Standardization of contracts can facilitate the movement of risk sharing especially for small and medium investors and finance seekers.

References

- A. 'Uwaidhah, Nadariyatu Almakhatir fi Aliqtisad Alislami, International Institute of Islamic Thought, (2010). a, b, c, d
- A. Abozaid, "Contemporary Islamic Financing Modes Between Contract Technicalities And Shari'ah Objectives", Islamic Economic Studies Vol. 17 No. 2, (2010). a, b
- A. W. Dusuki, "Principle and Application of Risk Management and Hedging Instruments in Islamic Finance", (2012).
- AAOIFI Shari'ah Standard, Standard 42 on Financial Rights and their Disposition, (2012). a, b
- 'Abd Al-Rahman al-Maqdisi, al-Sharh al-Kabir 'ala Matn al-Muqni', Dar al-Kitab al-'arabi.
- 'Abd Allah Sulaiman, Alinfaq wa Nadhairuh fi Al-Qurnani Al-Karim, Islamic University of Ghaza, (2006).

'Abd Al-Rahim Al-Sawti, "The Permissible Gharar (Risk) in Classical Islamic Jurisprudence", J.KAU: Islamic Econ. Vol. 16, No. 2. (1424 A.H / 2003 A.D).

Abu al-Walid, Ibn Rushd (al-jad), Al-Muqaddimat al-Mumahidat, Dar al-Gharb al-Islami, (1988).

Abu Dawud, Sulayman, Sunan Abu Dawud, Dar al-Risalah al-'Alamiyah (2009).

Accounting and Auditing Organisation for Islamic Financial Institutions. (2012). Al- Ma'ayir al- Shar'iyyah, Bahrain: Accounting and Auditing Organisation for Islamic Financial Institutions.

Afandi, 'Ali, Durar al-Hukkam Sharh Majallati al-Ahkam Dar al-Jil (1991).

Ahmad al-Sa'di, Al-Malkiyyat al-'Amat fi Islam; Nazratun Taesiliyyat, Fatih Universitesi.

Ahmed, Habib, Prof., and Tariquillah Khan, Prof. "Risk Management in Islamic Banking." Handbook of Islamic banking, 2009, 144-58. Al-Azdi, Muhammad, Jamharat al-Luggah, Dar al-'ilm, (1987).

Alaa Alaabed, Risk Shifting and Islamic Banking, (2016)

Al-Bahuti, Mansur, Kashafu al-Kina', Dar al-Kutub al-'Ilmiyyah, (2009).

Al-Bahuti, Mansur, Sharhu Muntaha Al-Iradat, 'Alam al-Kutub, (1993).

Al-Bahr al-Muhit fi al-Tafsir.

Al-Ba'li, Muhammad, Al-Mutli' 'ala Alfaz al-Muqni', Maktabat al-Sawadi, (2003).

Al-Baydhawi, 'Abd Allah, Anwaru al-Tanzil wa Asraru al-Taewil, Dar Ihya' al-Turath al-'Arabi, (AH 1418).

Al-Bayhaqi, Ahmad, al-Sunan al-Kubra, Dar al-Kutub al-'Ilmiyyah, (2003).

Al-Baydhawi, 'Abd Allah, Tafsir al-Baydhawi known as Anwar al-Tanzil wa Asrar al-Taewil, Dar Ihya' al-Turath, (AH1418).

Al-Babarti, Muhammad, al-'Inayah Sharh al-Hidayah, Dar al-Fikr.

Al-Bukhari, Muhammad Isma'il. Sahih al-Bukhari. n.p.: Dar al-Tuq al-Najah (1422AH).

Al-Dasuki, Muhammad, Hashiyat al-Dasuqi 'ala al-Sharh al-Kabir (Dar al-Fikr).

Ali, Engku Rabiah Adawiah Engku (2003). "Re-defining Property and Property Right in Islamic Law of Contract", Jurnal Syariah, 11(2),47-60.

Alexander Popov, Steven Ongena, (2011), "Interbank market integration, loan rates, and firm leverage", Journal of banking and Finance, Vol.35 pp 544-559.

Al-Farahidi, Abu 'Abd Al-Rahman, Kitab al-'Ayn, Dar Wa Maktabat al-Hilal.

Al-Fayruz Abadi. (1995). Al-Qamus al-Muḥiṭ. Beyrut, Dar al-Kutub al-'Ilmiyyah.

Al-Ghazali Ahmad, al-Wajiz, Dar al-Kutub al-'Ilmiyyah, (2004).

Al-Ghazali, Ahmad, al-Wasit fi al-Madhab, (Dar al-Salam AH 1417).

Al-Harawi, Abu Mansur, Tahdib al-Lughah, Dar Ihya' al-Turath, (2001).

Al-Haythami, Ahmad, Tuhfat al-Muhtaj fi Sharh al-Minhaj wa Hawashi al-Sharwani wa al-'Ibadi, al-Maktaba al-Tijariyah

(1983).

Al-Iqalah. Al-Farghani, Ali, Al-Hidayah fi Sharh bidayat al-Mubtadi, Dar Ihya' al-Turath.

Al-Jahid, Al-Bayan wa al-Tabyin, Dar al-Hilal, (AH 1423).

Al-Kasani, Badai' al-Sanai' fi atib al-Sharai' (Dar al-Kutub al-'Ilmiyyah, (1986).

Al-Khirshi, Muhammad, Sharh Mukhtasar Khalil, (Dar al-Fikr, Bayrut).

Al-Matoridi, Muhammad, Taewilat Ahl al-Sunnat, Dar al-Kutub al-'ilmiyah, (2005).

Al-Mawardi, Ali, al-Hawi al-Kabir (Dar al-Kutub al-'Ilmiyyah 1999).

Al-Mufradat fi Gharib al-Quran.

Al-Munjid, Muhammad, Al-Taraduf fi al-Quran al-Karim Bayna al-Naazriyyah wa al-Tatbiq, Dar al-Fikr al-Mu'asir, (1997).

Al-Mursi, Abu al-Hasan, al-Mukhassas, Dar Ihya' al-Turath, (1996).

Al-Nadawi, al-Qawa'id al-Fiqhiyyah, (Dar al-Qalam 1994).

Al-Nasafi, 'Abd Allah, Madarik al-Tanzil wa Haqaiq al-Taewil, Dar al-Kalim al-Tayib, (1998).

Al-Nasai, Ahmad, Sunan al-Nasai, Maktab al-Matbu'at al-Islamiyah, (1986).

Al-'Askari, al-Hasan, al-Furuq al-Lughawiyat, Dar al-'ilm wa al-Thaqafah.

Al-Nawawi, Yahya, Rawdhat al-'Ualibin wa 'Umdat al-Muftin, al-Maktabu al-Islami, (1991).

Al-Nu'mani, al-Lubab fi 'Ulum al-Kitab, Dar Al-Kutub al-'ilmiyyah, (1998).

Al-Qarafi, Al-Furuq, ('alam al-Kutub).

Al-Qirafi, Ahmad, al-Dakhirah, Dar al-Gharb al-Islami, (1994).

Al-Qurtubi, Muhammad, al-Jami' Liahkami al-Quran, Dar al-Kutub al-Misriyah, (1964).

Al-Rajhi Banking And Investment Corp "Decision under uncertainty: an Islamic perspective", (2000). →

Al-Ramli, Shams al-Din Muhammad, Nihayatu al-Muhtaj, Dar al-Fikr, (1984).

Al-Rawdh al-Murbi' Sharh Zad al-Mustaqna'.

Al-Raghib al-Asfahani, al-Mufradat fi gharibi al-Quran, Dar al-Qalam, (H1412).

Al-Razi, Muhammad, Mafatih al-Ghayb or al-Tafsir al-Kabir, Dar Ihya' al-Turath, (AH1420).

Al-Sanhuri, Masadir al-Haqq fi al-Fiqh al-Islami "A comparative study of Arab Jurisprudence", 1: 9. Published by Institute of Islamic Researches and Studies, (1967).

Al-Sarakhsi, Abu Bakr, al-Mabsut, Dar al-Ma'rifah, (1993).

Al-Suyuti, Al-Itiqan fi 'Ulum al-Quran, al-Haye'ah al-Misriyah, (1974).

Al-Suyuti, 'Abd Al-Rahman, Al-Muzhir fi 'Ulum al-Lughat wa Anwa'iha, Dar al-Kutub al-'ilmiyah, (1998).

Al-Suyuti, al-Ashbah wa al-Nazair, Dar al-Kutub al-'Ilmiyyah, (1990).

Al-Shafi'i, Muhammad ibn Idris. (1961). Al-Risala: Treatise on the Foundations of Islamic Jurisprudence. (Khadduri, M. Trans).

Al-Sharbini, Muhammad, Mughni al-Muhtaj ila Ma'rifat Ma'ani Alfaz al-Minhaj, Dar al-Kutub al-'ilmiyah, (1994).

Al-Shatibi, al-Muwafakat, Dar Ibn 'Affan, (1997).

Al-Tabarani, Sulayman, al-Mu'jam al-Kabir, Maktabat Ibn Taymiyyah, (1994).

Al-Taraduf fi al-Quran al-Karim Baya al-Nazariyyah wa al-Tatbiq.

Al-Tha'labi, 'Abd al-Wahab _al-Qadhi 'Abd al-Wahab_ al-Ma'unah Fi Madhabi 'alimi Ahli al-Madinah (al-Maktaba al-Tijariyah).

Al-Tha'labi, Ahmad, al-Kusshaf wa al-Bayan 'an Tafsir al-Quran, Dar Ihya' al-Turath.

Al-Tirmidi, Jami' at-Tirmidi, Mustafa al-Babi (1975).

Al-Wahidi, al-Tafsir al-Wasit.

Al-Zabidi, Muhammad, Taj al-'Arus, Dar al-Hidayah, (1984).

Al-Zajaj, Ibrahim, Ma'ani al-Quran, 'alam al-Kutub, (1988).

Al-Zamakhshari, Mahmud, Tafsir al-Kasshaf, Dar al-Kitab al-'arabi, (AH1407).

Al-Zarkashi, Jam' al-Jawami'.

Al-Zarkashi, Muhammad, Al-Bahr al-Muhit fi Usul al-Fiqh, Dar al-Kutub, (1994).

Al-Zarkashi, Muhammad, al-Manthur fi al-Qawa'id, Wizarat al-Awqaf alKuwaytiyah (1985) vol.3, 222; al-Suyuti, al-Ashbah wa al-Nazair.

Al-Zarqa, Mustafa Ahmad. (1999). Al-Madkhal ila Nazariyyah al-Iltizam al-'Ammah fi al-Fiqh al-Islami. Damascus: Dar al-Qalam.

Al-Zuhayli, Wahbah, Financial Transactions in Islamic Jurisprudence Dar Al-Fikr (2001).

Andrew Ang, Sergiy Gorovyy, Gregory B. vanInwegen. (2011), "Hedge fund leverage", *Journal of Financial Economics* Vol. 102 pp 102–126.

A. Salehabadi, & Aram, M. "Islamic justification of derivative instruments," *International Journal of Islamic Financial Services* 4, no. 3 (2002).

Asyraf Wajdi Dusuki, Shabnam Mokhtar, "The Concept and Operations of Swap as a Hedging Mechanism for Islamic Financial Institutions", *International Shari'ah Research Academy for Islamic Finance (ISRA) Research Paper No: 14*, (2010).

Balz, K, (2008), "How Islamic Finance Has Transformed Islamic Contract Law", *Islamic Legal Studies Program, Harvard Law School*. →

Bouheraoua, S. N. S. "A Critical Analysis of Shari'ah Issues in Intangible Assets", *ISRA, Research Paper, No. 61*, (2013).

Chris Wright Median "The LBO hits Islamic finance – but how?", (2008).

Dallah al-Barakah, *Resolution of the twentieth seminar on Islamic economics*, (2001). →

Daniel Kahneman and Amos Tversky, "Prospect Theory: An Analysis Of Decision Under Risk", *Econometrica*, Vol 47, No.2. (1979).

Derigs, U. and Marzban, S. "Review and analysis of current Shari'ah-Compliant equity screening process", *International Journal of Islamic and Middle Eastern Finance and Management*, ISSN: 1753-8394, (2008).

Elgari, M. 'Ali, (2006), "Hedging Mechanisms in Islamic Financial Operations", presented to the 7th conference of S hariah Boards

of the Islamic Financial Institutions- Auditing Unit for the Islamic Financial Institutions.

Fathi al-Darini, *al-Haqqu wa Sultan al-Daulat fi Taqayyudihi*. Beirut: Matba'at Dar al-Fikr, first edition.

Fredrik Carlsson, Dinky Daruvala and Olof Johansson-Stenman, "Are People Inequality-Averse, or Just Risk-Averse?", (2003).

H. 'Askari, Zamir Iqbal, Nouredine Krichne and 'Abbas Mirakhor, *Risk Sharing in Finance The Islamic Finance Alternative*, (John Wiley & Sons (Asia) Pte. Ltd, (2012). a, b, c

Habib Ahmed, "Risk Management Assessment Systems: An Application To Islamic Banks", *Islamic Economic Studies*, Vol 19 No. 1.

Hassan Kubrat, *Usul al-Qanun*. Published by Matba'at Dar al-Ma'arif, (1960).

Hassan. Z. (2010), "Islamic Finance: Structure-objective mismatch and its consequences", Working paper.

Hayne E. Leland; Klaus Bjerre Toft, (1996), "Optimal Capital Structure, Endogenous Bankruptcy, and the Term Structure of Credit Spreads", *The Journal of Finance*, Vol. 51, No. 3.

Hoyt Bleakley, Kevin Cowan, (2010), "Maturity mismatch and financial crises: Evidence from emerging market corporations", *Journal of Development Economics* Vol. 93 pp 189–205.

Humayon A. Dar & Jhon R. Presley, "Lack of Profit and Loss Sharing in Islamic Banking", *International Journal of Islamic Financial Services*, Vol. 2. (2000).

Hussein Hamid Hassan, "Basic Shari'ah Principles Governing Risk Management", *Harvard-LSE Workshop on Risk Management*, London School of Economics, (2009).

Hussein Hamid Hassan, "The Tools of Risk Management in Islamic Financial Institutions", (11th Shariah Committees Conference in Kingdom of Bahrain).

Ibn 'Abdin, Ahmad, Radu al-Muhtar 'ala al-Durri al-Mukhtar Dar al-Fikr, (1992).

Ibn al-Qayyim, Al-Turuq al-Hukmiyyah, (Dar al-Bayan).

Ibn al-Qayyim, I'lam al-muwak'in, Dar al-Kotub al-'Ilmiyah, (1991).

Ibn Anas, Malik, al-Muwattae _ 'Abd al-Baqi Narration (Dar Ihya al-Turath al-'Arabi AH 1985).

Ibn Hanbal, Ahmad in his Musnad, al-Risalah, (2002).

Ibn Hayyan, Muhammad, Al-Bahr al-Muhit, Dar al-Fikr, (AH 1420).

Ibn Hazm, 'Ali, al-Akhlaq wa al-Siyar, Dar al-Afaq, (1979).

Ibn Hazm, 'Ali, al-Muhalla Bi al-Athar (Dar al-Turath).

Ibn Kathir, Isma'il, Tafsir al-Quran al-'Adhim, Dar al-Kutub al-'Ilmiyyah (AH 1419).

Ibn Mandhur, Muhammad, Lisan al-'Arab, Dar Sadir, (1994).

Ibn Majah, Muhammad, Sunan Ibn Majah, Dar al-Risalah al-'Alamiyah (2009).

Ibn Muflih, Ibrahim, al-Mubdi' Sharí al-Muqni' (Dar al-Kutub al-'Ilmiyyah 1997).

Ibn Muflih, Muhammad, Kitabu al-Furu', al-Risalah, (2003).

Ibn 'Abd al-Barr, al-Kafi fi Fiqh Ahl al-Madinah, Maktabat al-Riyadh, (1980).

Ibn 'Atiyyah, al-Muharrar, al-Wajiz fi Tafsir al-Kitab al-'Aziz, Dar al-Kutub al-'ilmiyyah, (AH 1422).

Ibn 'Abidin, Ibn 'Abdin, Ahmad, Radu al-Muhtar 'ala al-Durri al-Mukhtar, Dar al-Fikr, (1992).

Ibn Nujaym, Zayn al-Din Ibrahim ibn Muhammad. (n.d.). Al-Baḥr al-Ra'iq. n.p.: Dar al-Kitab al-Islami.

Ibn 'Ashur, al-Tahrir wa al-Tanwir, al-Dar al-Tunisiyyah, (1984).

Ibn 'Ashur, Muhammad, Maqasid al-Shari'ah (Wizaratu al-Awqaf wa al-Shuoun al-Islamiyyah 2004).

Ibn Qayyim al-Jawziyah, Rawdhat al-Muhibbin wa Nazhat al-Mushtaqin, Dar al-kutub al-'ilmiyyah, (1983).

Ibn Qayyim al-Jawziyah, Muhammad, Zad al-Ma'ad, (al-Risalah 1994).

Ibn Qudamah, 'Abd Allah, al-Kafi fi Fiqhi al-Imam Ahmad, Dar al-Kutub al-'Ilmiyyah, (1994).

Ibn Qudamah, 'Abd Allah, al-Mughni, Dar al-Fikr, (1994).

Ibn Rajab, 'Abd Al-Rahman, Tafsir Ibn Rajab, Dar al-Asimah, (2001).

Ibn Rajab, al-Qawa'id, Dar al-Kutub al-'ilmiyyah.

Ibn Rushd, Bidayat al-Mujtahid wa Nihayat al-Muqtasid (Dar al-Hadith 2002).

Ibn Taymiyah, Amrdh al-Qulub wa Shifauha, al-Maktabah al-Salafiyyah, (AH1399).

Ibn Taymiyyah, Majmu' al-Fatawa al-Kobra Mujamma' al-Malik Fahd (1995).

Ibn Wahb, 'Abd Allah, Tafsiru al-Quran Mina al-Jami' Dar al-Gharb al-Islami (2003). a, b

Imam al-Haramain, al-Ghayathi, Reviewed by Dr. 'Abd al-'Aḍim al-Dib, Qatar.

International Accounting Standard (IAS) 38 Intangible Assets. Accessed September 2, 2013.

Islam, M. W. al-Mal: e Concept of Property in Islamic Legal Thought. Arab Law quarterly, 14 (4),361–368 (1999).

Islamic Development Bank & Islamic Fiqh Academy. (2000). Resolutions and Recommendations of Council of Islamic Fiqh Academy 1985–2000. a, b

Islamic Finance: Opportunities, Challenges, and Policy Options, IMF staff note, April 2015, prepared by Alfred Kammer, Muhammad Norat, Marco Pi'ón, Ananthakrishnan Prasad, Christopher Towe, Zeine Zeidane, and an IMF Staff Team.

Isma'il Ibn Abad, Al-Muhit fi al-Lugah, (1994).

ISRA Research Paper "Risk Taking In Islamic Commercial Transactions: A Fiqh Perspective", IRP No: 77 / 2014. →

J. Martinez-Correa, "Decisions under Risk, Uncertainty and Ambiguity: Theory and Experiments", Georgia State University, (2012).

Jalal al-Din Muhammad, Sharh al-Muhala 'ala al-Minhaj with two commentaries (Mustafa al-Babi 1956).

Jalal al-Din Muhammad, Sharh al-Muhala 'ala al-Minhaj with two commentaries, (1956).

Jasser 'Uda, Maqasid Al-Shari'ah a Beginners Guide. (The international institution of Islamic thoughts), Occasional Papers Series 14, (2008).

Jobst. A. (2008), "Derivatives in Islamic Finance", Islamic Economic Studies. Vol. 15, No. 1,

Jon Danielsson, Ashley Taylor, Jean-Pierre Zigrand, (2005), "Highwaymen or heroes: Should hedge funds be regulated? A survey", Journal of Financial Stability Vol 1 pp 522–543.

K. Bälz, "ShariahRisk? How Islamic Finance Has Transformed Islamic Contract Law," Islamic Legal Studies Program, Harvard Law School, (2008).

Kamaruzaman Noordin, The Implementation of Tabarru`and Ta'awun Contracts In The Takaful Models, Islamic Economics, Banking and Finance: Concepts and Critical Issues, (2014).

Kuala Lumpur Declaration, The Second Strategic Roundtable Discussion, jointly organized by the International Shari'ah Research Academy for Islamic Finance (ISRA), the Islamic Research and Training Institute (IRTI) and Durham University, Kuala Lumpur, (2012).

Lisan al-'Arab, 11: 430; al-Fayruz Abadi, al-Qamus al-Muhit, Moasat al-Risalah, (2005).

M. A. Elgari, "Hedging Mechanisms in Islamic Financial Operations", presented to the 7th conference of ShariahBoards of the Islamic Financial Institutions- Auditing Unit for the Islamic Financial Institutions, (2006).

M. S. Gassner, "Exchanges and Islamic finance" Michael Gassner Consultancy Ltd, (2007).

M. Sidiqi "Does Islamic Finance need to put its house in order?", New Horizon, no. 178, (2011). a, b

M. T. 'Usmani, "Sukuk and their Contemporary Applications", (2008).

Mafatih al-Ghayb or al-Tafsir Al-Kabir.

Matthew Rabin, "Risk Aversion and Expected-Utility Theory: A Calibration Theorem", (1999).

Malik Li'ibi, al-Taraduf fi al-Lughah.

Mher Mushtaq Hussain, Ahmad Tisman Pasha, "Conceptual And Operational Differences Between General Takaful And Conventional Insurance", Australian Journal of Business and Management Research Vol. 1 No.8, (2011).

Michelle R. Weise Clayton M. Christensen, "Hire Education, Mastery, Modularization, and the Workforce Revolution", Clayton Christensen Institute for Disruptive Innovation, (2014).

Miguel A. Duran, Ana Lozano-Vivas, (2013), "Off-balance-sheet activity under adverse selection: The European Experience", Journal of Economic Behavior & Organization Vol 85, pp 176–190.

Mirakhor, A. (1987). Analysis of Short-term Asset Concentration in Islamic Banking. IMF Working Paper. Mirakhor A (1996). Cost of capital and investment in a non-interest economy. Islam. Econ. Stud., 4(1): 35–47.

Mirakhor, A. (1997). Progress and Challenges of Islamic Banking. Review of Islamic Economics, Vol. 4, No.2, (1997) pp. 1–11.

Mirakhor, A. (2007). Islamic Finance and Globalization: A Convergence? MPRA Paper 56026, University Library of Munich, Germany.

Mirakhor, A. (2009). Islamic Economics and Finance: An Institutional Perspective. IIUM Journal of Economics and Management, Vol. 17, No. 1 (2009): pp. 31–72. 229.

Mirakhor, A. (2010). Whither Islamic Finance? Risk Sharing in an Age of Crises. Paper presented at the Inaugural Securities Commission Malaysia (SC) – Oxford Centre of Islamic Studies (OCIS) Roundtable "Developing a Scientific Methodology on Shari'ah Governance for Positioning Islamic Finance Globally", March 15, 2010, Kuala Lumpur.

Mirakhor, 'Abbas "Shari'ah compliance macroeconomic policy", presented at 2nd ISRA Colloquium, (2012).

Mirakhor, 'Abbas "Whither Islamic Finance? Risk Sharing in an Age of Crises". (Paper presented at the Inaugural Securities Commission Malaysia – Oxford Centre of Islamic Studies Roundtable: Developing a Scientific Methodology on Shariah Governance for Positioning Islamic Finance Globally, Kuala Lumpur, (2010).

Muhammad Akram Laldin, "Understanding the Concept of Maslaha and Its Parameters when used in Financial Transactions". ISRA, (2010).

Moustapha, S. Koutoub. The Sale of Debt as Implemented by the Islamic Financial Institutions in Malaysia, Kuala Lumpur: IIUM, (2001). →

Mu'tarik al-Aqran fi I'jaz al-Quran.

Muslim, Sahih Muslim. (Dar Ihya' al-Turath, Beyrut) (1995). a, b 'Ali al-Khafif, al-Haqq al-Dimmat\ by Maktabat Wahbat, (1947).

'Iyyish, Muhammad, Minahu al-Jalil Sharh Mukhtasar Khalil, Dar al-Fikr, (1989).

OECD, 2006, New sources of growth: intangible assets. →

OECD, 2010, Regulatory Policy and the Road to Sustainable Growth. →

OECD, Education Indicators In Focus, (2012).

'Omar, Al-Nasafi, Tulbat al-Talabah fi al-Istilahat al-Fiqhiyah, al-Maktabah al-Amirah, (AH 1311).

'Othman Ibn al-Hajib, al-Shafiiyah, Maktabat al-Adab, (2010).

Subhi Ibrahim al-Salih, Dirasat fi Fiqh al-Luggah.

P. Wouters, "Islamic Private Equity Fund" Islamic Finance News, (2007).

R. Golman, G. Loewenstein, and N. Gurney, "Information Gaps for Risk and Ambiguity", (2015).

R.Y. Al-Masri, "Renting an Item to Who Sold It Is It Different from Bay' Al-Wafae Contract?", J.KAU: Islamic Econ., Vol. 19, No. 2. (2006).

Resolution of OIC Fiqh Academy, Number (52/3/60), in its 6th meeting held in Jeddah, Saudi Arabia, (1990).

Sabine Bischoff G. S. "Measuring Intellectual Capital, published at Enabling Innovation: Innovative Capability – German and 17 International Views", Springer-Verlag, (2011).

Sadique, M. A. (2012). Capital and Profit Sharing in Islamic Equity Financing. Kuala Lumpur: The Other Press. →

Sahnun, M. S. H. Al-Mudawwanah al-Kubra. Umayrat, Dar al-Kutub al-'Ilmiyyah (1994).

Sami Al- Suwaylim, "Hedging in Islamic Finance", (IRTI,2006), and Muhammad 'Ali Elgari, "Credit Risk In Islamic Banking And Finance", Islamic Economic Studies, Vol. 10, No. 2, (2003).

Sami Al-Suwaylem, "Towards An Objective Measure Of Gharar In Exchange", Islamic Economic Studies, Vol 7, (Oct. '99, Apr. 2000). a, b, c

Sami al-Suwaylim, "Venture Capital: A Potential Model of Musharakah", JKAU: Islamic Econ., Vol. 10, pp. 3-20 (1998).

Sebnem Kalemli-Ozcan, Bent Sorensen, Sevcan Yesiltas, (2012), "Leverage across firms, banks, and countries", Journal of International Economics Vol. 88 pp. 284-298.

Sheridan Titman, (2010), "The leverage of hedge funds", Finance Research Letters, Vol. 7 pp 2-7.

Sidiqi Al-dhareer, Al-Gharar In Contracts And Its Effects On Contemporary Transactions, Islamic Research And Training Institute (IRTI), (1997).

Sidiqi, M. (2006), "Islamic Banking And Finance In Theory And Practice: A Survey Of State Of The Art", Islamic Economic Studies. Vol. 13, No. 2.

Siti Muawanah Lajis, Risk-Sharing Regulatory Framework: A Case for Malaysia, 2016.

Syed Aun Raza Rizvi, Ahcene Lahsasna, Derivatives in Islamic finance: the need and mechanisms available for Islamic financial markets, 2012.

Tafsir al-Mataridi, Taewilat Ahl al-Sunnat.

Al-Asfhani, Tafsir al-Raghib al-Asfahani.

Tafsir al-Tha'labi, al-Kusshaf wa al-Bayan 'an Tafsir al-Quran.

Tashnif al-Masami' bi Jam' al-Jawami', Maktabat Qurtubah, (1998).

Taqi Usmani, Introduction to Islamic Finance (2004).

Thalath Rasail fi 'I'jaz al-Quran (al-Bayan fi I'jaz al-Quran), Dar al-Ma'arif.

Tord Andersson, Colin Haslam, (2012) "The private equity business model: On terra firma or shifting sands?", Accounting Forum Vol 36 pp 27-37.

UNESCO & OECD, World Education Indicators Programme Financing Education Investments and Returns Analysis of the World Education Indicators, (2002).

Wahbah al-Zuhayli, al-Fiqh al-Islami wa Adillatuh, Dar al-Fikr (2009).

Wahbah Al-Zuhayli, Financial Transactions in Islamic Jurisprudence, Dar Al-Fikr, (2002).

Wizarat al-Awqaf wa al-Shuoun al-Islamiyyah. Al-Mawsu'ah al-Fiqhiyyah al-Kuwaytiyyah. Kuwait. (1992).

Z. Hasan, "Islamic Finance: Structure-objective mismatch and its consequences" Ideas, (2010).

Zarqa, Mustapha "istisna' Financing of Infrastructure Projects" Islamic Economic Studies, Vol. 4, No. 2, (1997).

Notes

- 1 K. Balz, "Shari'ah Risk? How Islamic Finance Has Transformed Islamic Contract Law," Islamic Legal Studies Program, Harvard Law School, (2008).
- 2 The Kuala Lumpur Declaration 2012 during the First Strategic Roundtable Discussion jointly organised by the International Shari'ah Research Academy (ISRA), Islamic Research and Training Institute (IRTI) and Durham University (2nd-Strategic-Roundtable, 2012).
- 3 Al-Qatan, Tarikho Al-tashri' Al-Islami, Ps: 13-14.
- 4 Al-Qatan, Tarikho Al-tashri' Al-Islami, Ps: 183-184.
- 5 Al-Zarqa, Al-Madkhal Al-Fiqhi Al-'Am, V: 1, Ps: 171-172.
- 6 The following are some Verses that legitimate what has been said:

Al-Hashr, Verse: 7, Al-Noor, Verse: 63, Al-nisae, Verses: 59, 65 and 80, Al-Ahzab, Verse: 36 Al-Najm, Verses: 3-4.
- 7 Al-Katan, Tarikho Al-tashri' Al-Islami, Ps: 124-131. Also, 'Abd Al-Karim Zaydan, Al-Madkhal Lidirasati Al-Shari'ati Al-Islamiyah, Ps: 97-98.
- 8 Al-Katan, Tarikho Al-tashri' Al-Islami, Ps: 124-131. Also, 'Abd Al-Karim Zaydan, Al-Madkhal Lidirasati Al-Shari'ati Al-Islamiyah, Ps: 185-188.
- 9 this paper uses the word mechanism for this type of Shari'ah "sources" because it believes that the sources

of Shari'ah are Quran and Sunnah only, and whatever comes after is only mechanism used to arrive to what is likely to be the Shari'ah position in a given matter.

- 10** Al-Katan, P: 231.
- 11** 'Abd Al-Karim Zaydan, Al-Madkhal Lidirasati Al-Siariati Al-Islamiyah, Ps: 113-114.
- 12** A. Mirakhor, "Whither Islamic Finance? Risk Sharing in an Age of Crises". (Paper presented at the Inaugural Securities Commission Malaysia – Oxford Centre of Islamic Studies Roundtable: Developing a Scientific Methodology on Shari'ah Governance for Positioning Islamic Finance Globally, Kuala Lumpur, March 15, 2010).
- 13** H. 'Askari, Zamir Iqbal, Nouredine Krichne and 'Abbas Mirakhor, Risk Sharing in Finance The Islamic Finance Alternative, (John Wiley & Sons (Asia) Pte. Ltd 2012), 4-8.
- 14** A. "'Uwaydhah, Nadhariyatu Almakhatir fi Aliqtisad Alislami", (International Institute of Islamic Thought 2010), 48.
- 15** M. A. Elgari, "Hedging Mechanisms in Islamic Financial Operations", (presented to the 7th conference of Shari'ah Boards of the Islamic Financial Institutions-Auditing Unit for the Islamic Financial Institutions, 2006).
- 16** A. Mirakhor, "Shari'ah compliance macroeconomic policy", (presented at 2nd ISRA Colloquium, 2012).
- 17** M. Sidiqi "Does Islamic Finance need to put its house in order?", New Horizon, no. 178, (2011).

- 18** ISRA Research Paper “Risk Taking In Islamic Commercial Transactions: A Fiqhi Perspective”, IRP No: 77/2014.
- 19** Alaa Alaabed, Risk Shifting and Islamic Banking, (2016).
- 20** (i) a company’s debt financing is not more than 33 percent of its capital, (ii) interest-related income of a company is not more than 10 percent of its total income, (iii) the composition of account receivables and liquid assets (cash at banks and marketable securities) compared to total assets is minimum at 51 percent while a few cite 33 percent as an acceptable ratio. (Derigs, U. and Marzban, S. “Review and analysis of current Shari’ah-Compliant equity screening process”, Internatinal Jurnal of Islamic and Middle Eastern Finance and Management, ISSN: 1753-8394 (2008))
- 21** → Moustapha, S. Koutoub. (2001). The Sale of Debt as Implemented by the Islamic Financial Institutions in Malaysia, Kuala Lumpur: IIUM Press., 44.
- 22** R.Y. Al-Masri, “Renting an Item to Who Sold It Is It Different from Bay’ Al-Wafae Contract?”, J.KAU: Islamic Econ., Vol. 19, No. 2, 39–42 (2006).
- 23** M. T. ‘Usmani, “Sukuk and their Contemporary Applications” (2008).
- 24** A. Abozaid, “Contemporary Islamic Financing Modes Between Contract Technicalities And Shari’ah Objectives”, Islamic Economic Studies Vol. 17 No. 2, (2010).

- 25** P. Wouters, "Islamic Private Equity Fund" Islamic Finance News, (2007).
- 26** Chris Wright Median "The LBO hits Islamic finance – but how?", (2008),
→ <http://www.chriswrightmedia.com/asiamoney-march08-islamic-lbo/>.
- 27** M. S. Gassner, "Exchanges and Islamic finance" Michael Gassner Consultancy Ltd (2007).
- 28** M. Siddiqui, 2011.
- 29** → Abozayd, 2010.
- 30** → Abozayd, 2010.
- 31** Z. Hasan, "Islamic Finance: Structure-objective mismatch and its consequences" Ideas, 2010,
→ <https://ideas.repec.org/p/pramprapa/21536.html>
- 32** → K. Balz, (2008).
- 33** → M. Sidiqi, (2011).
- 34** → H, 'Askari et al., (2012).
- 35** → A. ' Uwaydhah, 2010.
- 36** M. A. Elgare (2006).
- 37** A. Mirakhor, (2012).
- 38** → M. Sidiqi, (2011).
- 39** → A. ' Uwaydhah, (2010).

- 40** → ISRA 2014.
- 41** Zamir Iqbal, 'Abbas Mirakhor, Hussein 'Askari, Nouredine Krichene 2011.
- 42** Hakim Malik La'ibi, al-Taraduf fi al-Lughah, page 13 and the subsequent pages.
- 43** Hakim Malik La'ibi, al-Taraduf fi al-Lughah, p. 21-27.
- 44** 'Omar, Al-Nasafi, Tulbat al-Talabah fi al-Istilahat al-Fiqhiyyah, al-Maktabah al-Amirah, (H1311), p. 108.
- 45** Isma'il Ibn 'Abad, Al-Muhit fi al-Lughah, (1994) vol.1, 127.
- 46** Ibn Mandhur, Muhammad, Lisan al-'Arab, Dar Sadir, (H1414), vol.8, 23; al-Mursi, Abu al-Hasan, al-Mukhassas, Dar Ihyae al-Turath, (1996) 23; al-Muhit fi al-Lughah, vol.1, 127.
- 47** He said in Kitab al-'Ayn: 'ayn, bae', alif; 'ayn, bae', Hamza; 'ayn, yae', bae'; waw, 'ayn, bae';bae', waw, 'ayn; bae', 'ayn, waw; bae', yae', 'ayn. All these base words have their meanings that are associated with them.
- 48** Al-Farahidi, Abu 'Abd Al-Rahman, Kitab al-'Ayn, Dar Wa Maktabat al-Hilal, vol.2, 262.
- 49** Al-Harawi, Abu Mansur, Tahdhib al-Lughah, Dar Ihyae al-Turath (2001) vol.1, 393.
- 50** Al-Harawi, Abu Mansur, Tahdhib al-Lughah, Dar Ihyae al-Turath (2001) vol.1, 393.

- 51** Al-Zabidi, Muhammad, Taj al-'Arus, Dar al-Hidayah, (1984) vol.1, 5115.
- 52** Al-'Ayn, vol.2, 262.
- 53** Al-'Ayn, vol.2, 262.
- 54** Al-'Ayn, vol.262.
- 55** Al-'Ayn, vol.2, 262.
- 56** Lisan al-'Arab, vol.8, 23.
- 57** Al-Muhit fi al-Lughah, vol.1, 126.
- 58** Tahdhib al-Lughah, vol.1, 391.
- 59** Al-Mukhassis, vol.3, 75; al-Sihah, p. 60.
- 60** The Hadith is narrated by Al-Bukhari.
- 61** Al-Raghib al-Asfahani, al-Mufradat fi gharibi al-Quran, Dar al-Qalam (H1412).
- 62** Al-Kasani, Badaei' al-Sanaei' fi Tartib al-Sharae' (Dar al-Kutub al-' Ilmiyyah 1986) vol.5, 113, and 5: 306 under the section about al-Iqalah. Al-Farghani, Ali, Al-Hidayah fi Sharh bidayat al-Mubtadi, Dar Ihyae al-Turath, vol. 3, 42; al-Babarti, Mu'ammad, al-'Inayah Sharh al-Hidayah, Dar al-Fikr, vol.6, 246; Al-Sarkhsi, Muhammad, al-Mabsut, Dar al-Ma'rifah (1993), vol. 12, 181.
- 63** Al-Nawawi, Yahya, Raudhat al-Talibin wa 'Umdat al-Muftin, al-Maktabu al-Islami (1991) vol.3,338; al-Haythami, Ahmad, Tuhfat al-Muhtaj fi Sharh al-Minhaj wa Hawashi al-Sharwani wa al-'Ibadi, al-Maktaba al-

Tijariyyah (1983) vol.4, 215; al-Sharbini, Muhammad, Mughni al-Muhtaj ila Ma'rifat Ma'ani Alfaz al-Minhaj, Dar al-Kutub al-'ilmiyah (1994) vol.2, 322.

- 64** Abu al-Walid, Ibn Rushd (al-jad), Al-Muqaddimat al-Mumahidat, Dar al-Gharb al-Islami (1988) vol.3, 93; Al-Qirafi, Ahmad, al-Dhakhirah, Dar al-Gharb al-Islami (1994) vol.5, 375; 'Iyyish, Muhammad, Minahu al-Jalil Sharh Mukhtasar Khalil, Dar al-Fikr (1989) vol.1, 449.
- 65** Ibn Qudamah, 'Abd Allah, Al-Mughni Dar al-Fikr (1994) vol.3, 480; 'Abd Al-Rahman al-Maqdisi, al-Sharh al-Kabir 'ala Matn al-Muqni', Dar al-Kitab al-'arabi, vol.4, 2; al-Raudh al-Murbi' Sharh Zad al-Mustaqna', p. 304; Al-Bahuti, Mansur, Kashafu al-Kina', Dar al-Kutub al-'Ilmiyyah (2009), vol.3,146.
- 66** The author of al-Tahrir wa al-Tanwir, in vol. 3 page 83, noted: al-Bay' is the basis, given that Islam forbids riba in a way called, in the field of thesis relating to principles of jurisprudent, inverted analogy. (1) the reason is that inverted analogy is commonly used when there is a hot controversy on an issue; it is not used at the time a scholar is drawing out inference on an issue. Ibn Ashur, al-Tahrir wa al-Tanwir, al-Dar al-Tunisiyah (1984).
- 67** Ibn Hayyan, Muhammad, Al-Bahr al-Muhit, Dar al-Fikr (AH 1420) vol.2, 707.
- 68** Ibn 'Atiyyah, al-Muharrar, al-Wajiz fi Tafsir al-Kitab al-'Aziz, Dar al-Kutub al-'ilmiyah (AH1422) vol.1, 372.
- 69** Al-Razi, Muhammad, Mafatih al-Ghayb or al-Tafsir al-Kabir, Dar Ihya'e al-Turath (AH1420) vol.7, 78, al-

Baydhawi opined with regards to the Allah's statement in the Verse: [That is because they say, "bay' is [just] like riba.]. he said the punishment that will be meted out to them is as a result of their treatment of al-Bay' and riba as one and the same thing. The fact is that riba looks like al-Bay' but they are opposite of each other. They made riba a basis with which al-Bay' will be measured. The variance between the two is obvious; whoever repays a loan of dirham with two dirhams has lost one dirham, this is different from someone who buys a commodity worth of one dirham with two dirhams, in order to provide for his needs or with the belief that the commodity is marketable. This has made up for the deceit." al-Baydhawi, 'Abd Allah, Tafsir al-Baydhawi known as Anwar al-Tanzil wa Asrar al-Taewil, Dar Ihyae al-Turath (AH1418) vol.1, 162.

- 70** Abu Hayan Al-Andalusi, Al-Bahr al-Muhit fi al-Tafsir, vol.2, 708.
- 71** The viewpoint regarding al-ijmal (precision) belongs to Shafi'i school. Mafatih al-Ghayb or al-Tafsir Al-Kabir, vol.7, 78; al-Nu'mani, al-Lubab fi 'Ulum al-Kitab, Dar Al-Kutub al-'ilmiyyah (1998) vol.4, 453.
- 72** Al-Qurtubi, Muhammad, Tafsir al-Qurtubi, Dar al-Kutub al-Misriyah (1964) vol.3, 356.
- 73** Any contract that fall within any of the two systems will be considered as an application of it regardless of the term used for it. For example, if Musharakah contract has evolved with risk transfer element it would be considered as an apication of Riba system and vice versa.

- 74** The author might be referring to riba in the context of fiqh.
- 75** Tafsir al-Qurtubi, vol.3, 348.
- 76** Tafsir Ibn Kathir, vol.1, 710.
- 77** This is a portion from a long hadith which was narrated by Tawil from al-Dhahak ibn al-Nu'man ibn Sa'd that Masruq ibn Wael went to the Prophet SAA in al-'Aqiq, and he embraced Islam. Then, he requested from the Prophet SAA to send an envoy that will preach Islam to his people. He also requested from the Prophet SAA a letter through which he hoped Allah may guide his people to Islam. Then, the Prophet SAA turned to Mu'awiyah and asked him to write the letter and give it to him (Masruq). Then, Mu'awiyah wrote thus: In the name of Allah the most Gracious and the most Merciful, to the people of Hadhramaut; you are enjoined to observe daily obligatory salah, pay zakah and give charity from your (40 and above) sheep; one fifth of the treasure buried underground, one tenth of the harvest from the unirrigated land. You should not mix the livestock (mixing livestock of different type in a flock), you should not hide it in another flock to evade zakah, you should not exchange your daughters in marriage without dowry, you should not tie camel where she kneels to rest, you should not mix the proceeds from one flock with another to reduce the amount of zakah to be paid, you should not sell fruit in which one is not sure whether it is free from defects or not, you should not drag two camels in one headband, whoever sells farm products that are not yet ripe, has involves in riba, and

all that intoxicates is haram. Reported by al-Bayhaqi, under section of al-Iman, 3: 35; Ibn Abi 'Asim also reported it in al-Ahad wa al-Mathani, 5: 174; al-Tabarani reported it in al-Kabir, the remaining part of the hadith is in the book, but it is defective, while the reporter is reliable. See al-Haythami, Ali, Majma' al-Zawaed wa Manba' al-Fawaed, Dar al-Qudsi (1994) vol.3, 75.

- 78** The hadith was reported by Al-Bukhari, Muhammad Ismail. Sahis al- Bukhari. n.p.: Dar al-Tuq al-Najāh (1422AH), under section Yamhaqu Allah al-Riba, 6: 32; Muslim also reported the hadith in his Sahih, under section prohibition of selling of alcohols, 3: 1206; Ahmad also reported it in his Musnad called Musnad Ahmad, 40: 226; Ibn Majah and Ibn Hiban also reported the hadith.
- 79** Al-Tahrir wa al-Tanwir 3: 88.
- 80** Al-Tahrir wa al-Tanwir vol.3, 88.
- 81** The fuqaha, however, have deemed all the above activities as prohibited under the basis of gharar, maysir, etc. However, what is used as technical grounds of prohibition for some these activities, being gharar, maysir, etc. does not go in conflict with the terms used by the Hadith or other above statements as the common ground between all these prohibitions is risk transfer.
- 82** Vol. 1, Book 8, Hadith 449.
- 83** Riba Al Fadl means that excess which is taken in exchange of specific homogenous commodities known

as Ribawi commodities.

- 84** Unjustified increment in money lent whether in kind or cash over and above the principal amount.
- 85** This is a type of sale where the buyer or the seller of a piece of folded cloth used, in order to execute a sale transaction, to touch that cloth as a sign of finalizing the sale, without ever seeing it. The quality, size and other identifications of the cloths are defined and that a contractual risk that has been born by the buyer or transferred from the seller to the buyer unjustly.
- 86** This is another of sale where the buyer and seller throw two pieces of fabrics at each others and whichever fabric been thrown is sold without knowing the specifications of the item sold.
- 87** The sale of a fetus that is still in the belly of a pregnant camel.
- 88** Renting the land for a definite share of its yield.
- 89** This is one of the sales that is prohibited because of Gharar and yet the companion called it Riba.
- 90** The inflation of price of evaluated commodity in order to deceive buyers.
- 91** Ibn Rajan, 'Abd Al-Rahman, Tafsir Ibn Rajab, Dar al-Asimah (2001) vol.1, 195–198.
- 92** Tafsir al-Qurtubi, vol.3, 348.
- 93** Tafsir Ibn Rajab al-Hambal, vol.1, 195–198.

- 94** Anwar al-Tanzil wa asrar al-Taewil, 1: 153; al-Nasafi, 'Abd Allah, Madarik al-Tanzil wa Haqaeq al-Taewil, Dar al-Kalim al-Ùayib (1998) vol.1, 209.
- 95** Al-Wahidi, al-Tafsir al-Wasit, vol.1, 364.
- 96** Tafsir al-Raghib al-Asfahani, vol.1, 1521.
- 97** Tafsir Ibn 'Atiyyat, al-Muharrir al-Wajiz fi Tafir al-Kitab al-'Aziz, vol.1, 339.
- 98** Al-Qarzi said, when the Ansar (seventy in number) were making oath of allegiance with the Prophet (peace and blessings of Allah be upon him), in the night of al-'Aqabat in Makkah, 'Abd Allah ibn Rawaha asked the prophet to pledge for Allah and himself. he replied: I pledged to Allah that I would worship Him alone, I would not associate partner with Him in worship; I pledged to myself that it would prevent me from what is forbidden for you (Ansar). They then asked: if we do all these, what is our reward? He replied: Paradise. Then they remarked: what a profitable contract which we would never revoked! Al-Tafsir al-Wasit authored by al-Wahidi, vol.2, 526; Tafsir Ibn 'Atiyyat, al-Muharrir al-Wajiz fi Tafsir al-Kitab al-'Aziz, vol.3, 87.
- 99** Al-Matoridi, Muhammad, Taewilat Ahl al-Sunnat, Dar al-Kutub al-'ilmiyah (2005) vol.5, 487.
- 100** Al-Tha'labi, AÍmed, al-Kusshaf wa al-Bayan 'an Tafsir al-Quran, Dar Ihya'e al-Turath vol.5, 97.
- 101** Ibn 'Atiyyat, al-Muharrir al-Wajiz fi Tafsir al-Kitab al-'Aziz, vol.3, 87.

- 102** Tafsir al-Mataridi, Taewilat Ahl al-Sunnat, vol.7, 574.
- 103** Tafsir al-Tha'labi, al-Kusshaf wa al-Bayan 'an Tafsir al-Quran, vol.7, 109.
- 104** Tafsir al-Marudi, al-Nakt wa al-'Uyun, vol.4, 107.
- 105** Tafsir al-Baydhawi, Anwar al-Tanzil wa Asrar al-Taewil, vol.4, 109.
- 106** Al-Munjid, Muhammad, Al-Taraduf fi al-Quran al-Karim Baya al-Naazriyyah wa al-Tatbiq, Dar al-Fikr al-Mu'asir (1997), p; 30.
- 107** Al-Sayuti, 'Abd Al-Rahman, Al-Muzhir fi 'Ulum al-Lughat wa Anwa'iha, Dar al-Kutub al-'ilmiyah (1998) vol.1, 314; Al-Taraduf fi al-Quran al-Karim Baya al-Naazriyyah wa al-Tatbiq, page 38.
- 108** Al-Sayuti, 'Abd Al-Rahman, Al-Muzhir fi 'Ulum al-Lughat wa Anwa'iha, Dar al-Kutub al-'ilmiyah (1998) vol.1, 314; Al-Taraduf fi al-Quran al-Karim Baya al-Naazriyyah wa al-Tatbiq, page 38.
- 109** Al-Taraduf fi al-Lughah, 1: 197.
- 110** Al-Taraduf fi al-Lughat, 191 and the subsequent page; Al-Taraduf fi al-Quran al-Karim Baya al-Naazriyyah wa al-Tatbiq, page 30 and the subsequent page.
- 111** Al-Zarkashi, Muhammad, Al-Bahr al-Muhit fi Usul al-Fiqh, Dar al-Kutub (1994) vol.2, 357; Also, check al-Zarkasha, who reported the evidences of those that deny synonym, although he supported the synonymous-ness of words.

- 112** Al-Taraduf fi al-Quran al-Karim Baya al-Nazariyyat wa al-Tatbiq, page 45.
- 113** Al-Taraduf fi al-Lughah, page 197.
- 114** Al-Zarkashi, Muhammad, remarked in his commentary on Jam' al-Jawami' that there are different schools of thought regarding the synonyms in the language, and they are numerous in Arabic language. Check Tashnif al-Masami' bi Jam' al-Jawami', Maktabat Qurtubah (1998) vol.1, 419.
- 115** Al-Taraduf fi al-Lughat, page 56.
- 116** Tashnif al-Masami' bi Jam' al-Jawami', vol.1, 421.
- 117** Tashnif al-Masami' bi Jam' al-Jawami', vol.1, 421.
- 118** Tashnif al-Masami' bi Jam' al-Jawami', 1: 419.
- 119** Al-Taraduf fi al-Quran al-Karim Baya al-Nazariyyat wa al-Tatbiq, page 47.
- 120** Thalath Rasail fi 'I'jaz al-Quran (al-Bayan fi 'I'jaz al-Quran), Dar al-Ma'arif, page 29.
- 121** Al- Suyuti, Al-Itiqan fi 'Ulum al-Quran, al-Hayah al-Misriyah, (1974) vol.4, 10.
- 122** Majmu' al-Fatawa, 1: 341; Majmu' al-Fatawa, 7: 290 and the subsequent pages; Ibn Qayyim al-Jawziyah, Raudhat al-Muhibbin wa Nazhat al-Mushtaqin, Dar al-kutub al-'ilmiyah (1983) page 54.

- 123** Ruudhat al-Muhibbin wa Nazhat al-Mushtaqin, page 54.
- 124** Al-Zajaj, Ibrahim, Ma'ani al-Quran, 'alam al-Kutub (1988); and Subhi Ibrahim al-Salih, Dirasat fi Fiqh al-Lughat, page 338–345.
- 125** See al-Bahr al-Muhit fi al-Tafsir, vol.2, 739.
- 126** Al-Bahr al-Muhit fi al-Tafsir, vol.2, 739.
- 127** Al-Zabidi, Muhammad, Taj al-'Arus, Dar al-Hidayah, vol.6, 501.
- 128** Al-'Ayn, vol.8, 165–166; Tahdhib al-Lughat, vol.14, 280.
- 129** Kuliyyat al-Ta'amul refers, in this context, to all the human transactions and trade-offs, since risks sharing involves all the contracts/transactions that Muslims do engage in, starting from joint liability (or solidarity), protection of religion, mutual security/guaranty through charities and zakat, security/guaranty for the orphans and the relatives, fulfilling the needs of the needy and the weak. It is common knowledge that these interactions/projects are requisites for the upholding of Islamic system and its fundamentals. This is the perspective of Shari'ah in this regard. Although it is imperative to point to this, expatiating on it should be another subject matter of another research. Our objective in this research is to extract from minor and major issues and then apply it on the present financial crises.

- 130** Lisan al-'Arab, 11: 430; al-Fayruz Abadi, al-Qamus al-Muhit, Moasasat al-Risalah (2005) 1030.
- 131** Al-Jahiz, Tahdhib al-Akhlaq, page 28.
- 132** Ibn Hazm, Ali, al-Akhlaq wa al-Siyar, Dar al-Afaq (1979) page 81.
- 133** Ibn Taymiyah, Amradh al-Qulub wa Shifaaoha, al-Maktabah al-Salafiyah (AH1399) page 6.
- 134** Abi al-Baqae, al-Kulliyyat, al-Risalat (1413) p; 150-639.
- 135** Shaykh al-Islam posited that the basis of this is justice involving equality between two similar persons/things Allah said: "Indeed We have sent Our Messengers with clear proofs, and revealed with them the Scripture and the Balance (justice) that mankind may keep up justice." [al-Hadid: 25]. Justice involves religiosity, righteousness, and goodness in more than one aspect. The real justice may be somewhat difficult to dispense or implement. In a situation where equalization is impossible or unknown, then it is imperative to opt for what seems to be justice or closer to the justice. This is the best way to dispense justice. Allah, the most High, said: "and give full measure and full weight with justice. We burden not any person, but that which he can bear." [al-An'am: 152]. Ibn Taymiyyah, al-Istiqamah, 1: 434.
- 136** Ibn al-Qayyim, Al-Turuq al-Hukmiyyah, Dar al-Bayan, page 19.
- 137** Al-Hasabat fi al-Islam, page 27.
- 138** Lisan al-'Arab.

- 139** Al-Mausu'at al-Fiqhiyyah al-Kuwaitiyyat, vol.39, 31.
- 140** Al-Qarafi, Al-Furuq, 'alam al-Kutub, vol.3, 209.
- 141** Al-Shatibi, Abu Bakr, al-Muwafaqat, Dar Ibn 'afan, vol.2, 219.
- 142** Wahbah al-Zuhayli, al-Fiqh al-Islami wa Adillatuh, Dar al-Fikr (2009), 4: 2892.
- 143** Reported by al-Bukhari, 10: 7–8.; Muslim, 3: 1305–1306.
- 144** Imam al-Haramain, al-Ghayathi, 494–495. Reviewed by Dr. 'Abd al-'Azim al-Dib, Qatar.
- 145** Majmu' al-Fatawa, 29: 189.
- 146** Al-Zamakhshari, Mahmud, Tafsir al-Kasshaf, Dar al-Kitab al-'arabi (AH1407) vol.4, 61, and in al-Mausu'at al-Fiqhiyyat al-Kuwaitiyyat, 39: 33.
- 147** Al-Dardir, Al-Sharh al-Kabir, vol. 3,329, Al-Sharbini, Mughni al-Muhtaj, vol. 2,198.
- 148** Al-Shawkani, Muhammed, vol.5,299 via Al-Zuhayli, Wahbah, Nadhariyatu Al-Dhaman, Maktabat Al-Asad, page 21. See also Mandhur Al-xaq, Anisu Al-Rahman, Qa'idat Al-Kharaju Bi Al-Dhaman Wa Tatbiqatuha Fi Al-Mu'amalati Al-Maliyath, page 228.
- 149** Al-Zuhayli, Wahbah, Nadhariyatu Al-Dhaman, Maktabat Al-Asad, page 22.
- 150** See 'Uwaydah, 'Adnan, 2010, p: 41–44, Mandhur Al-Haq, Anisu Al-Rahman, Qa'idat Al-Kharaju Bi Al-Dhaman

Wa Tatbiqatuha Fi Al-Mu'amalati Al-Maliyath, page 228-230.

- 151** Al-Zuhayli, al-Fiqh al-Islami wa Adillatuh, vol.4, 2879.
- 152** Ibn Rajab, al-Qawa'id, page 208-210.
- 153** Hadith narrated by 'Aishah (may Allah be pleased with her) (Abu Dawud, hadith no. 1464; Ahmad 49:6, hadith nos. 161, 208, 237; Ibn Majah, 2:754; Sunnan al-Bayhaqi, 5:321). There is a conflicting views among scholars regarding the authenticity of this hadith; some, such as Ibn Hazm, said that it is not authentic, but others, such as Ibn al-Qattan, ruled that it is an authentic hadith. Nevertheless, the hadith has been held authentic by more than sixteen scholars. Via Ashraf Wajdi Dusuki, Principle and Application of Risk Management and Hedging Instruments in Islamic Finance. See also Mandhur Al-Haq, Anisu Al-Rahman, Qa'idat Al-Kharaju Bi Al-Dhaman Wa Tatbiqatuha Fi Al-Mu'amalati Al-Maliyath, page 213-215.
- 154** Al-Qurtubi, Muhammad, al-Jami' Li ahkami al-Quran.
- 155** The hadith in narrated by 'Abdulah Ibn 'Amr Ibn Al-'AS, via Jami' at-Tirmidi said this hadith is Hasan Sahih see hadith no. 1234, Book 14, hadith 34.
- 156** Al-Haqil, Musa'id Abulah, Ribh Malam Yudhman, Dirasah Taesiliyah Tatbikiyah, p. 52.
- 157** Fuqahae refer to this by the term Istiqraru Al-Milk استقرار الملك.
- 158** Al-Mabsuġ, vol, 12: 124.

- 159** Tahthibu Sunani Abi Dawud vol. 5: 158, Via Al-Haqil, Musa'id AbuLah, Ribh Malam Yudhman, Dirasah Taesiliyah Tatbikiyah, page 188.
- 160** Al-Hatab, Mawahibu Al-Jalil, vol. 4: 377, Al-Bahuti, Sharh Muntaha al-Iradat, vol.2: 62.
- 161** Al-'Ayni, Al-Binayah Sharh Al-Hidayah vol. 4: 46.
- 162** al-Kasani, Badai' al-Sanai' fi Tartib al-Sharai', vol 5, 180, al-Nawawi, Rawdhatu al-Talibeen vol. 3,159, Ibn Qudamah, al-Mughni, vol. 6:186.
- 163** Al-Bukhari, no. 2132, vol. 3: 68, Muslim no. 1525, vol. 3: 938.
- 164** Al-Hatab, Mawahibu Al-Jalil, vol. 4: 378, Ibn Qudamah, al-Mughni, vol. 6:186.
- 165** Malikis exluded some cases and hold the buyer liable only when he takes possession.
- 166** Ibn Taymiyyah, Majmu' al-Fatawa al-Kobra vol. 30: 274.
- 167** The main types of Khiyar are as follows:
- Khiyar al-shart, conditional option, where one of the parties stipulates certain conditions, failing to meet which would grant a right to the stipulating party an option to rescind the contact.
 - Khiyar al-'aib, the option to rescind the contract on discovery of a defect in the subject of sale.

- Khiyar al-rueyah, option of rejecting the thing purchased after seeing it.
- Khiyar al-t'ayin, where a person having purchased two or three things of the same kind, stipulates a period to make his selection.
- Khiyar al-majlis, the condition of with- drawing from the contract while the two parties are still at the place of transaction.
- Khiyar al-naqd, where the seller has the option to cancel the contract if the buyer does not pay cash up to a certain agreed date.
- Khiyar al-ghubn, the option of the buyer to cancel the contract if the seller has sold it at a price higher than what an independent evaluator evaluates.
- Khiyar al-taghrir, option to rescind the contract if the seller perpetrates a fraud causing loss to the buyer.

- 168** Ibn Nujaim, Zayn al-Din, Al-Bahr al-Raiq, vol. 6:15, Al-Raf'i, Al-'Aziz Sharh Al-Wajiz, vol. 4: 199, Ibn Qudamah, Al-Mughni, vol. 6:17.
- 169** Abu al-Walid, Ibn Rushd (al-jad), Al-Muqaddimat al-Mumahidat, vol. 2: 92.
- 170** Mandhur Al-Haq, Anisu Al-Rahman, Qa'idat Al-Kharaju Bi Al-Dhaman Wa Tatbiqatuha Fi Al-Mu'amalati Al-Maliyath, pages 515 onwards.
- 171** See Al-Zarqa, Al-Madkhal Al-Fiqhi Al-'Am, vol. 2:729.

- 172** Al-Zarqa, Al-Madkhal Al-Fiqhi Al-'Am, vol. 2:729.
- 173** Al-Nafrawi, Ahmad, Al-Fawakihu Al-Dawani, vol. 2:94–95, Abu Hamid, Al-Ghazali, Al-Wajiz, vol.8: 212, Ibn Qudamah, 'Abd Allah, Al-Mughni vol.4: 310. Via Mandhur Al-Haq, Anisu Al-Rahman, Qa'idat Al-Kharaju Bi Al-Dhaman Wa Tatbiqatuha Fi Al-Mu'amalati Al-Maliyath, page 518–519.
- 174** Al-Sarakhsi, Al-Mabsut, vol.22: 55.
- 175** Mandhur Al-Haq, Anisu Al-Rahman, Qa'idat Al-Kharaju Bi Al-Dhaman Wa Tatbiqatuha Fi Al-Mu'amalati Al-Maliyath, page 518–519.f.
- 176** See the previous references.
- 177** See section 3.2.3.2 of this thesis.
- 178** Al-Qamus al-Muhit, Lisan al-'Arab.
- 179** Radd al-Muhtaj, vol.5, 55.
- 180** Ibn Nujaim, Zayn al-Din, Al-Bahr al-Raeq, Dar al-Kitab al-Islami 2: 227; Ibn 'Abidin, Ahmad, Radu al-Muhtar 'ala al-Durri al-Mukhtar (Dar al-Fikr 1992), vol.3, 4, and Al-Zuhaili, al-Fiqh al-Islami wa Adillatuh, 4: 2876.
- 181** Al-Suyuti, al-Ashbah wa al-Nazair, (Dar al-Kutub al-'Ilmiyyah 1990), page 258.
- 182** The controversy has generated many issues among which are as follows: According to xanafi school, leasing contracts ends with the demise of the leaseholder, because the benefits is not property right that can be

inherited. However, other schools of thought portend that leasing contracts does not end with the demise of the leaseholder, it is still in effect until the set time framework. According to Hanafi school, rights cannot be inherited such as right to stipulate or right to vet the commodity. However, other schools of thought hold the view that right can be inherited. Al-Zuhayli, *al-Fiqh al-Islami wa Adillatuh*, vol.4, 2878.

183 Al-Zuhayli, *al-Fiqh al-Islami wa Adillatihi*, vol.4, 2876.

184 Al-Sanhuri, *Masadir al-Haqq fi al-Fiqh al-Islami "A comparative study of Arab Jurisprudence"*, 1: 9. Published by Institute of Islamic Researches and Studies, 1967; 'Ali al-Khafif, *al-Haqq wa al-Dimmat*, page 36. Published by Maktabat Wahbat, 1947; Hassan Kubrat, *Usul al-Qanun*, page 553. Published by Matba'at Dar al-Ma'arif, 1960; Fathi al-Darini, *al-Haqqu wa Sultan al-Daulat fi Taqayyudihi*, page 163. Beirut: Matba'at Dar al-Fikr, first edition.

185 Like ownership of the benefit of the rented house in the leasing contract.

186 Possession of the right to the usage of the loaned item. For example, if someone borrowed a pen, he has the right to the usage of the pen, but not the benefit of the pen, because the item and its benefit belongs to the lender/owner. Or Public ownership of public utilities, the property right belong to the public, the enjoyment and utilization of the property right is not meant for specific people, but the general public. Al-Qirafi *al-Maliki* had discussed the difference between ownership of the usage and ownership of the benefit, and he noted that

the former involves only usage of the item while the latter involves both usage of the item and giving it out for others' utilization of the item in form of leasing, or loaning etc. The latter is comprehensive and all-inclusive.

187 Majmu' al-Fatawa, vol.29, 178.

188 Regarding the first type, it is the general ownership of properties which can be acquired through the means of sale transaction, gift, inheritance etc. the second type involves ownership of the property right without its benefit. The third type denotes ownership of the benefit, but not the real property right. This is valid and had been established by the unanimity of the scholars. It has two forms: one is permanent ownership and it has several ways which include wills which may states that the item can be used by a particular person. It also includes endowment. The benefits and the proceeds for the endowed property right are all owned by the one to whom it is endowed. Permanent ownership can also take the form of land upon which a tribute is due. The second form is temporary ownership such as leasing, usage of the commodity selected for a period of time in a sale contract. As regards the fourth type, it is ownership of only usage, and it has many forms among which are: ownership of the loaned item, because the borrower has only the right to use the borrowed item but he has no right to its benefit, as reported by Ibn ManîËr from Ahmad. This also includes usage of the property right of one's neighbor such as placing his plank/wood or passing through his house etc. this also involves leasing, usage of public utilities such as

benches or chairs in the public markets, eating from sacrificial animals, visitor eating what was given to him by his host. All these are purely permitted. Check Ibn Rajab, al-Qawa'id, Dar al-Kutub al-'ilmiyyah, page 208-210.

- 189** Al-Zuhayli, al-Fiqh al-Islami wa Adillatuh, vol.4, 2879.
- 190** Ia.
- 191** Al-Zuhayli, al-Fiqh al-Islami wa Adillatuhu, vol.4, 2879.
- 192** Al-Zuhayli, al-Fiqh al-Islami wa Adillatuhu, vol.4, 2879.
- 193** A Critical Analysis of Shari'ah Issues in Intangible Assets, ISRA Research Paper, No. 61/2013.
- 194** Islamic Finance: Opportunities, Challenges, and Policy Options, IMF staff note, April 2015, prepared by Alfred Kammer, Muhammad Norat, Marco Pi'ón, Ananthakrishnan Prasad, Christopher Towe, Zeine Zeidane, and an IMF Staff Team.
- 195** The first point is discussed in the following pages, while the second point follows. The fiqhi approach for these investment is to be based on risk sharing.
- 196** See Al-Sayuti, Al-Ashbah wa Al-Nazair, p; 258.
- 197** Al-Muwafiqat, 2: 10.
- 198** Ibn al-'Arabi, Ahkam al-Quran (Tafsir al-Qutobi), vol.2: 607.

- 199** Al-Zarqashi, Muhammad, al-Manthur fi al-Qawa'id, Wizarat al-Awqaf alKuwaytiah (1985) vol.3, 222; al-Suyuti, al-Ashbah wa al-Naza'ir, page 327.
- 200** Sharh Muntaha al- Iradat, vol.2: 142.
- 201** (→ IDB & IFA, 2000: 89).
- 202** Sahih al-Bukhari 5029, Book 66, Hadith 51.
- 203** Sahih Muslim 2564, Chapter: The Prohibition of Wronging, Forsaking, or Despising a Muslim and the Inviolability of His Blood, Honor and Wealth, Book 45, Hadith 40.
- 204** More discussion on the matter is found in the following chapter.
- 205** A Critical Analysis of Shari'ah Issues in Intangible Assets, ISRA Research Paper, No. 61/2013.
- 206** Tafsir al-Qasimi, Mahasin al-Taewil, 2: 228.
- 1** → H, 'Askari et al., (2012).
- 2** Humayon A. Dar & Jhon R. Presley, "Lack of Profit and Loss Sharing in Islamic Banking", International Journal of Islamic Financial Services, Vol. 2, No.2, 3-18 (2000).
- 3** R. Golman, G. Loewenstein, and N. Gurney, "Information Gaps for Risk and Ambiguity", (2015)
[→ https://www.cmu.edu/dietrich/sds/docs/golman/Information%20Gaps%20for%20Risk%20and%20Ambiguity%20Golman%20Loewenstein%20May%202015.pdf](https://www.cmu.edu/dietrich/sds/docs/golman/Information%20Gaps%20for%20Risk%20and%20Ambiguity%20Golman%20Loewenstein%20May%202015.pdf)

4 J. Martinez-Correa, "Decisions under Risk, Uncertainty and Ambiguity: Theory and Experiments", Georgia State University, (2012).

[→ http://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1030&context=rmi_diss](http://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1030&context=rmi_diss)

5 Ibn 'Isa, al-Tirmidi, Jami`at-Tirmidi, Book 15, Hadith 32, (Mustafa al-Babi 1975).

6 Jami`at-Tirmidi, Book 78, Hadith 122, (Mustafa al-Babi 1975).

7 Ahmad Ibn 'Abdin, Radu al-Muhtar 'ala al-Durri al-Mukhtar, (Dar al-Fikr 1992), Vol 4, 109., Muhammad Al-Dasuki, Hashiyat al-Dasuqi 'ala al-Sharh al-Kabir (Dar al-Fikr), V 3, 57., Jalal al-Din Muhammad, Sharh al-Muhala 'ala al-Minhaj with two commentaries (Mustafa al-Babi 1956), V 2, 176.

8 Muslim, Sahih Muslim, Book 1, Hadith 190, (Dar Ihyae al-Turath, Beirut).

9 'Abd Al-Rahim Al-Saati, "The Permissible Gharar (Risk) in Classical Islamic Jurisprudence", J.KAU: Islamic Econ., Vol. 16, No. 2, 3-19 (1424 A.H / 2003 A.D).

10 Ibn Rushd, Bidayat al-Mujtahid wa Nihayat al-Muqtasid, (Dar al-Hadith 2002) Vol;2, 148.

11 A. W. Dusuki, "Principle and Application of Risk Management and Hedging Instruments in Islamic Finance", (2012).

- 12** 'Abd Al-Rahim Al-Saati, "The Permissible Gharar (Risk) in Classical Islamic Jurisprudence", J.KAU: Islamic Econ., Vol. 16, No. 2, 3-19 (1424 A.H / 2003 A.D).
- 13** Sami Al-Suwaylem, "Towards An Objective Measure Of Gharar In Exchange", Islamic Economic Studies, Vol 7, Nos. 1 & 2, (Oct. '99, Apr. 2000).
- 14** Wahbah Al-Zuhayli, Financial Transactions in Islamic Jurisprudence (D'Er Al-Fikr 2001) Vol 1, 13-63.
- 15** The majority of scholars are opined that the pricing is an act of the market and it should be left that way unless there is a necessity that calls for it. See al-Kasani, Badai' al-Sanai' fi Tartib al-Sharai' (Dar al-Kutub al-'Ilmiyyah 1986), Vol 5, 129., Ibn 'Abdin, Ahmad, Radu al-Muhtar 'ala al-Durri al-Mukhtar (Dar al-Fikr 1992), Vol 6, 400., Ibn 'Abd al-Barr, al-Kafi fi Fiqh Ahl al-Madinah, (Maktabat al-Riyadh 1980), Vol 2, 730., Al-Mawardi, 'Ali, al-Hawi al-Kabir (Dar al-Kutub al-'Ilmiyyah 1999), Vol 7, 405., Ibn Muflih, Ibrahim, al-Mubdi' Sharh al-Muqni' (Dar al-Kutub al-'Ilmiyyah 1997). Vol 3, 386.
- 16** Wahbah Al-Zuhayli, Vol. 1, 471-475.
- 17** S. Al-Suwaylim, Sami Al-Suwaylem, "Towards An Objective Measure Of Gharar In Exchange", Islamic Economic Studies, Vol 7, Nos. 1 & 2, (Oct. '99, Apr. 2000).
- 18** Hussein Hamid Hassan, "The Tools of Risk Management in Islamic Financial Institutions", (11th Shari'ah Committees Conference in Kingdom of Bahrain).

- 19** Wahbah Al-Zuhayli, *Al-Fiqh Al-Islami wa Adillatuh, Financial Transactions in Islamic Jurisprudence* V,1, Ps: 471-475.
- 20** Sami Al-Suwaylem, "Towards An Objective Measure Of Gharar In Exchange", *Islamic Economic Studies*, Vol 7, Nos. 1 & 2, (Oct. '99, Apr. 2000).
- 21** Habib Ahmed, *Risk Management Assessment Systems: An Application To Islamic Banks*, *Islamic Economic Studies*, Volume 19 No. 1.
- 22** Daniel Kahneman and Amos Tversky, "Prospect Theory: An Analysis Of Decision Under Risk", *Econometrica*, Vol 47, No.2. (1979), Matthew Rabin, "Risk Aversion and Expected-Utility Theory: A Calibration Theorem", (1999), and Fredrik Carlsson, Dinky Daruvala and Olof Johansson-Stenman, "Are People Inequality-Averse, or Just Risk-Averse?", (2003).
- 23** Habib Ahmed, *Habib Ahmed, Risk Management Assessment Systems: An Application To Islamic Banks*, *Islamic Economic Studies*, Volume 19 No. 1.
- 24** Hussein Hamid Hassan, "Basic Shari'ah Principles Governing Risk Management", (paper presented in Harvard-LSE Workshop on Risk Management, London School of Economics, February 2009, via Asyraf Wajdi Dusuki), Shabnam Mokhtar, "The Concept and Operations of Swap as a Hedging Mechanism for Islamic Financial Institutions", *International Shari'ah Research Academy for Islamic Finance (ISRA) Research Paper* No: 14 /2010.

- 25** See Al-Suyuti, al-Ashbah wa al-Nazair, (Dar al-Kutub al-'Ilmiyyah 1990), 23–135., Afandi, 'Ali, Durar al-Hukkam Sharh Majallati al-Ahkam (Dar al-Jil 1991), 75–85., Al-Ghazali Ahmad, al-Wajiz, (Dar al-Kutub al-'Ilmiyyah 2004), 313., Al-Nadawi, al-Qawa'id al-Fiqhiyyah, (Dar al-Qalam 1994), 409.
- 26** Abu Dawud, Sulayman, Sunan Abu Dawud (Dar al-Risalah al-'Alamiyah 2009), Book 24, Hadith 93, al-Nasai, Ahmad, Sunan al-Nasai (Maktab al-Matbu'at al-Islamiyah 1986), Book 44, Hadith 42, al-Tirmidi, Jami' at-Tirmidi, (Mustafa al-Babi 1975), Book 14, Hadith 88., Ibn Majah, Muhammad, Sunan Ibn Majah, (Dar al-Risalah al-'Alamiyah 2009), Book 12, Hadith 2243., at-Tirmidi grant authenticity to the hadith and Al-Abani stated that the hadith is Hasan (the second level of authenticity).
- 27** Ibn Anas, Malik, Al-Muwattae. (Muassasat al-Risalah 1412AH), Hadith 1437., Sunan Ibn Majah, Hadith 2441.
- 28** → A. 'Uwaydhah, (2010).
- 29** Ibn Taymiyyah, Majmu' al-Fatawa al-Kobra (Mujamma' al-Malik Fahd 1995).
- 30** → A. 'Uwaydhah, (2010).
- 31** Jami' at-Tirmidi, Book 11, Hadith 2518, Sunan an-Nasai, Book 51, Hadith 173.
- 32** Jasser 'Uda, Maqasid Al-Shari'ah a Beginners Guide. (The international institution of Islamic thoughts), Occasional Papers Series 14 (2008)., Muhammad Akram Laldin, "Understanding the Concept of Maslaha and Its

Parameters when used in Financial Transactions”. ISRA (2010).

- 33** Ibn Ashur, Muhammad, Maqasid al-Shari’ah (Wizaratu al-Awqaf wa al-Shuoun al-Islamiyah 2004).
- 34** “Decision under uncertainty: an Islamic perspective” → Al-Rajhi Banking And Investment Corp.(2000).
- 35** See Al-Baydhawi, ‘Abd Allah, Anwaru al-Tanzil wa Asraru al-Taewil, (Dar Ihyaie al-Turath al-‘Arabi AH 1418), Vol 1, 129., Ibn Wahb, ‘Abd Allah, Tafsiru al-Quran Mina al-Jami’ (Dar al-Gharb al-Islami 2003), 60–61.
- 36** → Ibn Wahb, (2003) 60–61.
- 37** → Ibn Wahb, (2003) 60–61.
- 38** Jami’ at-Tirmidi, Book 10, Hadith 11.
- 39** Al-Bayhaqi, Ahmad, al-Sunan al-Kubra, (Dar al-Kutub al-‘Ilmiyyah 2003) Vol 6, 111; Al-Tabarani, Sulayman, al-Mu’jam al-Kabir, (Maktabat Ibn Taymiyyah 1994)., V 1, 231.
- 40** The matter is well known in Usul al-fiqh under the title of ta’arud al-masalih aw al-mafasid (the conflict of two good/beneficial things or harmful things).
- 41** Sami → Al-Suwaylem (2000), Habib Ahmed, Risk Management Assessment Systems: An Application To Islamic Banks, Islamic Economic Studies, Volume 19 No. 1.
- 42** → H, ‘Askari et al., (2012).

- 43** See Sami Al- Suwaylim, “Hedging in Islamic Finance”, (IRTI,2006), and Muhammad ‘Ali Elgari, “Credit Risk In Islamic Banking And Finance”, Islamic Economic Studies, Vol. 10, No. 2, March 2003.
- 44** Mher Mushtaq Hussain, Ahmad Tisman Pasha, “Conceptual And Operational Differences Between General Takaful And Conventional Insurance”, Australian Journal of Business and Management Research Vol.1 No.8 [23–28] | (November-2011).
- 45** The benevolent contract like Kafalah, gift, Qardh and other transactions are not an exchange contract therefore they are not included in here.
- 46** Sahih Muslim, Book 45, Hadith 40.
- 47** Kamaruzaman Noordin, The Implementation of Tabarru`and Ta’Awun Contracts In The Takaful Models, Islamic Economics, Banking and Finance: Concepts and Critical Issues, chapter 7. (Person 2014).
- 48** Sami → Al-Suwaylem, (2000).
- 49** See chapter 2, al-Bay’ as a system.
- 50** This is the sale that is concluded with no proper identification of the subject matter of the sold goods. The identification happen is only when the buyer throw a stone and the reached place/goods are considered as identified. There is a massive Gharar in this sale and therefore is prohibited. Ibn ‘Abdin, Ahmad, Radu al-Muhtar ‘ala al-Durari al-Mukhtar (Dar al-Fikr 1992), Vol 4, 109, Muhammad Al-Dasuki, Hashiyat al-Dasuqi ‘ala al-

Sharh al-Kabir (Dar al-Fikr), Vol 3, 57, Jalal al-Din Muhammad, Sharh al-Muhala 'ala al-Minhaj with two commentaries (Mustafa al-Babi 1956), Vol 2, 176, and Al-Bahuti, Mansur, Kashafu al-Kina', (Dar al-Kutub al-'Ilmiyyah 2009), Vol 3, 167.

- 51** The Hadith is reported by Muslim, Sahih Muslim Chapter of the invalidity of Hasah transactions and transactions involving ambiguity, Book 21, Hadith 8, and Jami' at-Tirmidi the chapter of what Has Been Related About: Sales of Gharar Are Disliked, Book 14, Hadith 30.
- 52** Al-Khirshi, Muhammad, Sharh Mukhtasar Khalil, (Dar al-Fikr, Bayrut), he said: gharar is the vacillation between two probabilities one meets the objective (of the sale) and the second does not.
- 53** Sidiqi Al-Dhareer, Al-Gharar In Contracts And Its Effects On Contemporary Transactions, (Islamic Research And Training Institute (IRTI), 1997), 10.
- 54** Jami' at-Tirmidi, *Jami' at-Tirmidi* the chapter of what Has Been Related About: Sales of *Gharar* Are Disliked, Book 14, Hadith 30.
- 55** Asyraf Wajdi Dusuki, Shabnam Mokhtar, "The Concept and Operations of Swap as a Hedging Mechanism for Islamic Financial Institutions", International Shari'ah Research Academy for Islamic Finance (ISRA) Research Paper No: 14 /2010.
- 56** Wahbah Al-Zuhayli, al-Fiqh al-Islami wa Adillatuh, (Dar al-Fikr 2009). Vol 1, 471-475.

- 57** We shall translate Mukhatarah in this context as risk taking as Imam Malik repeatedly referred to it when giving examples for gharar.
- 58** Ibn Anas, Malik, al-Muwattae _'Abd al-Baq Narration, the book of Buyu', (Dar Ihyae al-Turath al-'Arabi 1985) Vol 2, 664.
- 59** Ibn Anas, Malik, al-Muwattae _'Abd al-Baq Narration, the book of Buyu', (Dar Ihyae al-Turath al-'Arabi 1985) Vol 2, 664.
- 60** 'Abd Al-Rahim Al-Saati, "The Permissible Gharar (Risk) in Classical Islamic Jurisprudence" J.KAU: Islamic Econ. Vol. 16, No. 2, pp. 3-19 (1424 A.H / 2003 A.D).
- 61** Ibn Muflih, Muhammad, Kitabu al-Furu' (al-Risalah 2003). vol.4.18.
- 62** 'Adnan 'Uwadhah, 2010, p: 25-27.
- 63** Ibn Qayyim al-Jawziyah, Muhammad, Zad al-Ma'ad, (al-Risalah 1994).vol.5. 816).
- 64** See Sami Ibrahim → al-Suwaylem, (2000), pp. 81-89.
- 65** Ibn Taymiyyah, al-Mustadrak 'ala Majmu' al-Fatawa, V,4, p: 66. Via Asyraf Wajdi Dusuki, Principle and Application of Risk Management and Hedging Instruments in Islamic Finance.
- 66** Hussein Hamid Hassan, The Tools of Risk Management in Islamic Financial Institutions, 11th Shari'ah Committees Conference in Kingdom of Bahrain, Pg 8.

- 67** Syed Aun Raza Rizvi, Dr. Ahcene Lahsasna, Derivatives in Islamic finance: the need and mechanisms available for Islamic financial markets, 2012.
- 68** Ahmed, Habib, Prof., and Tariqullah Khan, Prof. "Risk Management in Islamic Banking." Handbook of Islamic banking, 2009, 144-58.
- 69** A. Salehabadi, & Aram, M. "Islamic justification of derivative instruments," International Journal of Islamic Financial Services 4, no. 3 (2002).
- 70** Siti Muawanah Lajis, Risk-Sharing Regulatory Framework: A Case for Malaysia, 2016.
- 71** Siti Muawanah Lajis, Risk-Sharing Regulatory Framework: A Case for Malaysia, 2016.
- 72** Zamir Iqbal, 'Abbas Mirakhor, Hossein 'Askari, Nouredine Krichene 2011.
- 73** Kuala Lumpur Declaration, The Second Strategic Roundtable Discussion, jointly organized by the International Shari'ah Research Academy for Islamic Finance (ISRA), the Islamic Research and Training Institute (IRTI) and Durham University, met on 20th September 2012 in Lanai Kijang, Kuala Lumpur.

To read the full text of the declaration:

[→ https://ifikr.isra.my/library/pub/4227](https://ifikr.isra.my/library/pub/4227)

- 74** Examples of risk sharing/risk taking are illustrated in
→ sections 3.3. Risk sharing and contract legitimacy, and

3.3.2. Risk and risk taking as part of fuqaha consideration.

- 75** Traditionally known and deliberated as mutual consent.
- 76** Jami' at-Tirmidi, Book 14, Hadith no. 48, Sunan Abi Dawud Book 24, Hadith no. 43, Albani said that this Hadith no. is Hasan Sahih.
- 77** → Muslim. (1995). Sahih Muslim., Book 21, Hadith no. 6.
- 78** Wahbah Al-Zuhayli, Al-Fiqh Al-Islami wa Adillatuh, Financial Transactions in Islamic Jurisprudence V,1, P: 9.
- 79** Resolution of OIC Fiqh Academy, Number (60/3/52), in its 6th meeting held in Jeddah, Saudi Arabia, on 10-14, March, 1990.
- 80** Al-Farahidi, al-Khalil, Kitabu al-'ayn, (Dar wa Maktabat al-Hilal).vol. 2. 203.
- 81** See Surah al-Baqarah, Verse 233. In this Verse, Allah stated that the heir has the same responsibility/liability as the father on spending on the child. This is a supporting evidence for risk sharing theory. Since the heir is subject to inherit from the child he is liable, as per the legal maxim, alghunm bilghurm. See Al-Qurtubi, Muhammad, al-Jami' Liahkami al-Quran (Dar al-Kutub al-Misriyah 1964), vol.3.168.
- 82** This could be one of the reasons why the Maliki School of Law emphasises on the couple to hold similar social status and to be in similar state of healthiness. So that the man is capable to provide similarly to what she was

used to have in her family's home. In other words, they have held the man in a lower status as he is bearing more risk than he could do so.

83 See al-Qurtubi, Muhammad, al-Jami' Liahkami al-Quran (Dar al-Kutub al-Misriyah 1964), vol.7.136.

84 'Abd Allah Sulayman, Alinqa' wa Nadhairuh fi Al-Qurnani Al-Karim, (Master thesis, Islamic University of Ghaza, 2006).

[→ http://library.iugaza.edu.ps/thesis/68936.pdf](http://library.iugaza.edu.ps/thesis/68936.pdf)

85 Hanafi school opened that only offer and acceptance are the pillars of contract.

86 Wahbah Al-Zuhayli, Financial Transactions in Islamic Jurisprudence, V:1, P:13.

87 Wahbah Al-Zuhayli, Financial Transactions in Islamic Jurisprudence, V:1, P:13.

88 Wahbah Al-Zuhayli, Financial Transactions in Islamic Jurisprudence, V:1, P:13.

89 Al-Qurtubi, Muhammad, al-Jami' Liahkami al-Quran (Dar al-Kutub al-Misriyah 1964), vol.5.33-40, Al-Baydhawi, 'Abd Allah, Anwaru al-Tanzil wa Asraru al-Taewil, (Dar Ihya' al-Turath al-'Arabi AH 1418), vol.2. 60-61, Ibn Kathir, Isma'il, Tafsir al-Quran al-'Adhim, (Dar al-Kutub al-'Ilmiyyah AH 1419), vol.2. 214-216.

90 The following condition has been summarized from the book of Wahbah Al-Zuhayli, Financial Transactions in Islamic Jurisprudence, V:5-70.

- 91 Al-Kasani, *Badai' al-Sanai' fÊ TartÊb al-Shara'* (Dar al-Kutub al-'Ilmiyyah 1986).
- 92 Al-Dasuki, Muhammad, *Hashiyat al-Dasuqi 'ala al-Sharh al-Kabir* (Dar al-Fikr), vol. 10.1445.
- 93 Al-Khirshi, Muhammad, *Sharh Mukhtasar Khalil*, (Dar al-Fikr, Bayrut), vol.9.15.
- 94 Al-Bahuti, Mansur, *Sharh Muntaha Al-Iradat*, ('Alam al-Kutub, 1993), vol.4.336.
- 95 Al-Bahuti, Mansur, *Sharh Muntaha Al-Iradat*, ('Alam al-Kutub, 1993), vol.4.336.
- 96 Al-Dasuki, Muhammad, *Hashiyat al-Dasuqi 'ala al-Sharh al-Kabir* (Dar al-Fikr), vol.3. 2.
- 97 This section is meant for bringing an example of risk taking and risk sharing in exchange contract other than partnership contracts. The legitimate spot sale contract are also subject to risk sharing since they fall under the umbrella of al-bay' system, the theisi elaboration on Salam, Istisna' ijarah, and mudharabah is for giving example only.
- 98 Jurists had different opinions regarding the sign of the ownership transfer; is it the contract itself, taking possession of the money, or the disposal of the money. As a consequence of this, borrower is liable for the money by contract only or when he takes possession or when he disposes the money. Please see Mandur Al-xaq, Anisu Al-Rahman, *Qa'idat Al-Kharaju Bi Al-Dhaman Wa Tatbiqatuha Fi Al-Mu'amalati Al-Maliyath*, page 617.

- 99** Abu al-Walid, Ibn Rushd (al-jad), Al-Muqaddimat al-Mumahidat, vol.3, 93.
- 100** As per the Ijma' of the fuqaha', see Ibn Rushd, Bidayat al-Mujtahid wa Nihayat al-Muqtasid, Vol;2, 148.
- 101** Ibn Rajab, al-Qawa'id, page 166–167.
- 102** Please see the opinions and the reference at Mandur Al-Haq, Anisu Al-Rahman, Qa'idat Al-Kharaju Bi Al-Dhaman Wa Tatbiqatuha Fi Al-Mu'amalati Al-Maliyath, page 617.
- 103** Al-Nafrawi, Ahmad, Al-Fawakihu Al-Dawani, vol. 2:187.
- 104** Al-Kasani, Badai'o Al-Sanai' vol.5:517, Al-Mughni, vol.4:370.
- 105** Al-Kasani, Badai'o Al-Sanai' vol.6:49.
- 106** It is not the aim of this part of the book to discuss the legitimacy of the contract or choose one opinion over another. The aim of this part is to examine if risk was part of the consideration of the fuqaha in their juristic opinions.
- 107** Salam or salaf is the exchange of a deferred property right for an immediate price. In other words, it is a sale of a liability whose characteristics are described in exchange for a price or capital-sum (ra'su al-mal) paid in advance. The Shafi'i and Hanbali defined the forward contract thus: "It is a contract over described merchandise sold as a deferred liability on one party, in exchange for a price that is received during the contract session." The Maliki defined it thus: "It is a sale in which

the capital sum (price) is paid in advance, and the object of sale is deferred to a specified term". Thus, the conditions of the salam or forward sale include all the conditions of sales in general, and adds specific conditions that we discuss in detail below. Al-Kasani, *Badai' al-Sanai' fi Tartib al-Sharai'* (Dar al-Kutub al-'Ilmiyyah 1986), vol. 5. 2 and 201. Al-Sarkhsi, Muhammad, *al-Mabsut*, (Dar al-Ma'rifah 1993), vol. 12. 124 and vol.15. 84, Ibn 'Abd al-Barr, *al-Kafi fi Fiqh Ahl al-Madinah*, (Maktabat al-Riyadh 1980), vol. 2. 691, Al-Tha'labi, 'Abd al-Wahab _al-Qadhi 'Abd al-Wahab_ al-Ma'unah *Fi Madhabi 'alimi Ahli al-Madinah* (al-Maktaba al-Tijariyah), vol.1.982, Al-Mawardi, 'Ali, *al-Hawi al-Kabir* (Dar al-Kutub al-'Ilmiyyah 1999), vol. 5. 388, Al-Ghazali, Ahmad, *al-Wasit fi al-Madhab*, (Dar al-Salam AH 1417) vol. 3. 423, Ibn Qudamah, 'Abd Allah, *al-Kafi fi Fiqhi al-Imam A'Imad*, (Dar al-Kutub al-'Ilmiyyah 1994) vol.2. 62. Ibn Qudamah, 'Abd Allah, *Al-Mughni* (Dar al-Fikr 1994) vol.4. 207.

108 Taking risk and for the contract to have an element of risk is found in the fuqaha deliberation for these contracts. For example, Maliki are on the opinion that the "al-Ajal" in Salam is to be long enough to assure the changes in market conditions. Changes in market conditions affect the prices in the market and marketability of the product, hence, the risk structure. The reason might be that the fuqaha tried to limit the engagement in these types of transaction to the minimum, and to encourage more equity or equity like contract.

- 109** Only Hanafi School of law allows *istisna'*. The majority of Fuqaha consider it as prohibited. See Al-Kasani, *Badai' al-Sanai' fi Tartib al-Sharai'* (Dar al-Kutub al-'Ilmiyyah 1986), vol. 5, P: 2-5, al-Mabsut Lisarakhsi, vol.15, P: 84-90.
- 110** Ibn Rushd, *Bidayat al-Mujtahid wa Nihayat al-Muqta'id* (Dar al-Hadith 2002), vol.3. 217-224, Al-Tha'labi, 'Abd al-Wahab _al-Qadhi 'Abd al-Wahab_ al-Ma'unah Fi Madhabi 'alimi Ahli al-Madinah (al-Maktaba al-Tijariyah), vol.1. 982-994.
- 111** Al-Kasani, *Badai' al-Sanai' fi Tartib al-Sharai'* (Dar al-Kutub al-'Ilmiyyah 1986), vol. 5. 201-215, Al-Sarkhsi, Muhammad, al-Mabsut, (Dar al-Ma'rifah 1993), vol. 12.124-178, Ibn 'Abd al-Barr, al-Kafi fi Fiqh Ahl al-Madinah, (Maktabat al-Riyadh 1980), vol. 2.691-699, Al-Tha'labi, 'Abd al-Wahab _al-Qadhi 'Abd al-Wahab_ al-Ma'unah Fi Madhabi 'alimi Ahli al-Madinah (al-Maktaba al-Tijariyah) vol.1.982-994, Ibn Qudamah, 'Abd Allah, al-Kafi fi Fiqhi al-Imam Ahmad, (Dar al-Kutub al-'Ilmiyyah 1994) vol.2. 62-69, and Ibn Qudamah, 'Abd Allah, Al-Mughni (Dar al-Fikr 1994) vol.4.207-233.
- 112** Al-Mawardi, 'Ali, al-Hawi al-Kabir (Dar al-Kutub al-'Ilmiyyah 1999), vol. 5. 388-416, Al-Ghazali, Ahmad, al-Wasit fi al-Madhab, (Dar al-Salam AH 1417), vol. 3. 423-450.
- 113** Al-Mawardi, 'Ali, al-Hawi al-Kabir (Dar al-Kutub al-'Ilmiyyah 1999), vol. 5. 388-416, Al-Ghazali, Ahmad, al-Wasit fi al-Madhab, (Dar al-Salam AH 1417), vol. 3. 423-450.

- 114** Referring to the statement above that “if salam is permitted with a deferred object of sale, then it must be permitted with an immediately delivered object of sale, since the latter case eliminates gharar”.
- 115** Maliki in this regards, have stated the wisdom or the reason why the deferment is a condition and why it should be this long. They have stated that this period is sufficiently long for market conditions to change, which may make it possible for the seller to obtain the object of the forward sale. They have also opined that, of the distance is far enough for the market condition to change then this period is not required. According to Maliki School, two days travel is the distance that allows the market condition to change according to the common sense, they argue. See Al-Tha’labi, ‘Abd al-Wahab_al-Qadhi ‘Abd al-Wahab_ al-Ma’unah Fi Madhabi ‘alimi Ahli al-Madinah (al-Maktaba al-Tijariyah), vol.1. 982-994.
- 116** Al-Kasani, Badai’ al-Sanai’ fi Tartib al-Sharai’ (Dar al-Kutub al-’ Ilmiyyah 1986), vol. 5. 201-215, Al-Sarkhsi, Muhammad, al-Mabsut, (Dar al-Ma’rifah 1993), vol. 12. 124-178, 32, Ibn ‘Abd al-Barr, al-Kafi fi Fiqh Ahl al-Madinah, (Maktabat al-Riyadh 1980) vol. 2. 691-699, Al-Tha’labi, ‘Abd al-Wahab_al-Qadhi ‘Abd al-Wahab_ al-Ma’unah Fi Madhabi ‘alimi Ahli al-Madinah (al-Maktaba al-Tijariyah) vol.1.982-994, Ibn Qudamah, ‘Abd Allah, al-Kafi fi Fiqhi al-Imam Ahmad, (Dar al-Kutub al-’Ilmiyyah 1994) vol.2. 62-69, and Ibn Qudamah, ‘Abd Allah, Al-Mughni (Dar al-Fikr 1994) vol.4.207-233.

- 117** Zarqa, “istisna’ ‘ Financing of Infrastructure Projects” Islamic Economic Studies, Vol. 4, No. 2, May 1997.
- 118** Zarqa, “istisna’ ‘ Financing of Infrastructure Projects” Islamic Economic Studies, Vol. 4, No. 2, May 1997.
- 119** Al-Kasani, Badai’ al-Sanai’ fi Tartib al-Sharai’ (Dar al-Kutub al-’Ilmiyyah 1986) Vol. 5.2–4, and Al-Sarkhsi, Muhammad, al-Mabsut, (Dar al-Ma’rifah 1993) vol. 12. 84–90.
- 120** One of the conditions is for the goods to be commonly available in the market at the time of delivery. See Al-Kasani, Badai’ al-Sanai’ fi Tartib al-Sharai’ (Dar al-Kutub al-’Ilmiyyah 1986) Vol. 5.2–4, and Al-Sarkhsi, Muhammad, al-Mabsut, (Dar al-Ma’rifah 1993) vol. 12. 84–90.
- 121** See P. 218.
- 122** Due to the similarities between the contract of Mudhurabah and these contracts, jurists often make analogy with these contracts when it comes to deliberating its rules. Please refer to the table below.
- 123** Badai’ al-Sanai’ fi Tartib al-Sharai’ (Dar al-Kutub al-’Ilmiyyah 1986), vol. 6, P: 79, Wizarat al-Awqaf wa al-Shuoun al-Islamiyyah. Al-Mawsu’ah al-Fiqhiyyah al-Kuwaytiyyah, vol. 38, P: 37.
- 124** Al-Mabsut vol. 22: p. 19.
- 125** → Sadique, M. A. (2012). Capital and Profit Sharing in Islamic Equity Financing. Kuala Lumpur: The Other Press, via ISRA Research Paper “Risk Taking In Islamic

Commercial Transactions: A Fiqhi Perspective”, IRP No: 77 / 2014.

- 126** Wahbah Al-Zuhayli, Financial Transactions in Islamic Jurisprudence, Dar Al-Fikr, (2002) Vol.1 p. 495.
- 127** The hadith in narrated by ‘Abdulah Ibn ‘Amr Ibn Al-‘As, via Jami’ at-Tirmidi said this hadith is Hasan Sahih see hadith no. 1234, Book 14, hadith 34.
- 128** Ibn ‘Abidin vol.4, p.506, via Wahbah Al-Zuhayli, Financial Transactions in Islamic Jurisprudence, Dar Al-Fikr, (2002) Vol.1 p. 495.
- 129** Al-Kasani, Vol. 3, p. 545.
- 130** Wahbah Al-Zuhayli, Financial Transactions in Islamic Jurisprudence, Dar Al-Fikr, (2002) Vol.1 p. 495.
- 131** ISRA Research Paper “Risk Taking In Islamic Commercial Transactions: A Fiqhi Perspective”, IRP No: 77 / 2014, and Wahbah Al-Zuhayli, Financial Transactions in Islamic Jurisprudence, Dar Al-Fikr, (2002) Vol.1 p. 495.
- 132** Wahbah al-Zuhayli, Vol. 2, p. 821.
- 133** Fatawa, Vol.20. p. 356.
- 134** Introduction to Islamic Finance (2004) p. 72.
- 135** State Bank of Pakistan in its report ‘Financial Stability Review for 2007–08’ commented on the issue infollowing words: “In fact, the agency problem is one of the major factors for the reluctance on the part of banks toundertake equity based modes of financing, as it gives

entrepreneurs the incentive to under-state profits.”(p. 7, Chapter 8)

- 136** Wahbah al-Zuhayli, Vol. 1, p. 385.
- 137** Ibn Rushd, Bidayat al-Mujtahid wa Nihayat al-Muqtasid, vol.2, p.218.
- 138** This refers to the legal maxim: al-gunmu bil-ghurm.
- 139** This condition as agreed by all schools of jurisprudence. See Wahbah al-Zuhayli, Vol. 1, p. 385.
- 140** Hashiyatu Al-Dasuki Vol. 4 p. 45.
- 141** Mohammad Hashim Kamali, A Shari’ah Analysis of Issues in Islamic Leasing, Islamic Econ., Vol. 20 No. 1, pp: 3–22 (2007 A.D./1428 A.H.).
- 142** Al-Haqil, Musa’id AbuLah, Ribh Malam Yudhman, Dirasah Taesiliyah Tatbikiyah, page 313–314.
- 143** Al-Kasani, Vol.4, p.206.
- 144** Al-Haqil, Musa’id AbuLah, Ribh Malam Yudhman, Dirasah Taesiliyah Tatbikiyah, p. 313–314.
- 145** Ibn Al-Qyim commented on the matter with a similar statement. Please see Al-Haqil, Musa’id p. 316.
- 1** → OECD, 2010, Regulatory Policy and the Road to Sustainable Growth.

[→ https://www.oecd.org/regreform/policyconference/46270065.pdf](https://www.oecd.org/regreform/policyconference/46270065.pdf)

- 2 Muslim, Sahih Muslim. (Dar Ihya' al-Turath) Book 43, Hadith no. 186.
- 3 Ibn Majah, Muhammad, Sunan Ibn Majah (Dar al-Risalah al-'Alamiyyah 2009), Book 16, Hadith no. 2565.
- 4 Al-Suyuti, al-Ashbah wa al-Nazair, (Dar al-Kutub al-'Ilmiyyah 1990) p:60.
- 5 Ibn Hazm, 'Ali, al-Muhalla Bi al-Athar (Dar al-Turath) vol.8.412-420.
- 6 They are 7 conditions that are, according to Dhahiri school, to be stated. Ibn Hazm, 'Ali, al-Muhalla Bi al-Athar (Dar al-Turath) vol.8.412-420.
- 7 Ibn Hazm, 'Ali, al-Muhalla Bi al-Athar (Dar al-Turath), Vol.8. 408-410.
- 8 This is considered as passing incomplete ownership and the sale is voidable. That is why the prophet SAA did not recognise the condition. In addition, this can be considered as evidence for Alghunm Bil Ghurm and risk sharing principle, as the liability and risk of freeing someone is rewarded, entitling the master to get the benefit of inheritance.
- 9 Walae is the relationship between the freed slave and his master. Like any normal relationship between father and son or husband and wife, walae give the right of inheritance to the master as a gratitude for his noble act.
- 10 Al-Bukhaarii, Muhammad Isma'iil. (1422AH). Sahih al-Bukhari. n.p.: Dar al-Tuq al-Najah, Book 34, Hadith no.

106.

- 11** Al-Ramli, Shams al-Din Muhammad, Nihayatu al-Muhtaj (Dar al-Fikr 1984), vol. 3. 60–65.
- 12** Al-Sarakhsi, Abu Bakr, al-Mabsut (Dar al-Ma'rifah 1993), vol.12.138, al-Kasani, Badai' al-Sanai' fi Tartib al-Sharai' (Dar al-Kutub al-'Ilmiyyah 1986), vol.5. 302.
- 13** The Hadith is reported by Ibn Hanbal, Ahmad in his Musnad (al-Risalah 2002) and it is a Marfou' Hadith.
- 14** Ibn Rushd, Bidayat al-Mujtahid wa Nihayat al-Muqtasid (Dar al-Hadith 2002), vol.3.158, and Ibn Qudamah, al-Mughni (Maktabat al-Qahirah 1968), vol. 4.202 onwards.
- 15** Ibn Taymiyyah, Majmu' al-Fatawa al-Kobra (Mujamma' al-Malik Fahd 1995), vol. 3. 481–483, and see Ibn al-Qayyim, I'lam al-muwak'in (Dar al-Kotub al-'Ilmiyah 1991) vol.1. 386, al-Shatibi, al-Muwafakat (Dar Ibn 'Affan 1997), vol.1.162.
- 16** → OECD, 2006, New sources of growth: intangible assets.

[→ https://www.oecd.org/sti/inno/46349020.pdf](https://www.oecd.org/sti/inno/46349020.pdf)
- 17** Sabine Bischoff, Gergana Vladova, & Sabina Jeschke, Measuring Intellectual Capital, published at "Enabling Innovation: Innovative Capability – German and 17 International Views", © Springer-Verlag 2011.
- 18** UNESCO & OECD, World Education Indicators Programme Financing Education Investments and

Returns Analysis of the World Education Indicators, 2002 Edition.

→ <http://www.oecd.org/education/skills-beyond-school/2494749.pdf>

- 19** OECD, Education Indicators In Focus – 2012/02 (February).

→ <http://www.oecd.org/education/skills-beyond-school/49729932.pdf>

- 20** Michelle R. Weise Clayton M. Christensen, 2014, Hire Education, Mastery, Modularization, and the Workforce Revolution. Clayton Christensen Institute for Disruptive Innovation.

- 21** Depends on the area of intellectual capacity, experts may develop assessments, surveys and other effective measures to assess the worthiness of the intellectual capacity and its potential.

- 22** Sa'id Bouheraoua, S. N. S. "A Critical Analysis of Shari'ah Issues in Intangible Assets", ISRA, Research Paper, No. 61/2013.

- 23** AAOIFI Shari'ah Standard, Standard 42 on Financial Rights and their Disposition in 2012, Article 3/4 and 3/3/3/2.

- 24** ISRA Research Paper, No. 61/2013.

- 25** → Dallah al-Barakah. (2001). Resolution of the twentieth seminar on Islamic economics, via Sa'id Bouheraoua, S.

N. S. "A Critical Analysis of Shari'ah Issues in Intangible Assets", ISRA Research Paper, No. 61/2013.

26

→ Muslim. (1995). Sahih Muslim., Book 43, Hadith no. 186.

zlibrary

Your gateway to knowledge and culture. Accessible for everyone.



z-library.sk

z-lib.gs

z-lib.fm

go-to-library.sk



[Official Telegram channel](#)



[Z-Access](#)



<https://wikipedia.org/wiki/Z-Library>