

Artículos Originales

A systematic method for identifying the leading causes of illegal islamic financial transactions

Un método sistemático para identificar las principales causas de las transacciones financieras islámicas ilegales

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RESUMEN

Las ventas y finanzas islámicas se presentan actualmente como herramientas prácticas en proyectos de desarrollo a nivel global en países musulmanes y no musulmanes. La mayoría de las transacciones financieras contemporáneas involucran contratos complejos, y no es fácil saber el alcance de su compatibilidad con la sharia. Por esta razón, en este artículo se presentará una lista de las principales causas que afectan las transacciones financieras y de ventas desde la perspectiva de la sharia. Estos factores ocasionantes se formularon legalmente y se presentaron en artículos codificados, lo que facilita que los investigadores y los comerciantes y contratistas del sector financiero islámico estudien una transacción y determinen su legalidad según la sharia. El método propuesto ayuda a desarrollar un marco legal para que el sector judicial determine hasta qué punto los contratos son compatibles con las disposiciones de la sharia islámica.

Palabras clave: contratos de compraventa islámicos; Principales factores que ocasionan (*illah shariya*); transacciones islámicas prohibidas; Codificación de las finanzas islámicas; Objetivos de la Sharia (*al-maqasid al-Sharia*).

ABSTRACT

Islamic sales and finance are currently presented as practical tools in development projects at the global level in Muslim and non-Muslim countries. Most contemporary financial transactions involve complex contracts, and it is not easy to know the extent of their *sharia* compatibility. For this reason, a list of the leading causes that affect financial and sales transactions will be presented in this article from a *sharia* perspective. These occasioning factors have been formulated legally and presented in codified articles, making it easier for researchers and for traders and contractors in the Islamic financial sector to study a transaction and determine its *sharia* legality. The proposed method helps to develop a legal framework for the judiciary sector to determine the extent to which contracts are compatible with Islamic *sharia* provisions.

Key Words: Islamic sale contracts; Main occasioning factors (*illah shariya*); Forbidden Islamic transactions; Codifying Islamic finance; *Sharia* objectives (*al-maqasid al-Sharia*).

GLOSSARY

Allah: One of God's most beautiful names and attributes

Prophet Mohammad: The name of Allah's last and final Messenger

Quran: The book revealed to prophet Mohammad (peace be upon him)

Sunnah: The way of the prophet Mohammad (peace be upon him)

Sharia: Islamic law

Islamic fiqh: Islamic jurisprudence

Illah shariya: Occasioning factors

Riba: An interest taken on moneylending

Introduction

Islamic jurisprudence mainly touches on four categories: a) acts of worship (e.g., prayer, fasting, alms, and pilgrimage to Mecca); b) commercial and financial transactions; c) family issues (e.g., marriage, divorce, inheritance); and d) crimes and punishable acts. In this article, the focus will be on modern commercial and financial transactions.

Sharia university students and researchers commonly discuss the difficulty of understanding Islamic jurisprudence science (*al-fiqh*) regarding sales. Anyone who delves into the study of jurisprudence of Islamic transactions (*fiqh al-mua'malat*) is familiar with this complexity. Especially when studying new transactions, one seeks to understand Islamic *sharia* compliance through scientific research and recent commercial transaction studies.

Even before an individual knows the jurisprudential provisions, the perception of contemporary Islamic commercial dealing is challenging. One might read studies of specific modern jurisprudential transactions but still emerge confused, with only a vague understanding of the matter. Moreover, a vital legal maxim of Islamic jurisprudence (*al-fiqh*) is applicable when studying new transactions: The principle *sharia* ruling of any commercial and financial transaction is permissible, and the relevant prohibition must be reasonable in meaning and logic. This means that *sharia* forbids only a small number of transactions. Any transaction that is not expressly prohibited and does not include any of the causes that prohibit the transaction is automatically *sharia* permissible.

Furthermore, it is essential to know that the source of Islamic jurisprudence is not derived from human beings' understanding and implementation but rather is a divine law derived from the revealed words of Almighty Allah (the Noble Qur'an) and the way (*Sunnah*) of the Prophet Muhammad (peace be upon him).

Consequently, the rulings on Islamic financial and commercial transactions that Almighty Allah has put forth for the general public to work within their markets and stores have not been revealed as the monopoly of intelligent scholars and specialists.

It is not fair for Almighty Allah to impose obligatory *sharia* rulings on His servants and forbid them from doing actions that constitute sin if it is difficult for them to understand and implement these rulings. The issue mentioned above is worth studying, and proper methodology for studying the *sharia* compliance of new types of transactions must be addressed, particularly for contemporary transactions with a very complex structure.

It is necessary to establish maxims that serve as critical guidelines and filters to determine the legal condition of contemporary commercial transactions and understand the *sharia* provisions for such transactions.

This article presents a mechanism to simplify understanding of the jurisprudence of contemporary Islamic commercial and financial transactions and to avoid factors that make a *sharia* transaction forbidden. Accordingly, all the factors that affect a transaction from a *sharia* perspective will be presented in this article for the first time as codified material.

Identifying the Fundamental Occasioning Factors (Illah Shariya¹) of Prohibited Islamic Financial Transactions and How to Benefit from These Restrictions

To develop a comprehensive methodology to determine the correct provisions related to newly structured Islamic financial and commercial transactions, it is necessary to enumerate the fundamental factors that affect transactions that make them prohibited by Islamic law.

The basis is, as previously mentioned, the following maxim: In principle, any financial transactions are *sharia* permissible. Nevertheless, this is conditional on ensuring that no *sharia* prohibitions are involved. Thus, an important question arises: What are the main factors of these legal prohibitions? Knowing what these prohibition-triggering factors are can help to verify the absence of evidence, which leads to a change in the central maxim: In principle, any financial transactions are permissible.

The Efforts of Sharia Scholars to Highlight the Main Factors that Lead to the Prohibition of Financial Transactions

Several Muslim jurists have attempted to identify some of the main factors that lead to the prohibition of a financial or commercial transaction. For example, Abū al-Walid al-Bājī (d. 1081 CE), a famous Andalusian scholar of the Maliki school, said,

Corrupt sales are of three types: First, *riba* and what a pretext is for *riba*. Second, deceit and similar acts. The third aspect is buying an unseen commodity, the details of which are unknown. Furthermore, these sales have similar aspects and are classified under these three mentioned classifications. Jurisprudence scholars assess new sales based on these criteria.²

Another Andalusian scholar, judge Ibn al-Arabī al-Mālikī (d. 1148 CE), also tried to determine what makes a sale forbidden in Islamic *sharia*. When discussing forbidden components of sales, he decided that incorrect sales,

1 "It is the interests that the Sharia intended to bring to humans, and the evils that it intended to repel. The mentioned meaning indicates that the Islamic law is justified in its entirety, by consider the essence purpose of things and the interests of people. Thus, this essence is subject to consensus among all Islamic jurisprudence schools". Abdennour Basa, Jamila Tilout, and Mohammed Abdou, "al-Ilal al-Shariya Fi al-Istilah al-Maqasidi," in *Mu'jam al-mus'talahat al-mqasidiyah*, ed. Ahmed Al-Raissouni (London: Al-Furqan Islamic Heritage Foundation, 2017), 458.

2 Abu Al-Walid Al-Baji, *Fusul al-ahkam wa bayan ma mada alaih al-amal inda al-fuqaha wa al-hukkam* (Beirut: Dar Ibn Hazm, 2002), 215.

Do not depart from three categories: *ribā*, void, and aleatory (*gharar*). By careful analysis, we find that *gharar* is due to invalidity. These legal prohibitions overlap, although their meanings differ (Ibn al-Arabī 324:1).³

He also said,

The corruption of the sale is due to three things: *Riba*, deception, from buying something with an unknown detail (i.e., buying uncaught fish in the ocean, or a bird flying in the sky and not being able to catch); or deceiving people and taking their money unjustly.⁴

Abu al-Walīd Ibn Rushd (d. 1198 CE), born in Cordoba and known in the West as Averroes, also attempted to identify the leading causes of sales being prohibited in *sharia*. He concluded,

The main reasons for the legal prohibition of sales in *sharia* are the same as the general causes of corruption, and they are: First, the items being sold are already prohibited in *sharia* (i.e., selling alcohol). Second: *riba*. Or a combination of both. These mentioned factors that affect sales are the origins of corruption. Moreover, *sharia* forbids other sales for similar reasons, such as fraud and harm.

Furthermore, some sales are forbidden by *sharia* due to the sale timing (i.e., if the sale took place during Friday prayer time). Additionally, some sales are forbidden by *sharia* law because the content is already forbidden in *sharia* (for example: selling alcohol).⁵

Imam Ibn Taimiyyah (d. 1328 CE) briefly described the matters that affect the validity of a contract: “The acquisition of another’s money in illicit transactions falls into two types, which Almighty mentioned in holy Qur’an; they are *riba* and gambling”.⁶

He elaborated by saying,

The basic principle in all contracts is justice, for [this declaration] was sent by the messengers and revealed in the holy books. God Almighty said, ‘Indeed, We have sent Our Messengers with clear proofs and revealed with them the Scripture and the Balance (justice) so that mankind may keep up justice’ (57:25).

Sharia forbids *riba* because of its unjust character. Additionally, it forbids gambling because of the injustice it involves. Likewise, the Qur’an prohibits both transactions because they involve the wrongful acquisition of another person’s money.

Moreover, all that the Prophet Mohammad, (peace be upon him) forbade in transactions, such as ambiguity and selling fruits before they seem edible, is included either in *riba* or gambling.⁷

³ Abu Bakr Ibn Al-Arabi, *Al-qabas fe sharh muwatta malik bin anas* (Beirut: Dar Al-Qharb Al-Islami, 1992), 1:324.

⁴ Al-Arabi, *al-qabas fe sharh muwatta malik*, 2:787.

⁵ Abu Al-Waleed Ibn Rushd, *Bidayat al-mujtahid wa nihayat al-muqtaṣid* (Cairo: Ibn Taimiyyah Publishing, 1995), 3:237.

⁶ Ahmad Ibn Taimiyyah, 1995. “Majmua al-fatawa. Vol. 29. Al-Madina: Saudi Ministry of Islamic Affairs, Dawah and Guidance.” Accessed June 5, 2021. <https://ia800300.us.archive.org/4/items/mfsiaitmmfsiaitm/mfsiaitm29.pdf>, 29:22.

⁷ Ahmad Ibn Taimiyyah, 1995. “Majmua al-fatawa. Vol. 28. Al-Medina: Saudi Ministry of Islamic Affairs, Dawah and Guidance.” Accessed February 2, 2021. <https://ia800300.us.archive.org/4/items/mfsiaitmmfsiaitm/mfsiaitm28.pdf>, 28:385.

Shaikh Abdulrahman al-Saadi (d. 1957 CE), a well-known contemporary scholar, said, “The greatest prohibitions affecting the validity of transactions are *riba*, deception, and injustice”.⁸

He also said, “The greatest among them are the maxim of interest, the maxim of ambiguity and gambling, and the maxim of deception”.⁹

Shaikh Muhammad al-Uthaimeen (d. 2000 CE), one of the most famous contemporary scholars from Saudi Arabia, said, “The conditions revolve around three things: injustice, *riba*, and deception”.¹⁰

He also said, “The basic principle in all transactions is that they must be permissible. The prohibition of transactions comes only in the presence of the following: *riba*, injustice, or deception”.¹¹

Shaikh Abdullah Al-Bassam (d. 2002 CE), a reputed Saudi scholar from the Hanbali Islamic jurisprudence school, said,

To sum up, forbidden transactions are due to *sharia*, the most important of which are the following three:

Firstly: *Riba*, in its three types. *Riba* in sale and exchange (*riba al-fadl*); *riba* that increases the debt period and leads to the increase in money being exchanged (*al-nāsiyāh*); and *riba* on every type of loan, conditional upon adding direct benefit by the lender.

Second: Ignorance and uncertainty, which include many parts and multiple forms.

Third: Deception. [This category] includes multiple types.¹²

Shaikh Bakr Abu Zayd (d. 2008 CE), a Saudi *sharia* scholar, said,

It is well known that every transaction that *sharia* forbids falls under one of the three prohibition rules, which are the prohibition of *riba*, prohibition of aleatory (*gharar*), and prohibition of deception (*tāghreer*).

Corrupt Islamic transactions occur either because the product is unable to be delivered, such as in the case of a stray camel, or because the product did not exist initially at the time the contract was concluded, such as in the case of selling the fetus in a cow’s belly or selling a fetus that will be in the stomach of the present fetus in the future. Additionally, if the buyer has no descriptive information of the product bought [the sale is false]. Moreover, ignorance of the quantity that will be bought will result in a false transaction.¹³

He also said in another book,

Expressly, forbidden transactions are prohibited by *sharia* in cases of injustice. Usually, [this happens] when the buyer’s money is acquired unlawfully. No matter how different the structures introduced, these forbidden transac-

8 Abdulrahman Al-Saadi, *Taysir al-latif al-mnan fi khulasat tafsir al-quran* (Riyadh: Saudi Ministry of Islamic Affairs, Dawah and Guidance, 2001), 117.

9 Abdulrahman Al-Saadi. *Irshad uwli al-basayir wal’albab linil al-faqih bi’aqrab al-turuq wa aysar al-asbab* (Riyadh: Adhwa Al-Salaf Publishing, 2000), 168.

10 Mohammad Al-Uthaimeen, *Al-Sharah al-mumtieu ala zad al-mustaqnae* (Dammam: Dar Ibn Al-Jawzi, 2004), 8:184.

11 Mohammad Al-Uthaimeen, *Al-ta’leeq ala al-kafi* (Al-Qaseem: Ibn al-Uthaimeen Foundation, 2018, 6:140).

12 Abdulla Al-Bassam, *Tayseer al-allam sharah umdat al-ahkam* (Sharjah: Al-Sahaba Bookshop, 2006), 449.

13 Bakr Abu Zayd, *Bitaaqat al-ai’timan* (Beruit: Al-Resala Publishing, 1996), 2.

tions are forbidden due to three main reasons, as stated clearly in the Holy Qur'an and *Sunnah* of Prophet Mohammed (peace be upon him), which are *riba*, deception, and deceit.¹⁴

The findings of previous scholars can be summarized as follows.

First, most scholars have agreed on three reasons for a transaction being forbidden: Injustice, *riba*, and deception. Some scholars have added harm, others have added deception (the meaning of fraud), and Ibn Taimiyyah mentioned redundant transactions.

Second, scholars have mentioned six causes of prohibition, all of which relate to contracts and are common reasons financial transactions are prohibited according to *sharia*. These causes are injustice (*dhulm*), harm (*dharar*), *riba*, aleatory issues (*gharar*), fraud (*taghreer*), and stratagems in transactions (*hiyal*).

Advantages of Stating the Main Occasioning Factors of Forbidden Islamic Financial Transactions

One of the essential benefits of acknowledging the occasioning factors (*illah*) is that doing so helps to apply *sharia* legal provisions to new financial and commercial transactions. It provides a systematic method for examining the new structural transactions and analyzing them for legal prohibitions.

The study of any contemporary financial transaction is based on two crucial stages: First, understanding the new transaction's nature, knowing its details, and ensuring that it is not fraudulent; and second, the jurisprudential adjustment of this new financial transaction. This adjustment includes two steps:

- a. Studying possible similarities between the modern transaction and a nominate contract in Islamic sales jurisprudence (*fiqh*). Consequently, this new structure transaction will be subject to the provisions of the nominate contract known in Islamic *sharia*. Alternatively, we may conclude that a given contract is not based on an example of a previous contract.
- b. Ensuring that all new transaction procedures are free of legal prohibitions.
- c. However, for the second step to be based on a disciplined methodology, we subject the new contemporary financial transaction to the following crosscheck:
- d. The new transaction is tested to determine whether it is free of any of the following three characteristics: *riba*, aleatory issues (*gharar*), and fraud.
- e. Next, if the transaction is free from all three illicit characteristics, the basis of the transaction is subjected to the test of a search for any cause of injustice.

¹⁴ Omar Al-Mitrik, *Al-riba wa al-mueamalat al-masrafia fi nadhar al-shariaa al-islamiyah* (Riyadh: Dar Al-Asimah, 1996), Introductory-B.

f. Next, the transaction is assessed for harmfulness. The contract should be free of any condition that causes harm to either the contractors or external things.

g. Last, a final check is conducted to ensure that a transaction is an actual contract with no signs of illegal stratagems, redundancy, or virtual contracts aiming to bypass the *sharia* prohibition of *riba*.

Provided that all tests performed on the transaction are accurately conducted, one can generally conclude that the transaction is permissible according to Islamic *sharia* law.

As mentioned earlier, to adapt these reasons into a framework for determining the legitimacy of any sales with a new financial structure, it is necessary to determine how to identify evidence of these six occasioning factors that scholars understand and that are derived from the texts of the Holy Qur'an and the authentic *Sunnah* of the Prophet (peace be upon him).

It is also imperative to know the *sharia* objectives that prohibit transactions involving any of the mentioned occasioning factors. These factors can be described in terms of legal codified articles so that contracting parties, sellers, and buyers will be aware of them.

Codifying the Different Types of Riba as Influencing Factors in Transactions

Islamic *sharia* is not alone in prohibiting *riba*; all monotheistic religions agree on the impermissibility of the factors that constitute *riba*. Moreover, in “approximately 1800 B.C., Hammurabi, a king of the first dynasty of ancient Babylonia, gave his people their earliest known formal code of laws. A number of the chief provisions of this code regulated the relation of a debtor to a creditor”.¹⁵

Furthermore, most human-made laws place multiple restrictions on interest by, for example, setting a ceiling or limit on compound interest. According to the well-known jurist Abd al-Razzaq al-Sanhuri, there is “a traditional hatred of *riba*, not only in Egypt, nor in Islamic countries alone, but in most of the world’s legislation. *Riba* is hated in all countries and eras”.¹⁶

Moreover, it is essential to mention that Western encyclopedias define “usury” as holding the same meaning as *riba*. Adding interest to a loan or debt was a forbidden act until the sixteenth century, when Western culture altered the definition of “usury”:

Usury, in modern law, is the practice of charging an illegal rate of interest for the loan of money. In Old English law, the taking of any compensation what-

¹⁵ Sidney Homer and Richard Syllam, *A History of Interest Rates* (New Jersey: John Wiley & Sons, Inc., (1963) 2005), 3.

¹⁶ Abdulrazzaq Al-Sanhuri, *Al-waseet sharh al-qanoon al-madani al-jadeed* (Cairo: Dar Ihyaa Al-Turath Al-Arabi, 1952, 2:282).

soever was termed usury. With the expansion of trade in the 13th century, however, the demand for credit increased, necessitating a modification in the definition of the term. Usury was then applied to exorbitant or unconscionable interest rates. In 1545, England fixed a legal maximum interest, and any amount in excess of the maximum was usury. The practice of setting a legal maximum on interest rates later was followed by most States of the United States, and most other Western nations.¹⁷

One of the most significant objectives of prohibiting *riba* is to prevent injustice from befalling the debtor due to a *riba* practice. Of course, the material harm that practicing *riba* inflicts on the individual harms society as a whole because societies are groups of individuals. Among the manifestations of injustice toward debtors is a wise person paying interest without material compensation. Except when necessary, exploiting a person's need is a form of injustice.

Those with money can exploit people's cash needs by providing cash loaded with interest. This interest appears small but accumulates until it is too great a burden for the needy borrower, who does not receive any additional compensation for the extra interest payments except for a delay in the repayment terms. This only delays the resolution of the problem. However, by making the solution more complicated, this "solution" also increases the injustice in the situation.

Moreover, one of society's grievances is that *riba* helps money holders make money without investing it in economic projects that benefit society. This act separates money from actual value, a situation represented by the economic circumstances that generate money crises in every period. As a result, financial crises have arisen in every period and harmed national economies. Decision-makers are forced to forgive large amounts of debt and create new investment opportunities to revive the economy and ease the debt gap.

In this paper, the original *sharia* term *riba* is used as neither of the other terms (usury and interest) explains the exact Islamic *sharia* meaning of *riba*, even though the linguistic meaning of *riba* is "increase". Nevertheless, the ambit of *riba* in *sharia* is much broader than forbidden interest on a conditional loan or deferring repayment.

Thus, codifying the different types of *riba* and their details is essential to avoid forbidden Islamic *sharia* transactions.

Methodology for Codifying Different Types of Riba as They Appear in Modern Transactions

The purpose of presenting *riba* conditions in codified articles is to determine the best systematic method for assessing whether a transaction involves

¹⁷ The Editors of Encyclopaedia Britannica, 2020. "Usury | Law | Britannica. In *Encyclopædia Britannica*." Accessed February 21, 2021. <https://www.britannica.com/topic/usury>.

one of the prohibited types of *riba* according to Islamic law. Thus, it will be easier to judge the validity of new types of transactions.

A clear definition of the concept of *riba* and its multiple types is introduced. Then, detailed codified articles of the jurisprudential maxims related to the types of *riba* are presented. This is because it is vital to provide clear codifications showing the conditions that lead to a transaction being judged invalid (*riba*).

Last, a group of codified articles regarding transaction conditions under the *riba* umbrella is addressed, and codified articles defining the effect of the *riba* condition on the validity of transactions are described.

The Codified Articles Being Proposed

Article 1: *Riba* is a conditional increase in return for deferring a loan. In addition, each subsequent postponement of the debt after its settlement is *riba*, whether due as a loan, sale, or exchange between fungible commodities/goods of the same homogeneous type.

Article 2: *Riba* is forbidden, and a contract shall be void if *riba* is involved.

Article 3: If a sale based on *riba* is concluded, the trader must gain nothing additional but his or her rightful amount of capital. Whether a trader receives *riba* or not, it must be returned if the trader seizes additional *riba*.

Likewise, if a person deals with *riba* and then repents, he or she must have no extra return but his or her original capital. The trader must return the extra amount to the one from whom it was received as interest.

Article 4: *Riba* is divided into two types:

1. *Riba* in loans and debts (*riba al-quroodh wa duyun*): Every debt includes a conditional increase on the loan's principal or debt increase in exchange for delaying payment.¹⁸

- *Riba* in loans (*riba al-quroodh*) has one of the following characteristics:

- a. A conditional increase in the loan's capital.

- b. The loan gives a conditional benefit to the borrower.

- *Riba* in debts (*riba al-duyoon*) involves the conditional increase that the creditor takes from the debtor in exchange for deferment.

2. *Riba* in sales (*riba al-buyua*) is an exchange between fungible commodities (bartering) and is split into two types:

¹⁸ Whether for financing, investment, risk management, legal interest or agreement, fixed or variable base, or delayed interest; regardless of interest-based forms or designations such as time deposits, loans, and banking facilities of all kinds and purposes; broker loans in financial markets; issuance or trading of bonds; and the deduction of all kinds of debts and delay penalties on outstanding debts. All of the above are considered *riba*.

- *Riba* in excess/surplus (*riba al-fadl*): An excess taken in exchange for specific homogeneous commodities sale (barter).¹⁹
- *Riba* in delay (*riba al-nasa*): A deferral in exchange for a specific homogeneous commodities sale (barter),²⁰ where receipt of one of the two commodities is related to the *riba* causes mentioned above regarding excess/surplus and the sharia criterion requires that the commodities be exchanged immediately and neither of the two exchanged commodities is cash.

Article 5: *Riba* in sales (*riba al-buyua*) can be verified by two main maxims:

First, if the two exchanged commodities are of the same homogeneous type and share the same occasioning factor (*illah sharia*), then both excess *riba* (*al-fadl*) and delayed *riba* (*al-nāsā*) are prohibited.

Second, if the two exchange commodities share the same occasioning factor (*illah sharia*) and are of different homogeneous types, then only delayed *riba* (*al-nasa*) is prohibited, and excess *riba* (*al-fadl*) does not apply.

Article 6: In an exchange sale contract (bartering) involving the same homogeneous commodities²¹ and having an exact *riba* cause, the following conditions must be met, and a breach of one of these conditions invalidates the contract:

- a. The exchange must be on the spot, and deferment is forbidden.
- b. The exchanged commodities must be alike and equal.
- c. An increase in the volume of the same homogeneous commodities is forbidden.

Article 7: The following condition must be met in an exchange sale contract (bartering) involving different homogeneous commodities²² with an exact type of *riba*. A breach of the following condition invalidates the contract: The exchange of commodities is forbidden to be deferred but is allowed on the spot.

Article 8: The quality of the same homogeneous commodities does not affect an interchange's exemption from *riba* prohibitions.²³

Article 9: Unawareness of an equal exchange of the same homogeneous commodity type has the same consequences as full awareness of excess-related *riba*.

¹⁹ The hadith narrated by Ubada bin Al-Samit (Allah be pleased with him) reported Allah's Messenger (may peace be upon him) as saying, "Gold is to be paid for by gold, silver by silver, wheat by wheat, barley by barley, dates by dates, and salt by salt, should be exchanged like for like, and equal for equal. Moreover, payment is being made hand to hand. If these classes differ, then sell as you wish, if payment is made hand to hand". Al-Naysāburī, *Sahih Muslim*, 646, Number: 1587.

²⁰ For example, gold for gold, silver for silver, gold for silver, wheat for wheat, or wheat for barley, and what is attached to that from the prophetic hadith narrated in the prohibition of *riba* or any commodity that is measured under the analogy method (Al-Qiyas) of Islamic jurisprudence.

²¹ For example, an exchange between Italian 24 carat gold and Brazilian 24 carat gold, American silver and African silver, Saudi dates and UAE dates, Egyptian wheat and Mexican wheat, Jordanian salt and Algerian salt, and Chinese barley and French barley.

²² For example, between gold and silver, wheat and barley, and dates and salts.

²³ For example, an exchange between grade A Spanish corn with a lower quality of grade A Spanish corn.

Article 10: An exchange between different commodities that share the same *riba* occasioning factor (*illah*) is not permitted under any conditions or standards.²⁴

Article 11: It is permissible to exchange two homogeneous commodities of different quantities with compensation added to the transaction²⁵ provided it is not a ploy to bypass excess *riba*.

Article 12: It is permissible to sell a *riba*-based commodity alongside another *riba*-based commodity of the same homogeneous type when handicrafts are involved.²⁶ The two exchanged commodities are not required to be equal or identical, and exchanges can vary in their circumstances.²⁷ There are two primary conditions for this type of transaction:

- a. The sale should not be made for insider trading reasons.
- b. The crafted item should not be used to circumvent excess *riba*.

Article 13: It is not permissible to agree on a sale involving a fixed cash price that will decrease if there is a delay in payment. It is also not permissible to agree that the sale price will increase if there is a delay in payment.

Article 14: Every loan that benefits the lender is considered *riba*.

Article 15: Every loan in which the lender stipulates an increase in any form added to the loan is forbidden.

Article 16: Trading in currencies is permitted provided that the following criteria are met:

- a. The parties take possession of the exchanged materials before leaving one another, whether the received material is tangible or virtual, or the status of the received material must be stipulated.
- b. There should be no conditional option or deferment regarding the delivery by either party.
- c. It is forbidden to deal in the forward/futures exchange market.
- d. Possession must be taken off the total exchanged amount. Taking possession of part of the exchanged amount makes the received amount valid and voids the remaining amount.

²⁴ For example, an exchange between wheat and barley, dates and sugar, rice and wheat, or milk and ghee.

²⁵ For example, a company offering its stock for trading where the assets are a mixture of productive projects and cash liquidities.

²⁶ For example, 24 carat gold jewelry in exchange for less-weighted 24 carat gold, bread in exchange for wheat, olive oil in exchange for olives, and all crafted *riba* items exchanged for their raw material.

²⁷ The jurisprudential opinions differ on this issue. This opinion was chosen based on market need and because the excess *riba* does not apply between the traded items. Additionally, this chosen *sharia* provision aligns with the maxim, "The origin of new commercial transactions is: Permissibility (*Mu'bah*)". Moreover, the chosen opinion was favored by two reputed Islamic scholars, Ibn Taimiyyah and Ibn al-Qayyim. See Ahmad Ibn Taimiyyah, *Tafseer ayat ashkalat* (Riyadh: Al-Rushd Publishing, 1996), 2:632 and Mohamed Ibn Al-Qayyim, 2002. "Ilam al-muwaqqi'in 'an rabb al 'alamin. Vol. 3. Al-Dammam: Dar Ibn Al-Jawzi." Accessed March 1, 2021. <https://ia800904.us.archive.org/31/items/FP57544/3-57546.pdf>, 3:407.

Codifying Aleatory²⁸ (Al-gharar)²⁹ as an Influencing Factor in a Transaction

In the proposed methodology to evaluate new commercial/financial transactions and their *sharia* compliance, a second systematic examination is made to scan for possible aleatory (*gharar*) transactions.

Islamic *sharia* prohibits aleatory transactions in contracts primarily based on what Prophet Mohammad (peace be upon him) stated in various authentic sayings (*hadith*): “The Prophet forbade transactions involving (*gharar*) aleatory and ambiguity” (Al-Sajestani, “Sunan Abi Dawud (3504) - Wages (Kitab Al-Ijarah)” 83: 4).

Muslim scholars from different jurisprudence schools present various definitions of the *sharia* term *gharar* in relation to contracts: 1) An unknown consequence or what the person is unable to deliver when sold, and 2) what is not known about the quantity or amount of exchanged material or the concealment of information.³⁰

The closest equivalent to the meaning of *gharar* in relation to new forms of contemporary contracts in English is aleatory, which the Merriam-Webster dictionary defines as follows: “depending on an uncertain event, or contingency as to profit and loss. Additionally, relating to luck, and especially to bad luck”.³¹

Therefore, the term aleatory is used in this paper as the English translation of the Islamic legal term *gharar*. Aleatory contracts are prevalent in the insurance industry and are defined as follows: “An agreement that is connected with an event that is not under someone’s control, that may or may not happen, and of which the result is uncertain. Most insurance agreements and derivatives (financial products based on the value of another asset) are aleatory contracts”.³²

In French civil law, according to article 1104 paragraph 2, a contract *aleatoire* is a “random contract [that] is a reciprocal agreement whose effects, in terms of advantages and losses, either for all the parties, or for one or more of them depend on an uncertain event”.³³

28 Some researchers refer to the translation of *gharar* as excessive uncertainty. From my perspective, this is not accurate. Uncertainty in trade (trade risk) is permissible in Islamic *sharia* even if it is excessive. However, the higher the risk is, the greater the expected profit.

As for *gharar* in selling, it is permissible if it is minor and cannot be avoided. However, it is not permissible if it is outrageous or if its avoidance may cause many difficulties and high costs.

29 The Arabic meaning of the word *gharar* is “originally derived from the word *taghreer*, which means exposing oneself, or one’s money to perdition, without knowing” Al-Sddiq Al-Dharir, *Al-Gharar wa atharuh fe al-uqood fe al-fiqh al-islami* (Jeddah: Islamic Institute for Research and Training, 1993, 51).

30 Al-Dharir, *Al-Gharar wa atharuh fe al-uqood*, 51.

31 Merriam-Webster, 1828. *Aleatory* (Springfield, MA: Merriam-Webster Inc). Accessed March 4, 2021. <https://www.merriam-webster.com/dictionary/aleatory>.

32 Cambridge Dictionary, *Aleatory contract* (Cambridge, UK: Dictionary.cambridge.org., Cambridge University Press, n.d.).

33 Such as the insurance contract, games and bets, and lifetime annuity contracts. A random contract is a contract regarding value in which the existence of an obligation depends on an uncertain future event, the hazard. Juris pe-

Islamic law scholars have a more specific definition of aleatory (*gharar*). Professor Al-Sanhuri defines a probabilistic contract as a “contract in which neither contracting party can determine when the contract is completed, how much is taken, or how much is given”.³⁴

Islamic *sharia* mentions many reasons for prohibiting sales based on aleatory (*gharar*) characteristics:

- a. A certain level of ambiguity in contracts.
- b. A lack of information that leads to *riba*.
- c. Disputes that occur between the contracting parties.

As a result, aleatory (*gharar*) transactions involve a gambling aspect or are accompanied by vagueness and greed, which are prohibited in Islamic law because they involve an unjust obsession with people’s money. However, aleatory has a broader meaning than indicating that gambling is occurring. Consequently, all gambling is *gharar*, but not every aleatory (*gharar*) transaction involves gambling.

However, even if the two parties accept the conditions of the aleatory (*gharar*) contract, the acceptance of the two parties does not make the transaction permissible under Islamic *sharia*. *Gharar* in contracts has been mentioned in some civil laws. However, past scholars have not detailed such circumstances or mentioned example cases. Thus, it is essential to codify the status of aleatory contracts since doing so is the second method in our proposed methodology for assessing the *sharia* legality of new commercial and financial transactions.

Methodology of Codifying Aleatory (*gharar*) Contracts as They Appear in Modern Transactions

The concept of aleatory (*gharar*) contracts is studied in Islamic jurisprudence (*fiqh*) books. Accordingly, a clear Islamic *sharia* definition of the meaning of aleatory (*gharar*) will be codified and written in modern legal language herein. Different types of aleatory (*gharar*) contracts will be explained in detail. An example of standard *gharar* contracts is given with reference to the codification developed in this paper. However, not every type of contractual ambiguity is considered *gharar*. Thus, the presented articles clarify the amount of ambiguity permissible in a contract and what is considered an excessive level of aleatory (*gharar*) elements and is thus prohibited by *sharia*.

dia, n.d. “Contract aléatoire. Juris pedia le droit partaé.” Accessed March 5, 2021. [http://fr.jurispedia.org/index.php/Contrat_al%C3%A9atoire_\(fr\)](http://fr.jurispedia.org/index.php/Contrat_al%C3%A9atoire_(fr)).

34 Abdulrazzaq Al-Sanhuri, *Nadhariyat al-haq* (Beirut: Al-Halabi Legal Publications, 1998), 140.

The Codified Articles Proposed

Article 17: An aleatory (*gharar*) contract happens when neither contracting party can determine when a contract is considered complete or what amount is taken or given in the transaction.

Article: 18: A contract is considered aleatory (*gharar*) if it meets the following four conditions; however, if one of these conditions fails, then the *gharar* does not have an effect on the contract, and the contract remains valid:

- a. A contract is so aleatory that the transaction can be described as ambiguous selling.
- b. The contract is not necessary.
- c. Aleatory elements are part of a contract, but the contract is not intended to be aleatory itself.
- d. Aleatory elements are only one type of financial contract transaction.

Article 19: Aleatory (*gharar*) contracts are unlawful in four conditions:

First type: The terms of the contract cannot be met.

Second type: The costs or description of the evaluated materials are unclear.

Third type: The materials sold are not in the trader's possession.

Fourth type: There is *gharar* related to deferment that is not clearly defined, whether concerning the price or a commodity sale.

Article 20: Consent between the contracting parties in a contract known to involve aleatory issues, jeopardy, or gambling does not make the contract valid.

Article 21: A contract whose type is not specified before the exchange is invalid. For example, this may occur when two contracts are combined into one contract, sale, or lease.

Article 22: Any obscurity or vagueness in the sales contract leads to a dispute, invalidating the contract.

Article 23: Sales that include a condition of a nonrefundable down payment wherein the advance is forfeited if the buyer does not end up purchasing the commodity are *sharia* permissible.

Article 24: Any agreement/contract based on gambling or betting is unlawful and considered void.

Article 25: Any commitment to a debt due to gambling or betting is legally void, and the person who agreed to the commitment is not required to act upon his or her obligation.³⁵

³⁵ The Spanish Civil Code does not encourage gambling and does not endorse such activities; however, in the event that the gambler falls into debt due to gambling, unlike Islamic law, he or she is responsible for paying that debt, as indicated in the following clauses:

Article 26: Whoever loses in gambling or a wager may recover what has been paid within a period to be determined by the judge, even if there is a different agreement between the parties.³⁶

Article 27: The preceding provisions are excluded from prizes won for specific achievements in sports. It is permissible for the prize to be offered by one contestant or by a third party to give the prize to the winner.

Article 28: Before fruit ripens, selling the fruit separately from the trees is not permissible. Additionally, plants may not be sold before they are ripe. Unless the purchaser can benefit from the goods as they are, they must be harvested immediately.³⁷

Codifying Fraud (*Taghreer*)³⁸ as an Influencing Factor in Transactions

Checking for fraud is the third stage of the systematic examination that this paper introduces. When detecting fraud in contemporary Islamic finance contracts, it is essential to know the extent of the contract's compliance with the *sharia* laws that naturally govern financial and commercial transactions.

Moreover, the act of fraud (*taghreer*) is forbidden in all religions. It is also prohibited if the act is proven according to civil laws.³⁹ Likewise, in Islamic law, many penal provisions for fraud or deception lead to the acceptance of

³⁶Article 1798: The law does not provide any action to claim what has been won in a game of luck, gambling or chance; but the person who has lost money therein cannot recover what he has voluntarily paid, unless it should have been obtained pursuant to fraudulent misrepresentation, or such person should be a minor or should have been incapacitated to administer his own property.

Article 1799: The provisions of the preceding article regarding gambling shall apply to betting" (Ministry of Justice and Clusen).

³⁶ The Spanish Civil Code does not give legal authority to recover the money lost in gambling, as indicated in the following articles:

"Article 1800: A person who loses in any gambling or betting in respect of non-prohibited games shall be liable under civil law.

Article 1801: The judicial authority may, however, find against a claim where the amount exchange in the gamble or wager should have been excessive, or reduce the obligation to the extent that it exceeds the custom of an orderly paterfamilias" *Al-Dharīr, Al-Gharar wa atharuh fe al-uqood*, 51.

³⁷ Delayed harvesting after a contract is signed is not *sharia* permissible because it may lead to aleatory elements and increase the likelihood that fruit is damaged or rotten, which will cause the buyer harm. Therefore, harvesting must be done immediately after the contract is signed.

Portuguese civil law Article 880 is a similar law:

"1. In the sale of future goods, of pending fruits or of component or integral parts of a thing, the seller is obliged to exercise the necessary diligence so that the buyer acquires the goods sold, according to what is stipulated or results from the circumstances of the contract.

2. If the parties attribute a random nature to the contract, the price is due, even if the transfer of the goods does not take place (Ministry of Justices - Portugal)."

³⁸ The Arabic linguistic translation of fraud is *taghreer*, which means pushing others to fall into a fraudulent scheme.

³⁹ For example, the Spanish civil code Article 1269 states, "Fraudulent misrepresentation exists where, with insidious words or machinations on the part of one of the contracting parties, the other is induced to enter into a contract which he would not have done without them" (Ministry of Justice).

For another example, see French Civil Law, Article 1137: "Le dol est le fait pour un contractant d'obtenir le consentement de l'autre par des manœuvres ou des mensonges. Constitue également un dol la dissimulation intentionnelle par l'un des contractants d'une information dont il sait le caractère déterminant pour l'autre partie. Néanmoins, ne constitue pas un dol le fait pour une partie de ne pas révéler à son cocontractant son estimation de la valeur de la prestation" "Article 1137 - Code Civil - Légifrance." n.d. Accessed March 8, 2021. www.legifrance.gouv.fr/, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000036829827/.

the contract by one of the parties. Therefore, contracting parties who engage in fraud to convince the other party to accept the contract are deceiving the other party, who would not accept the contract if he or she knew the truth. Furthermore, fraud may be perpetrated by either of the two contracting parties or by a third party at the request of one of the two parties. Fraud may take the form of speech⁴⁰ or action.⁴¹

Islamic law has many reasons for prohibiting contracts that involve fraud, including considering the interests of the general public, preventing the unlawful acquisition of wealth, protecting parties from fraudulent contracts, and protecting contractors from harm. Islamic law makes severe provisions for rulings regarding deception due to the significant amount of damage that can occur to individuals and society due to fraud. If fraud were tolerated, impure commodities would spread, and the damage would extend to people's food, clothes, and all of their other needs. People would be exposed to risk. Additionally, companies would produce lower-quality products and rely on fraud in marketing.

Thus, examples of recent financial transactions that may involve fraud will be given below in the section focusing on prohibited Islamic commercial contracts.

Methodology of Codifying Fraud (Taqhreeer) as it Appears in Modern Transactions

Western civil laws include codifications and provisions related to fraud in commercial transactions. France is considered to have the first codified modern legal system in Europe. French law includes articles on fraud in contracts.

These codified articles will be highlighted and compared with Islamic *sharia*-related provisions. The codified materials are described to reveal the effect of the fraud occasioning factor (*illah sharia*) in modern financial and commercial contracts. Additionally, the *sharia* provisions resulting from fraud and its impact on the contract are codified in simple legal terms.

The Proposed Codified Articles

Article 29: It is not permissible for one of the two contracting parties to deceive the other using fraud, whether by word or by action, to influence the other party to conclude a contract that he or she would not have concluded otherwise.

Article 30: Fraud makes the contract void if the following four conditions are met:

⁴⁰ Examples of fraudulent words (sayings) include transmitting false information about the contracted person, making claims that the commodity was bought at a higher cost, or a third party promising to purchase commodities at a higher price to tempt the other party to sign the contract.

⁴¹ Examples of fraudulent actions include changing the country, company, or date of manufacturing to give the impression that the merchandise is of high quality.

- a. Fraudulent methods are used.
- b. The fraudulent aspect influences the other party to accept and conclude the contract.
- c. The fraud was propagated by one of the contractors or a third party.⁴²
- d. The fraud is hidden and not visible to one of the parties. Moreover, that party cannot easily detect fraud.

Article 31: The party perpetrating the fraud loses the right of recourse if the sale is cancelled after the other party becomes aware of the fraud.

Article 32: The contracting party who discovers that the sale is fraudulent and that the commodity sold was defective may return the sold commodity in exchange for the original amount paid.

Codifying Injustice (Dhulm) as an Influencing Factor in Transactions

The divine laws dictate that justice should be done in everything and for everyone. Thus, Islam requires justice and forbids injustice, oppression, aggression, plunder, and theft.

The Almighty Allah sent Messengers and revealed the divine laws with them so that the people could do justice in God's rights over them and in servants' rights with each other. As Almighty Allah said in the Holy Quran, "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".⁴³

Moreover, to emphasize the necessity of justice and the prohibition of injustice, Almighty Allah said, as narrated in the divine *hadith*, "My servants, I have made oppression unlawful for Me and unlawful for you, so do not commit oppression against one another".⁴⁴

Justice is the duty of all human beings. Thus, it is not permissible for anyone to oppress another. The Almighty Allah says, "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".⁴⁵

⁴² French law explicitly states that fraud must be conducted by the other contracting party (Article 1137), and if fraud is perpetuated by a third party, it does not affect the validity of the contract.

According to Islamic law, fraud affects the satisfaction of the person or entity that accepted the contract. This is an important psychological criterion that affects the contract's validity; therefore, there is no difference between fraud committed by one of the contracting parties and fraud committed by a third party under the condition that it happens with the knowledge of one of the contracting parties. Al-Sanhuri, *Nadhariyat al-haq*, 404.

⁴³ Taqi Al-Din Hilali and Muhammad Muhsin Khan, *Translation of the meanings of the noble qur'an in the english language = tafsir ma'ani al-qur'an al-karim bial-lughah al-injiliziyah* (Madinah, K.S.A.: King Fahd Complex for the Printing of the Holy Qur'an, 1998), 57: 25.

⁴⁴ Muslim Al-Naysaburi, *Sahih Muslim* (Riyadh: Bayt Al-Afkar Al-Duwalayah, 1998, 646, Number: 1548).

⁴⁵ Hilali and Khan, *Translation of the Meanings of the Noble Qur'an*, 5:8.

This passage confirms that all transactions described in the Holy Qur'an and by the *Sunnah* of Prophet Mohamed (peace be upon him) were forbidden due to the requirement that justice prevails and unfairness be eliminated.

For example, Islamic *sharia* forbids *riba* and gambling because of the injustice inherent in these acts and the unlawful acquisition of wealth. Likewise, many types of sales are forbidden because of their injustice and oppression. Moreover, injustice has numerous disadvantages and can cause societal ruin. The famous Arab philosopher and historian Ibn Khaldun (d. 1406 CE) said,

It should be known that forcibly acquiring people's property removes the incentive to purchase and gain property. People then become of the opinion that the purpose and ultimate destiny of (acquiring property) are to have it taken away from them.

When the incentive to acquire and obtain property is gone, people no longer make efforts to acquire any. The extent to which property rights are infringed upon determines the extent and degree to which the subjects' efforts to acquire property slackens.

When intensive demand [for property] is extensive and general, extending to all means of making a livelihood, business inactivity also becomes [general] because the general extent of [such a high demand upon property] means the general destruction of the incentive [to do business].

If the demands upon a property are but light, the stoppage of gainful activity is correspondingly slight. Civilization and its well-being and business prosperity depend on productivity and people's efforts in all directions in their interest and profit.

When people no longer do business to make a living, and when they cease all gainful activity, the business of civilization slumps, and everything decays.⁴⁶

This paper focuses on the types of injustice in contracts. At the same time, injustice is an influential factor in judging new forms of contemporary financial transactions and the extent of their alignment with *sharia* provisions.

Methodology of Codifying Injustice (Dhulm) as it Appears in Modern Transactions

There is a question that deserves attention and research: If the exact reasons for the prohibitions mentioned above, namely, *riba*, aleatory (*gharar*) contracts, and fraud (*taghreer*), are all included in the general meaning of injustice, then what is the purpose behind highlighting the occasioning factor of injustice?

The answer to this question is as follows: Some types of contemporary transactions are not easily discovered. However, once identified, the injus-

⁴⁶ Abdulrahman Ibn Khaldun, *The muqaddimah*. Translated by Franz Rosenthal (New Jersey: Princeton University Press, (1967) 2015), 272.

tice-causing factor is apparent. Thus, the leading indicator of injustice is examined: The unlawful appropriation of things by one party to the contract.

If the indicators of injustice in the transaction contract are examined and no other occasioning factor appears, there is no reason to prohibit the transaction. However, if another cause appears alongside the injustice, such as aleatory transactions or *riba*, then the transaction is prohibited for both reasons: aleatory issues or *riba* and injustice.

To codify the cases in which injustice affects either contracting party, it is imperative to establish means to detect such injustice. Thus, professionals can systematically judge the compliance of a financial transaction with *sharia* standards accordingly.

The Proposed Codified Articles

Article 33: Unjust financial and commercial transactions are defined as financial or commercial transactions that result in unlawful appropriation by one of the contracting parties.

Article 34: Injustice between the contracting parties is forbidden. Accordingly, the contract is void after evidence indicates the occurrence of injustice against the affected contractor.

Article 35: A contract is considered void if the following three conditions are proven:

- a. A contractor obtains wealth from the contract without the knowledge of the other contracting party⁴⁷.
- b. One contractor is aware of the infringement upon the other contracting party's rights, but this infringement is not acknowledged in the contract⁴⁸.
- c. One contractor knows of the infringement upon the other contracting party's rights; however, the first contractor still agrees to the contract out of need⁴⁹.

Article 36: A sale that leads to a monopoly over a commodity is prohibited⁵⁰.

Article 37: A trader who buys a commodity to monopolize the market and control its price when consumers are in serious need of this commodity is legally obligated to sell that commodity at the market price.

Article 38: A contract assisting with something prohibited by *sharia* is not permissible⁵¹.

⁴⁷ For example, wealth taken possession of by deception or fraud.

⁴⁸ For example, the party is forced to surrender his or her wealth.

⁴⁹ For example, the concluded contract involves *riba*.

⁵⁰ Because it leads to price control and harms consumers.

⁵¹ For example, selling grapes to wineries. Even though selling grapes is permissible, selling grapes to make into alcohol is *sharia* unlawful. This sale causes injustice to the self through sin. Additionally, there is an injustice to society because it helps spread a prohibited commodity.

Article 39: All contracting parties deserve potential profit from a commercial transaction but must also bear potential losses.

Codifying Harm (*Dharar*) as an Influencing Factor in Transactions

The sixth stage of the proposed methodology is verifying the compatibility of new financial and commercial transactions with the provisions of Islamic law. This involves investigating the possibility of harmfulness (*dharar*) as an occasioning factor affecting the legality of the transaction.

One of the essential legal intentions of all divine laws is to prevent people from being harmed. Instead, the primary goal of Islamic *sharia* obligations is to meet people's needs in this world and the hereafter. It is narrated in an authentic *hadith* that Prophet Mohamed (peace be upon him) said, "There should be neither harm (*dharar*) nor the reciprocation of harm (*Dhirar*)" (Ibn Majah Al-Qazwini 338: 3).

In this paper, the focus is on harm or damage in commercial and financial transactions. In other words, the focus is on a particular type of harm that makes transactions *sharia* unlawful. In commercial and financial exchanges, it is not *sharia* lawful for a seller, buyer, or any other party to harm someone.

Islamic *sharia* urges that rights (e.g., ownership) are not restricted only to avoiding harm; it is not acceptable for anyone to benefit if all or part of society loses. It was said by the Prophet Mohamed (peace be upon him) that "whoever causes harm, Allah harms him, and whoever is harsh, Allah will be harsh with him" (At-Tirmidhi 52: 3).

The harm theory in Islamic jurisprudence differs distinctly from the definition of "harm" in Western jurisprudence, where any materialistic or moralistic harm may be subject to compensation by the offender. Materialistic harm causes losses or lost profit for one of the parties. However, in Islamic jurisprudence, to receive a guarantee, it is required that the commodity have commercial value. The equivalent value of guaranteed commodities and compensation, without considering the extra benefits and work attached to acquiring the commodity, is a condition for the validity of the transaction (Al-Sanhuri 168: 6).

Furthermore, legal professionals have a term similar to the occasioning factor of harm (*dharar*) caused by a transaction that indicates inadequate validity of the financial transaction according to Islamic *sharia*. This legal term is labeled a wrongful act⁵², which means, as stated in U.A.E. transaction civil law, that "any harm done to another shall render the actor, even though not

⁵² According to TransLegal, a reputed web-based law dictionary, the term wrongful act means "any action, error, misstatement, or omission, etc., that is in violation of the law, especially the civil law" TransLegal, n.d. "Wrongful Act." Accessed March 20, 2021. <https://www.translegal.com/dictionary/en/wrongful-act/noun/?to=en>.

a person of discretion, liable to make good the harm” (Ministry of State for Federal National Council Affairs Article 282: Article 282).

Nevertheless, the legal term (wrongful act) is not the focus of our research paper because law specialists use this term to mean that the damage, if achieved, results in an obligation to compensate and guarantee the injured. In this research, this type of harm in contracts is a reason for prohibiting a proposed new type of financial transaction between two contractors. Therefore, it is imperative to develop a methodology to determine the damage resulting from a proposed contract.

Methodology of Codifying Harm (Dharar) as it Appears in Modern Transactions

As in the previous section, the same question regarding the occasioning factor of injustice (*dhulm*) can be asked concerning the harm factor. Moreover, all previous legal prohibitions (usury, deception, deceit, and injustice) are combined with the occasioning factor of harm, bearing in mind the extent of the harm inflicted. Moreover, *sharia* prohibitions have an essential purpose: to clarify people’s interests and prevent unjust acts. Included in these prohibitions are forbidden financial and commercial transactions.

Nevertheless, it must be determined when the harm caused affects the validity of a contract. Are the other factors mentioned above that cause the transaction to be prohibited included in the current understanding of the harm occasioning factor? Are there examples of contemporary financial transactions where harm being caused is the sole reason for forbidding the transaction? These questions can be answered concerning illegal transactions.

A clear *sharia* definition of the harm occasioning factor is codified to differentiate between Islamic jurisprudence and legal meaning. Regulations concerning the harm that warrants the prohibition of a transaction are codified below. Finally, important Islamic *sharia* jurisdictional maxims concerning the harm caused by a transaction are codified.

The Proposed Codified Articles

Article 40: Harm in Islamic financial and commercial dealings means that either of the contracting parties inflicts harm on themselves or others; as a result, the harm neither exceeds the benefit nor is equivalent to it.

Article 41: Insignificant harmfulness is tolerable in all contract types, even though harm is still done to one of the contracting parties or others⁵³.

Article 42: Harm that warrants the prohibition of a financial and commercial is determined by the following conditions:

⁵³ Logically speaking, there is no transaction between two parties without at least partial harm for one of the contractors. Thus, insignificant harm is permissible.

- a. The harm must outweigh the corresponding benefit or be equal to it⁵⁴.
- b. The harm occurs immediately or is thought to likely occur in the future.

Article 43: For contractual liability to be fulfilled, there must be harm to the creditor/contractor due to the debtor's/contractor's failure to meet his or her contractual obligations. Thus, if there is no harm, then there is no liability. However, if the harm is probable, liability is not realized until the harm occurs.

Codifying Stratagems⁵⁵ (Ḥiyal) as an Influencing Factor in Transactions

The influential factor of stratagems has been saved for last. The most essential elements of this factor are as follows.

First, most recent financing transactions in Islamic finance institutions involve stratagems (*ḥiyal*) that affect the transaction's validity. This statement might not be acceptable to many Islamic finance industry professionals; however, the reality of the current transactions of Islamic banks, such as commodity Murabaha (*al-Tawarruq*) and financing through *Salam* contracts set purely to bypass *riba* interest charges, requires that the actual sales transaction be considered.

Second, it is challenging to detect stratagems because they depend on fictitious contracts; stratagems make the contract appear valid and compatible with *sharia* while occluding illegal actions.

In our systematic examinations, stratagems (*ḥiyal*) are the sixth and final occasioning factor (*illah*) that indicates whether a financial transaction conforms to Islamic legal provisions. Specifically, stratagems (*ḥiyal*) are used to circumvent fundamental Islamic prohibitions in the financial transactions sector. Stratagems are mainly used to circumvent *riba*, which is expressly forbidden in all its forms in Islamic law. As a result, stratagems usually lead to fictitious contracts.

Thus, the opinions of Islamic jurisprudence scholars regarding financial contracts that involve stratagems (*ḥiyal*) are categorized as follows:

- a. One opinion is related to judging the outward appearance of a fictitious contract. Conformity is apparent in contracts with Islamic *sharia* provisions, and the internal purposes of the contract are treated with indifference.
- b. The other opinion concerns the approval of fictitious contracts from a *sharia* perspective. It is also concerned with contracts' content, purpose, results, and consequences.

⁵⁴ In another meaning, *sharia* law prohibits every sale wherein the harm exceeds the main benefit.

⁵⁵ "Stratagems: Any artifice, ruse, or trick devised, or used to attain a goal, or to gain an advantage over an adversary, or competitor" Dictionary.com. n.d., "Definition of STRATAGEM | Dictionary.com." Accessed March 29, 2021. <https://www.dictionary.com/browse/stratagem>.

This second opinion is adopted by several reputed scholars from various Islamic jurisprudence schools because it is positioned with the higher purposes of Islamic *sharia*. Additionally, it is aligned with the statutory laws.

Imam Abu Ishaq Al-Shatibi (d. 1388 CE), a famous Islamic scholar from Granada, Spain, described stratagems as follows: "Its well-known fact is that these stratagems introduce the apparent action of permissibility to nullify a *sharia* legal ruling, and convert it to another ruling".⁵⁶ The famous Tunisian scholar al-Taher bin Ashour (d. 1973 CE) explained Al-Shatibi's stratagem definition: "It is displaying the thing that is forbidden by *sharia* law, and presents it in a permissible form".⁵⁷

Therefore, we specifically examine a new type of financial transaction that has fulfilled all the conditions for its legitimacy. However, it merely deceives what God Almighty has forbidden or omits what God Almighty has enjoined upon us.

Moreover, Islamic law jurists have stated that there are many subdivisions of stratagems (*hiyal*). Scholars' categorization of stratagems differs based on their analyses of the purposes of *sharia* (*maqasid al-sharia*) and its means (*waseela*).

It is essential to pay close attention when evaluating the causes of illicit Islamic financial transactions and determine the extent of stratagems and their conflict with higher *sharia* purposes (*maqasid Al-Sharia*).

Based on the abovementioned analytical method, reputed Islamic jurisprudence scholars such as Ibn Taimiyah⁵⁸, Ibn Al-Qayyim⁵⁹, and Al-Shatibi⁶⁰ divided the use of stratagems (*hiyal*) into two categories. The first category⁶¹ concerns the scope of stratagems' legitimacy compared to the means (*waseela*) and their purposes. It contains two types:

First type: Stratagems used for forbidden purposes, nullifying rights, or proving a transaction's invalidity. This type is further divided into three subcategories:

- a. The method has a forbidden origin and is intended to achieve something that is forbidden by *sharia*.
- b. The method has permissible origins but is intended to achieve something forbidden by *sharia*.

56 Abu Ishaq Al-Shatibi, 1997. "Al-Muwafaqat fi usul al-sharia. vol. 5. Al khobar: Dar Ibn Afan." Accessed March 27, 2021. <https://ia802608.us.archive.org/12/items/FPmuafkat/muafkat5.pdf>, 5:187.

57 Muhammad al-Tahir Ibn Ashur, *Maqasid al-sharia* (Doha: Ministry of Awqaf and Islamic Affairs, 2004, 3:317).

58 See Ahmad Ibn Taimiyah, *Al-Fatawa al-kubra* (Beirut: Dar Al-Arqam Bin Abi Al-Arqam, 1999). 3: 193.

59 See Mohamed Ibn Al-Qayyim, 2002. "Ilam al-muwaqqi'in 'an rabb al 'alamin. Vol. 5. Al-Dammam: Dar Ibn Al-Jawzi." Accessed April 2, 2021. <https://ia600904.us.archive.org/31/items/FP57544/5-57548.pdf>, 5:294.

60 See Abu Ishaq Al-Shatibi, 1997. "Al-Muwafaqat fi usul al-sharia. Vol. 2. Al-Khobar: Dar Ibn Afan." Accessed November 11, 2021. <https://ia902608.us.archive.org/12/items/FPmuafkat/muafkat2.pdf>, 2: 388.

61 The first method for categorizing stratagems was initially designed by Ibn Taimiyah; this was then adapted by his well-known student, Ibn Al-Qayyim. Subsequently, many jurists followed this methodology.

c. The method is legitimate, and the implementation is legitimate. However, the act is used as a pathway to achieve the illegal, which is how *sharia* scholars have made different rulings.

Second type: Stratagems are used for permissible purposes, such as proving the truth or uncovering a falsehood.

a. The method is unlawful; however, the purpose is to ensure one's rights.

b. The method is legitimate, and what it leads to is legitimate.

c. The method is used to ensure rights or acceptably prevent injustice. However, the method was created to achieve a different goal.

The second category⁶² concerns the extent of the legitimacy of the stratagems in terms of Islamic law purposes (*maqasid al-sharia*). It contains three types:

First type: Stratagems that are indisputably invalid (haram) because they contradict *sharia* permissible purposes⁶³.

Second type: Stratagems that are generally agreed to be *sharia* permissible⁶⁴.

Third type: Stratagems that are a topic of discussion among *sharia* scholars⁶⁵.

This paper focuses on the different types of the first category, which limit the legitimacy of the financial transaction according to *sharia*. However, there is a convergence in the relationship between stratagems and fictitious contracts. Because of the purpose of these fictitious contracts, which appear to be legitimate, these fictitious contracts are used to circumvent *sharia* rulings and achieve a forbidden goal, such as collecting interest.

Thus, judgments regarding these fictitious contracts are based on the intended aim of the contract. If this fictitious contract, which is, in reality, a type of stratagem, does not contradict Islamic law principles or legitimate interests or if the contract is made to prevent a forbidden act, such as dealing with *riba* (interest loans) or restoring rights, then the fictitious contract is permissible based on previous stratagem categorizations by Islamic *sharia* scholars.

However, suppose that these fictitious contracts originally contradict the principles of *sharia* or legitimate interest, such as signing fictitious contracts as a trick to achieve forbidden aims, revoke rights, or disguise falsehood. In

62 The second method for categorizing stratagems was initially designed by Imam al-Shatibi, after which many jurists began following this methodology.

63 For example, engaging in *riba* deals with non-Muslim clients is not permitted by *sharia* because Islamic law prohibits *riba* deals among all people, not just between Muslims.

64 For example, when one wants to exchange a gold ring for a gold necklace of the same caliber and pay the price difference between them, this act is not permissible in Islamic law. Therefore, the ring may be sold for cash, and the money is then used to buy the necklace.

65 The great Andalusian jurist from Granada, Imam al-Shatibi (d. 1388 CE), explained the reasons behind the dispute between the jurists regarding stratagem categorization: "Because there was no clear and definitive evidence, for attaching this specific stratagem segment to the first or second type. In a sense, no purpose was found in this type that is consistent with or clearly contradicts the objectives of Islamic law" al-Shatibi, *Al-Muwafaqat fi usul al-Sharia*, 2: 388.

such cases, the fictitious contract is considered a forbidden stratagem under *sharia*.

Methodology of Codifying Stratagems (Ḥiyal) as They Appear in Modern Transactions

It is always challenging to spot stratagems in new financial transactions. Most modern contracts are complex. Nevertheless, these contracts still have apparent goals and hidden intentions. However, intent plays a vital role in judging contract compliance in this case when the contracting parties choose to involve *riba* through fictitious contracts.

In Islamic *sharia*, transactions are judged according to the intentions and motives involved. The intention and motives for any behavior, including making contracts, are considered. If they are acceptable, the behavior is approved; otherwise, the behavior is rejected. Therefore, a transparent codification methodology should include a mechanism for identifying suspicious transactions to determine the types of stratagems that affect new financial transaction structures.

Consequently, the following well-known maxim in Islamic jurisprudence is adopted in identifying stratagems: “The consideration of contracts is based on their purposes and meanings, not their phrasing. In other words, the consideration of *Sharia* compliance is based on the contract’s reality and its purposes”.⁶⁶

This section focuses on codifying only the stratagem (*ḥiyal*) types that are indisputably forbidden (*haram*). This specific influential factor (*illah*) of the different types of stratagems determines the validity of a transaction.

The Proposed Codified Articles

Article 44: Definition of stratagems (*ḥiyal*): Engaging in unlawful artifice to appear to be engaged in a legitimate act, bypass a *sharia* legal provision, or turn attention to another ruling. Additionally, the provision would not change or be dropped without employing such a stratagem.

Article 45: Every stratagem that includes a prohibited act is considered forbidden.

Article 46: Every stratagem used to achieve something forbidden is forbidden; the original ruling does not change simply by changing its shape, form, or name.

Article 47: Every stratagem involving trespassing upon a right or premised upon something forbidden is considered a forbidden ploy.

⁶⁶ Fawaz Al-Qahtani, *Al-qawaeid wa al-dhawabit al-faqhia al-muathira fi al-mueamalat al-masrifia al-islamia* (Al-Madina: Dar Al-Nasiha, 2017, 2: 357).

Article 48: Every stratagem involved in an indebtedness process is a ploy or *riba*.

Article 49: Every fictitious transaction intended to access cash is *riba*.

Article 50: Any contract with the same effects as those mentioned with *sharia* forbidden purposes, such as *riba* damages, is *riba*, and changes in the contract do not change its real essence.

Article 51: Every sale contract not intended for its stated purposes but rather to achieve a loan with interest is *sharia* invalid.

Article 52: If a third party, as a financier of the sale, enters into a sale contract between two parties, the sale is a *riba* ploy in the form of a sale contract that leads to a loan with excess interest, thus invalidating the contract.

Article 53: Commodities obtained on credit are prohibited from being resold at a price lower than the original purchase price, except if the characteristics of the purchased commodity have changed.

Conclusion

Listing the main occasioning factors (*illah*) that affect financial transactions clarifies the extent to which Islam tolerates innovative financial transactions based on Islamic *sharia* permissibility. Strictly speaking, *sharia* forbids transactions tied to a narrow circle. However, these forbidden transactions have alternatives that are permissible in Islamic *sharia*.

Thus, the researchers build a comprehensive view of illegal financial transactions in Islamic *sharia* and explain the fundamental factors that affect a transaction's validity and why these factors lead to the prohibition of a transaction.

Additionally, by discussing why prohibitions are made based on occasioning factors, the researchers provide consistent reassurance that there is great wisdom behind Almighty Allah's prohibition on certain transactions. Moreover, moving away from these forbidden causes will benefit humanity—both individuals and society as a whole.

Thus, in this paper, six (6) fundamental occasioning factors (*illah*) are presented, and they all affect the validity of transactions: *riba*, aleatory (*gharar*) issues, fraud (*taqhreer*), injustice (*dhulm*), harms (*dharar*), and stratagems (*hiyal*)⁶⁷.

Through a careful analysis of these main occasioning factors (*illah*) that affect financial and commercial transactions, it is evident that a common factor among them is the appropriation of people's money in unjust and impermissible ways.

⁶⁷ See Diagram 1.

The first occasioning factor (*illah*) is categorized into two types of *riba*:

a. *Riba* in loans and debts (*riba al-quroodh and al-duyun*). The majority of *riba* cases in banking transactions involve loans.

b. *Riba* in sales (*riba al-buyua*) is further classified into two types:

- *Riba* in excess/surplus (*riba al-fadl*).
- *Riba* in delay (*riba al-nasa*).

There should be no problem with *riba* in sales if the commodity is categorized under *riba* categories as a direct cash purchase. However, two things must be considered when exchange trading (bartering) occurs involving these commodities.

First condition: If the commodities are of the same *riba* type (i.e., gold or silver), which means that the exchanged commodities have the same attributes and characteristics as money, then the exchange must involve the same type and quantity of a commodity and must be exchanged on the spot.

Second condition: If the commodities are of unlike *riba* types (i.e., gold and sugar), which means that the exchanged commodities have different attributes and characteristics from money, then the exchange must be made on the spot, and the commodities can differ in quantity.

The second occasioning factor (*illah*) is the attribute of aleatory (*gharar*) contracts. Knowing that aleatory aspects are an adequate condition for invalidating the transaction only in financial or commercial contracts is essential. However, if the aleatory contract is a charity contract, the aleatory nature does not affect the contract.

Furthermore, most contemporary financial contracts that involve aleatory factors and are found to be invalid relate to commodities that are not under the seller's full ownership. Additionally, aleatory contracts are those through which commodities with unknown specifications and characteristics are sold. Moreover, if the aleatory aspect is slight and unintentional, this does not affect the transaction validity according to Islamic law since hardly any transactions have no aleatory aspects.

The third occasioning factor (*illah*) is fraud (*taqhreer*). Islamic law and civil law forbids fraud in all its forms. Fraud can be perpetrated by one of the contracting parties or by a third party in the contract under the direction of one of the contracting parties to deceive the counterparty. Fraud is a diabolical way to obtain people's money. Thus, it is necessary to tighten the laws that deter fraud.

The fourth occasioning factor (*illah*) is injustice (*dhulm*). It is imperative to know that all judgments of the legitimacy of transaction factors are related to injustice. However, the main reason for singling out injustice as an occasioning factor is to simplify the assessment process. Additionally, injustice is a

factor that affects transactions themselves. One of the most evident signs of injustice in contracts is when a contract exploits people’s need for money by involving high-interest rates, thus binding the needy person and making him or her a prisoner of the creditor.

The fifth occasioning factor is harm (*dharar*). All transactions involve some harm being inflicted upon one of the parties. However, this rises to an unacceptable level when the harm outweighs the desired benefit or at least equals it.

The sixth occasioning factor is stratagems (*hiyal*). It is essential to note that this factor is challenging to detect when examining new types of financial transactions because it is occluded within fictitious transactions. Moreover, Islamic jurisprudence scholars’ classifications of stratagems differ according to their *sharia* purposes (*maqasid al-sharia*), analyses, and means (*waseela*).

As a summary of the presented methodology for examining new types of financial transactions to determine the legitimacy of these transactions under *sharia*, scholars take two different approaches to evaluate the essence of a contract and its legitimacy:

- The first approach focuses on inspecting the outward appearance of the transaction. The provisions are based on the appearance of the contract, such as the contract’s main pillars, conditions, and other apparent matters. The contract’s content is not examined to determine its true essence and identify the desired result.
- The second approach examines the actual essence of the transaction. This is the primary approach adopted in this paper. It is an investigation into the true essence of contracts, not just judgments based on the contract’s apparent validity.
- Ultimately, this paper contains fifty-three (53) codified articles, divided as shown in Table 1.

	Occasioning Factor Type (<i>illah</i>)	Codified Articles
A	<i>Riba</i>	16
B	Aleatory (<i>gharar</i>)	12
C	Fraud (<i>taqhreer</i>)	4
D	Injustice (<i>dhulm</i>)	7
E	Harm (<i>dharar</i>)	4
F	Stratagems (<i>hiyal</i>)	10
	Total	53

Table 1. Codified articles.

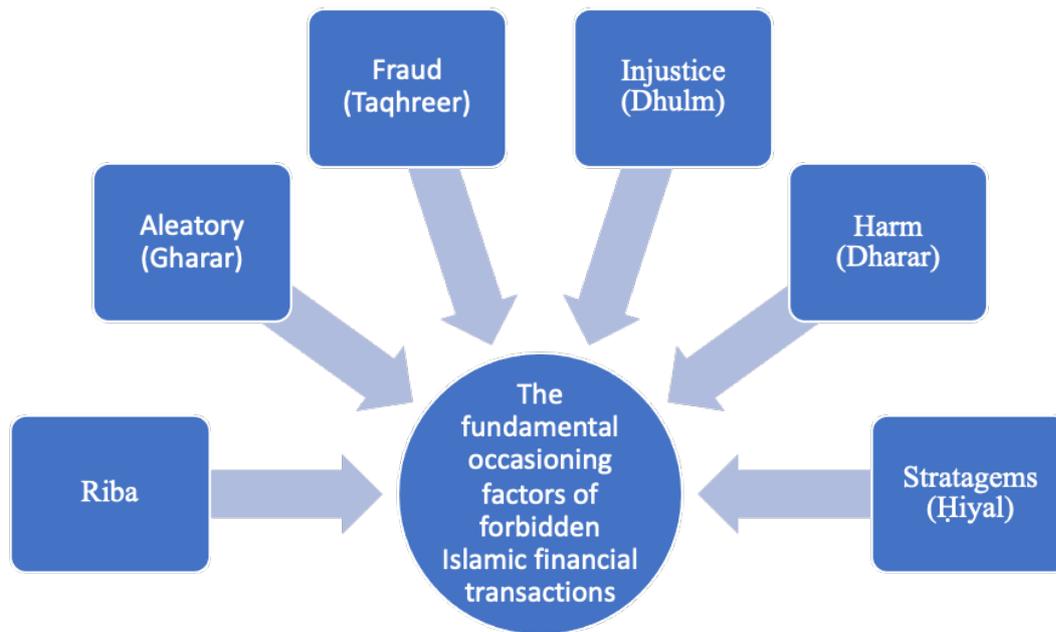


Diagram 1. Fundamental occasioning factors

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