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Formalism versus Purposivism in Islamic Jurisprudence: The Case of Islamic Finance Law

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Abstract: This manuscript critically discusses the current implications of the scriptural injunctions against *gharar* and *maysir*. It elaborates how overlooking the features of the contemporary world and adopting a formalistic approach in Islamic jurisprudence have led to absurdity in the implication of the doctrines of *gharar* and *maysir* for Muslims' financial activities. The manuscript also underscores the necessity of adopting the *maqāsid* approach (purposivism) in Islamic jurisprudence. It propounds that the cogent concern of the injunctions could have been an initiative for Islamic scholars to establish an advanced contract law and to promote transparency in economic activities if a *maqāsid* approach had been adopted in Islamic jurisprudence.

Keywords: Islamic finance law; maqāsid al-sharī'ah; purposivism; gharar; maysir

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1. Introduction

Today's Muslims inherited Islamic scripture that was introduced to medieval seventh-century society in the Arabian Peninsula. The key challenge for contemporary Muslims is how they should apply the sacred orders in present times; that is, whether they should observe them literally or consider the objectives of the orders given the context within which they were revealed. The majority of Islamic jurists have a textual orientation toward driving contemporaneous implications for scriptural injunctions and guidance. They seek to preserve the appearance of the divine rules and mandate for Muslims to follow them formalistically. This practice can be absurd, as it does not necessarily preserve the substance and objectives of the injunctions. Islamic finance is an interesting case for evaluating this approach, as it is chiefly established based on the *sharī'ah*-compliant solutions for the injunctions against *ribā*, *gharar*, and *maysir*.[1]

This manuscript discusses the doctrines of *gharar* and *maysir* and their impacts on the financial activities of today's Muslims. Indeed, devout Muslims should not only observe the legal framework of their country of residence but also comply with Islamic jurisprudence (*fiqh*) in their financial activities.[2] This two-tier regulatory system can create complexity and can be cumbersome, in particular when Islamic jurists overlook the features of the modern world and the historical context of Islamic scripture, and adopt a formalistic approach in jurisprudence.

In a formalistic approach,[3] Islamic jurists appraise the permissibility of conventional financial products in light of *fiqh*. They examine them through the lens of pre-modern frameworks, which were recognized as permissible by earlier authoritative Islamic jurists, and reshuffle the legal structure of the financial products where necessary to make them compatible with such frameworks. This approach has led to the emergence of Islamic finance, which has grown substantially in recent decades and has attracted considerable attention from many researchers and policymakers around the globe.[4] Yet it is subject to criticism for being a mechanism that mimics conventional finance, using a different form (Maurer 2001; Hamoudi 2007; Rudnyckyj 2019, p. 168).[5]

Islamic jurists could consider the spirit and intention of the scriptural injunctions (*maqāsid al-sharī'ah*) in their jurisprudence and attempt to preserve the purpose of the injunctions within the context of the modern world. This implies that the jurists should first examine whether the rationale behind the injunctions has already been addressed in contemporary law. If not, they can then use the objectives of the injunctions as an initiative to contribute to advancing the existing law. This approach is in line with "religious liberalism", described by Hallaq (1997, p. 254) as an approach that seeks to reform Islamic law based on the notion of text/context analysis with an emphasis on a humanistic law which is indicatively and generally directed by the divine intention rather than a law which is literally dictated.

This paper seeks to contribute to the literature of Islamic studies by underscoring the absurdity in Islamic finance law as a result of sticking to forms and adopting a formalistic approach in Islamic jurisprudence. It sheds light on the importance of considering *maqāsid al-sharī'ah* in Islamic jurisprudence. Several Islamic scholars already advocate a *maqāsid* approach (Rahman 1979, 1982; Ashmawi 1983; Shahrur 1992; Kamali 2011; Ibn Ashur 2013; Fadel 2017 among others). Ashmawi (1983, pp. 110–16) and Shahrur (1992, pp. 468–70) reinterpreted the injunction against usury (*ribā*) based on the fact that the socio-economic background of the Arabian society addressed by the *Qur'ān* has changed substantially in our contemporary world. This manuscript extends the literature by studying two other pivotal economic injunctions of Islam, i.e., the doctrines of *gharar* and *maysir*, which have considerable impacts on shaping the financial system of the Muslim world. It discusses how the injunctions against *gharar* and *maysir* are revisited when we apply the *maqāsid* approach in jurisprudence. This work complements Fadel (2017), who adopts the *maqāsid* approach—and indeed rejects the use of a formalistic approach—in explaining the role of different kinds of finance, i.e., charitable and for-profit financial sectors, in the contemporary world. He concluded that each sector of finance should be governed by its purposes. This work also relates to the body of literature which indicates that modern financial products are new phenomena and cannot be appraised through the lens of traditional *fiqh* (e.g., Kamali 1996, 1997, 1999, 2000, 2007). This article connects with the literature on religion and reasoning by explaining how fideism can distort Islamic jurisprudence.

The manuscript is organized as follows: it begins by explaining *maqāsid al-sharī'ah*. It then discusses the doctrines of *gharar* and *maysir* and their implications for Muslims' financial activities, including using commercial insurance and financial derivatives and trading indices in stock markets. It also describes the *sharī'ah*-compliant solutions put forward by Islamic scholars as alternatives for conventional financial products. Next, it elaborates on the critiques of the current implications of the doctrines of *gharar* and *maysir*. The penultimate section explains the contemporaneous implications of the doctrines of *gharar* and *maysir* based on a *maqāsid* approach. Finally, it provides concluding remarks on the reasons for the adoption of a formalistic approach in Islamic jurisprudence.

2. The Maqāsid al-Sharī'ah Approach

Maqāsid al-sharī'ah represents the higher objectives of *sharī'ah*. Al-Ghazali defines it as the promotion of the well-being of all humankind (see, e.g., Opwis 2010, p. 78). Al-Shatibi (1320–1388) is among the first Islamic scholars to underscore that guidance and injunctions were introduced by Islam to serve specific purposes. Therefore, we should seek to achieve the objectives of such injunctions (*maqāsid al-sharī'ah*) rather than adhering to their appearance and framework (Al-Raysuni 1997, p. 129 as quoted in El-Gamal 2006, p. 44).[6] The Egyptian modernist Muhammad Abduh (1849–1905) suggests that we should have different approaches toward scriptural injunctions that are related to social affairs (*fiqh al-muʿāmalāt*) than toward the injunctions relating to devotional rituals, such as prayer (*fiqh al-ʿibādāt*), because the former group of injunctions is more subject to context than the latter group (Moaddel 2005, p. 90). Ibn Ashur (1879–1973), a Tunisian contemporary Islamic jurist, realizes that textual orientation in jurisprudence can create absurdity, and he seeks to revisit jurisprudence and establish an Islamic law based on the *maqāsid* approach. Rahman

(1986) indicates that understanding Islamic scripture and eliciting a universal implication from it requires a thorough understanding of the Arabian society in which Islam emerged. Ashmawi (1983) argues that religious thought—contrary to religion as a pure idea, divinely revealed—is humanistic, and therefore it cannot be isolated from the background of society. He also points out that the *Qur'ān* consists of revelations that are inextricably linked to the changes in society that occurred during the Prophet's life. Therefore, we observe that some verses were abrogated in response to the changes in society. Hallaq (2009, pp. 506–7) indicates that in Islamic jurisprudence, a cause (*'illa*) of a divine order should have support in the divine text. However, in the *maqāsid* approach, *'illa* can be inducted by the general spirit and intention of the revelation. Kamali (2011), a contemporary Islamic scholar, also underscores the need for a *maqāsid*-based approach in jurisprudence.

Hallaq (1997, pp. 231–62) uses the term "religious liberalism" for this approach and describes it as a method which considers both the text and context of the revelation. The implication of the sacred text for modern society must be established based on the spirit and intention behind the scripture, not upon a literalist hermeneutic.[7] In this method, the emphasis is placed on humanistic law and not the laws literally dictated. In his view, this approach is a more cohesive, rigorous, and convincing methodology, and it delivers a system of thought which is more committed to Islam. Yet he underscores that religious liberalism remains marginal and outside the mainstream of legislation due to the foreignness of its theories to the extant legal systems and the isolation of its intellectuals from the centers of political powers. Fadel (2017, p. 20) rejects the use of a formalistic approach in understanding the role of finance in relation to the modern world because in his view, it is in contradiction with the principles of jurisprudence, which implicitly assume that a human being is capable of understanding the purposes of the divine text. He adopts the *maqāsid* approach and claims that all sectors of finance are united by the efficiency/anti-waste principle of Islam.

3. The Doctrine of *Gharar*

The Arabic word *gharar* literally means deception, uncertainty, ambiguity, or hazard (Saiti and Abdullah 2016a, p. 148; Saleem 2013, p. 3). There is no specific verse in the *Qur'ān* that explicitly bans *gharar*.[8] Stricture against *gharar* is, however, initiated based on the Prophet Muhammad's words (*ḥadīth*), which prohibit a transaction that contains *gharar* (*bayʿ al-gharar*). The *ḥadīth* has been reported in all major Islamic schools of thought, and there is a conclusive agreement by Islamic jurists about the stricture (Naraghi 1994, pp. 83–84 as quoted in Musawian 2012, pp. 139–40). *Gharar* is related to a business transaction and is defined by prominent scholars, such as Ibn Rushd, as an ambiguity or lack of knowledge about the essential elements of a contract, e.g., the quality or quantity of the subject matter, the price, the terms of delivery, and the mode of payment. For instance, the sale of milk in the udder of a goat without a measurement (Mansuri 2010, p. 93).[9] In addition, the subject matter of the contract should be feasible, e.g., the sale of birds in the sky makes the contract subject to *gharar* (El-Gamal 2001, p. 30). Saleem (2013, pp. 3–4) defines *bayʿ al-gharar* as a sale contract with ambiguous and unknown elements, such as selling a product without a clear description of its quality or condition.[10]

The purpose (*ḥikmah*) of the prohibition is described as avoiding a dispute between parties (Ibn Taymiyah (1988), vol. 4 as quoted in El-Gamal 2001, p. 31). Saleem (2013, p. 3) claims that *gharar* is prohibited because ambiguity can be used to deceive the party to the contract. A contract is not permissible when the intensity of *gharar* is such that one party is exposed to the "risk" of substantial loss or deceit. Hence, minor *gharar* (*gharar yasir*), which exists in almost all contracts, is negligible (El-Gamal 2006, p. 59). Startlingly, this specification and the use of the word "*risk*" leads to the belief among some contemporary jurists that financial products must be assessed by *sharīʿah* scholars in terms of *risk* to make sure that they are not subject to major *gharar*. El-Gamal (2006, p. 60) defines *gharar* as "trading unbundled risk" and claims that the purpose of its prohibition is the prevention of exposing people to excessive financial risk. However, Saleem (2013, p. 4) distinguishes

gharar from "risk", arguing that the former refers to "potentially deceptive ambiguity" in a contract, whereas "risk" is uncertainty about the expected profit or loss;[11] "risk" is not designed to deceive people, and it does not lead to a dispute between the parties of a transaction.

4. The Doctrine of *Maysir*

Maysir literally means obtaining something very easily. It was a kind of wager during the pre-Islamic era in the Arabian Peninsula (Mohammad 1988 as quoted in Khan et al. 2011; Kamali 2000, p. 151; Saleem 2013, p. 4). Most contemporary jurists and scholars define a wager as reliance on pure chance to gain money or any other benefits (Al-Suwailem 2002; Mansuri 2010). Ibn Arabi defines a wager as a game in which "each of two contestants seeks to defeat his partner in an action or statement in order to take property set aside for the winner" (Ibn al-Arabi 1934 as quoted in Abdullah 2013, p. 90). *Maysir* is explicitly prohibited in the *Qur'ān* (2:219; 5:90–91). The purpose of the prohibition is described as avoiding hatred among people (Buang 2000 quoted in Saiti and Abdullah 2016a, p. 152; Saleem 2013, p. 4).

Al-Suwailem (2002) distinguishes between a wager and risk-taking, arguing that in the latter case, we exert control after making the decision and put effort into containing the risk and achieving the outcome, whereas in the former case, we simply take the risk without having any control over the outcome. He claims that the rationale for banning wagers is to avoid relying on chance—rather than skills and actions—to achieve objectives because such an approach leads to regret and frustration and makes people distressed.

Interestingly, some contemporary jurists, such as Al-Zarqa, redefine *gharar* as a kind of wager. They claim that the ban on *gharar* is because of its resemblance to a wager (El-Gamal 2006, pp. 58, 60). Al-Suwailem (2006, p. 73) argues that wagering is a zero-sum game, and a transaction is subject to *gharar* if a zero-sum outcome is plausible. Obaidullah (2005, p. 34) argues that "Uncertainty is the same as *gharar* and under such conditions, exchange or contracting is reduced to a gamble".

5. Current Implications of the Doctrines of *Gharar* and *Maysir* for Conventional Financial Products

5.1. Impermissibility of Commercial Insurance

One of the important implications of the *gharar* and *maysir* doctrines in finance relates to conventional commercial insurance. The international conference on Islamic Economics, held in Mekkah in 1976, announced that an insurance business with profit-making purposes was not permissible because it contained the elements of a wager (Obaidullah 2005, p. 124). In 1983, the Council of Islamic Ideology of Pakistan announced that commercial insurance was not permissible (Khan et al. 2011, p. 283). In its second session in December 1985, the council of Islamic Fiqh Academy announced that commercial insurance contracts were subject to substantial *gharar* and were therefore not permissible. The council suggested practitioners use cooperative insurance (known as *takaful*) as the alternative mechanism (Islamic Development Bank 2000, p. 13).

Islamic jurists and scholars who claim commercial insurance is subject to a wager argue that the assured person pays a premium and receives in return either nothing or a payoff that far exceeds the premium paid (Khan et al. 2011, p. 283). However, this view has been challenged by the fact that in insurance contracts, both parties, i.e., the insurance company and the assured person, prefer that the event does not occur, whereas in a wager one party benefits from the outcome while the other loses (Obaidullah 2005, p. 122; Abdullah 2013, pp. 93–94).

Some scholars believe that *gharar* is embedded in insurance because at the time of signing an insurance contract, the assured person does not know whether, when, and how much indemnity they will receive (Obaidullah 2005, p. 123; Khan et al. 2011, p. 283; Abdullah 2013, pp. 93–94; Fadel 2011). In their view, risk and uncertainty are the necessary and unavoidable features of commercial insurance contracts. Nonetheless, they believe

that insurance is necessary for society; for instance, Obaidullah (2005, p. 120) argues that insurance is a mechanism for transferring "pure" risks to others, and it reduces "society's cost of bearing risk".[12] He admits that insurance can be viewed as a mechanism enabling people to purchase "peace of mind", yet he points out that trading "peace of mind" has no basis in *fiqh* (Obaidullah 2005, p. 123). Fadel (2011) indicates that if the insurer pays indemnity, the contract will be subject to *ribā* of the deferred exchange of money, and if the insurer does not pay indemnity—in the absence of an accident—the insurer has not paid anything in return for the premium it received. This makes the contract invalid because it is subject to "consuming the property of another unjustly" (*akl amwāl al-nās bil-bātil*), and this will reduce the welfare of the contracting parties.[13]

On the other hand, however, there are some contemporary jurists, such as Al-Zarqa, Siddiqi, Al-Misri, and Jumah, who believe that conventional insurance is not subject to *gharar* because based on the law of large numbers, insurers know approximately how much they will pay as indemnification. The assured person also knows how much they should pay in the form of a premium and how much they will receive in case of loss (El-Gamal 2006, p. 154).

5.2. Sharī'ah-Compliant Alternatives for Commercial Insurance

Some Islamic jurists prescribe *takaful* as an alternative to conventional commercial insurance that is compatible with *fiqh*. They describe it as an arrangement by a group of individuals to remunerate each member of the group from a pool of voluntary donations when certain misfortunate events occur. The surplus (deficit) contribution at the end of the period is paid back to (collected from) the members (Obaidullah 2005, p. 124).

A *takaful* industry was established in 1979 (Anwar 1994, p. 1315), and has evolved in Muslim-majority countries. Nowadays, there are around 306 institutions offering *takaful* products in nearly 45 countries (IFSB 2019, p. 5). The *takaful* industry grows by 4.3% per annum on average, with a total value of USD 24.2 billion in 2020 (IFSB 2022, p. 46). However, since the industry has not been established on a large scale, re-*takaful* is not available; as a result, reinsurance under a conventional insurance framework is allowed by some jurists (Obaidullah 2005, p. 140; El-Gamal 2006, p. 59). It is interesting to note that contrary to the recommendation of the jurists and councils such as the Fiqh Academy, *takaful* insurance companies do not necessarily have a mutual organizational structure. Their business model, as a profit-oriented venture, is classified into two main groups: *muḍāraba* -based *takaful* and *wakāla*-based *takaful*. In the former model, the *takaful* operator, as a general partner (*muḍārib)*, seeks a proportion of profit generated from the investment of the *takaful* fund. In the latter model, the *takaful* operator, as an agent (*wakīl*) of the policyholders, collects an agency fee for investing the policyholders' fund in *sharī'ah*-compliant assets. In both cases, the *takaful* operator does not seek any return for managing the *takaful* business.[14]

5.3. Impermissibility of Financial Derivatives

Financial derivatives such as forwards, futures, and options are subject to various *fiqh* injunctions. In futures and options markets, the parties do not have the intention to deliver or receive the commodity of the contract. The physical exchange or delivery of commodities rarely takes place. Instead, the market players merely settle the price differences in these markets. Fadel (2011) argues that these contracts are impermissible because one party receives money without paying anything in return, and such contracts are subject to *akl amwāl al-nās bil-bātil*. Some Islamic scholars believe that these instruments are subject to *maysir* because they are very similar to a game of chance and are used for speculation and betting on the direction of the market. In such markets, one party loses and the other wins (Islamic Development Bank 2000, pp. 131–33; Obaidullah 2005, pp. 175–79; Al-Suwailem 2006, pp. 28, 59–68, 131 among others).

Some scholars also claim that these instruments are subject to *gharar*, mainly for two reasons: (1) a person cannot sell a commodity that they do not have in hand.[15] They must receive it before selling it to someone else. (2) These instruments are subject to

excessive risk because the expected loss of such instruments can be substantial, whereas people are generally deceived by the upside potential gain (Obaidullah 2005; Wilson 1991; Al-Suwailem 2006, p. 60).

Future and forward contracts are claimed to be subject to another stricture in Islamic commercial law, which is called *bayʿ al-kālī bil-kālī*. According to this stricture, in a sale contract, it is impermissible to deliver both the subject matter and the price in a future time. This kind of trade is prohibited based on a *ḥadīth* attributed to the Prophet Muhammad.[16] Financial options are criticized on the grounds that in *fiqh*, a financial right alone cannot be the subject of a sale contract.[17]

Contrary to the aforementioned arguments, several scholars, e.g., Kamali, believe that financial derivatives are permissible. They argue that speculation in financial markets is useful because it facilitates the transfer of risk from those who are unwilling to take it to those who are interested in taking it. Financial derivatives help hedging and price discovery in the market; hence, they are different from gambling. These instruments are used to reduce risk and they are beneficial for the economy. Fluctuations in the price are derived by demand and supply in the future markets, whereas gambling depends solely on luck and not on supply and demand. These scholars underscore the fact that the deposit put into future markets as a margin by market player does not constitute a bet. They believe that financial derivatives, in particular those that are traded in an exchange, do not contain the element of *gharar* because they are standardized and their specifications are clearly stated. In addition, the market is highly regulated and closely monitored to ensure that the process is conducted correctly. This implies that the requirement that parties must "receive a product before selling it" is not applicable. This prerequisite for a sale existed in the era of the Prophet because the market at that time was small, and the delivery of a product could not be guaranteed.[18]

5.4. Sharīʿah-Compliant Alternatives for Financial Derivatives

Islamic jurists postulate various permissible alternatives for financial derivatives. Agents can hedge their future risk by creating a synthetic forward contract, i.e., to construct a forward position through multiple permissible contracts (please see Obaidullah 2005, pp. 179–82, for further details). They can circumvent the injunction imposed by *bayʿ al-kālī bil-kālī*, by making a *commitment/binding promise (waʿd mulzim)* to sell a commodity at a future date.[19] In addition, Islamic commercial law allows parties to include some conditions in their contracts. This principle is called *khiar al-shart* (options by stipulation). Accordingly, Islamic scholars advise agents to maintain the right to rescind the trade contract as a *sharīʿah*-compliant risk management instrument and an alternative to conventional options (Obaidullah 2005, pp. 185–92).

It is worth noting that even under these alternatives, agents must fulfill some specific criteria. For instance, they must settle transactions by delivery of the commodity and not price differences (please see Islamic Development Bank 2000, p. 133, and Musawian and Meysami 2017, (2), pp. 295–99).

5.5. Impermissibility of Index Trading

Index trading constitutes, according to some Islamic jurists and scholars, pure gambling and the sale of something fictitious because the underlying assets in such trades are not specified (Islamic Development Bank 2000, p. 133; Musawian and Meysami 2017, pp. 65–66).

This view, however, is not accepted by all Islamic jurists. For instance, in its 13th meeting on 19 March 1998, the Shariah Advisory Council (SAC) of the Securities Commission Malaysia announced that there is no ambiguity in index trading and it is hence not subject to *gharar* because its features, including quantity and price, are known, and the price is determined in the market based on supply and demand. Index trading is permissible as long as the index comprises *sharīʿah*-compliant securities (Securities Commission Malaysia 2007, p. 79). The SAC also argues that index trading is not subject to a wager because in

gambling, if a player makes a wrong choice, he/she will lose all his/her money, whereas the index has its own inherent value, and the investor will experience an increase or decrease in the value of its investment based on the demand and supply in the market.

Lastly, the impermissibility of index trading is because of a misunderstanding of this concept by some Islamic scholars. An index return is the weighted average return of all underlying shares in a market. Mutual funds construct a portfolio of shares that follows the performance of an index very closely, and small investors can take a share of this portfolio. Therefore, index trading, strictly speaking, is trading a portfolio of shares that mimics the returns of an index; hence, it is not fictitious.

5.6. Sharīʿah-Compliant Alternatives for Index Trading

The ban on index trading implies that Muslim investors should purchase the underlying stocks of an index directly to construct their own portfolios. This alternative is costly, and is perhaps not economically viable for small investors.

6. Critiques of the Current Implications of the Doctrines of *Gharar* and *Maysir*

The formalistic approach in jurisprudence imposes some costs on Muslim society because Islamic jurists overlook the paradigms established based on the necessities of modern life. Instead, they create an alternative mechanism within the pre-modern frameworks compatible with *fiqh*, with trivial economic substance, which must be observed by devout Muslims as a religious order. Such Islamic jurists first prohibit some practices, e.g., commercial insurance and financial derivatives, for being in conflict with *fiqh*, using rather flimsy arguments.[20] Then, since those practices are necessary for society, they introduce some alternatives that are based on loopholes in *fiqh;* more importantly, they neglect the main rationale behind the spiritual injunctions.

For instance, the key feature of *takaful* that exempts it from the doctrine of *gharar* is that assured persons must make a donation to the pool—instead of paying an insurance premium—without legally expecting a return, and *takaful* companies should not make any binding promise to pay indemnification to the assured persons to avoid violation of the voluntary contribution assumption. In the case of a loss event, *takaful* companies must pay indemnification to the assured person based on a voluntary contribution (*tabarruʿ*) and not based on a commutative contract. *Takaful* companies maintain this formalistic principle to comply with Islamic law and to be exempted from the doctrine of *gharar* (El-Gamal 2006, p. 148). This formalistic approach is disappointing because in reality, the assured persons expect remuneration at the time that loss occurs. Seyadi (2015, p. 295) argues that the *takaful* industry "is based on how to earn money by providing acceptable formalism in terms of Islamic procedures." He calls it "legitimacy stratagems" and claims that in this approach, the spirit of *sharīʿah* is ignored.

Islamic jurists also use a loophole to bypass the stricture against forward contracts in *fiqh* by prescribing binding promise agreements to purchase products in the future. The solution is startlingly senseless as it has the same features as and legal consequence of a conventional forward contract. Several scholars argue that the rationale behind the injunction against *bayʿ al-kālī bil-kālī* is blocking the loopholes to exercise *ribā* in transactions. Since agents at present do not use forward or futures contracts as a means to circumvent the injunction against *ribā*, the ban against *bayʿ al-kālī bil-kālī* is not applicable; nonetheless, if someone believes that this injunction must still be applicable, then he or she must admit that the solution, i.e., binding promise agreements, does not close the loophole for by-passing the stricture against *ribā*. This practice shows that many scholars do not see a convincing rationale behind some religious orders within the context of the modern world; at the same time, they cannot ignore them because they think there may be some reasons behind the religious orders that they are not aware of. Therefore, they adopt a formalist approach to maintain the forms of such orders. It is interesting to note that there is a story about using loopholes and the formalistic observation of religious commands in the *Qurʾān* (7:163). Believers were instructed not to fish on Saturdays; however, some of them trapped the fish

on Saturdays and caught them on the day after. The *Qur'ān* considers this action a breach of God's command (Tabatabai [1971] 1984, (8), pp. 381–92).

7. Contemporaneous Implications of the Doctrines of *Gharar* and *Maysir* Based on the *Maqāsid* Approach

Driving contemporaneous implications for the injunction against *gharar* requires knowledge about the rationale behind the injunction as well as the features of the modern world. The doctrine of *gharar* seeks to eliminate equivocations from contracts because one party can use ambiguities in a contract to deceive the other party. In the modern world, however, legislative and judicial powers introduce detailed laws and regulations to settle disputes in economic activities. For instance, contemporary law elaborates on all necessary elements that an agreement must contain to be considered a valid contract. In addition, the law requires that all major elements be expressed clearly and with certainty. These legal requirements adequately satisfy the permissibility of a contract under the doctrine of *gharar.*[21] Therefore, we do not need to appraise the presence of *gharar* in contracts when a modern legislative and judicial system is officially in place and the objective of the injunction is considered in the existing law. In the absence of such a legal framework in a country, the jurists could encourage the legal authorities to incorporate the cogent concern of the injunction in the law, instead of establishing a separate layer of the so-called "Islamic" law and persuading Muslims to comply with it in addition to the existing law. This is in line with the "religious liberalism" method described by Hallaq (1997, p. 254).[22] Regarding the injunction against wagering, no law or regulation can completely prevent it[23] because individuals can act based on a wager using lawful activities (Khan 1988). Muslims, therefore, should be inspired by their piety and religious advice not to wager.

The cogent concern of the doctrine of *gharar* is not only addressed in legislating contract law but has also been the point of contention in different fields, such as modern financial economics after the emergence of corporations as independent legal entities and in financial markets as conduit for mobilizing funds in the economy. Corporations are required to disclose information to the public in order to mitigate ambiguities for outside stakeholders. In the US, for instance, the security exchange act regarding disclosure and information asymmetry was first introduced in 1934. Since then, more stringent disclosure requirements and auditing standards have been implemented to adequately protect the interests of outsiders and minority shareholders. In addition, regulators have sought to establish an institutional framework such that financial markets have a semi-strong form of efficiency so that prices reflect publicly available information. This implies that in theory, securities are not substantially mispriced,[24] and buyers and sellers are not abused due to ambiguities or a lack of access to information, which is the main objective of the doctrine of *gharar*.

8. Epilogue

This paper underscores that formalism has led to the creation of an extra layer of "Islamic regulation" which devout Muslims must fulfill in addition to adhering to the legal framework of their country of residence. In a formalistic approach, Islamic jurists assess modern products through the lens of pre-modern frameworks considered acceptable by *fiqh*. In most cases and perhaps by construction, they find these novel products incompatible with those pre-modern frameworks. In such cases, Islamic jurists reshuffle the structure of these products to make them compatible with *fiqh* and mandate Muslims to follow these "Islamic" frameworks. Muslims, therefore, should use the so-called "Islamic" version of these modern products.

This paper suggests that Islamic jurists could consider the purposes of the pre-modern Islamic rules and examine whether such purposes are preserved in modern products. If those purposes are neglected, the jurists could then encourage the legal authorities to incorporate the concerns of the pre-modern Islamic rules into the existing laws. Adopting

such an approach will avoid redundancy for Muslims, and jurists could indeed contribute to the advancement of laws.

The current implications of the doctrines of *gharar* and *maysir* suggest that some Islamic jurists and scholars are not sufficiently familiar with the modern financial system and contemporary law, and they mainly follow a formalistic approach in Islamic jurisprudence. Indeed, many jurists, such as those influenced by the *Hanbali* school of thought, place even a weak *ḥadīth*[25] above any reasoning (El-Gamal 2006, p. 87); this is somehow similar to a fideism approach (Peterson et al. 2013, pp. 65–75). On the other hand, there are many jurists, such as *Uṣūli*—the majority of *Twelver Shīa Muslims*—scholars, who believe that reasoning precedes a weak *ḥadīth* (Lahiji [1885] 1994).[26] Nonetheless, in practice, they prefer not to ignore a *ḥadīth* for which they cannot establish the trustworthiness of all the narrators or provide a reasonable rationale; they follow such a *ḥadīth* formalistically as a precautionary measure (*ihtiyat*) to avoid the violation of religious orders (El-Gamal 2006, p. 28).

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Notes

1 *Ribā* means usury (please refer to Abedifar 2019 for the discussion of the doctrine of ribā). *Gharar* means deception or ambiguity (Saiti and Abdullah 2016a, p. 148; Saleem 2013, p. 3). *Maysir* means obtaining something very easily (Mohammad 1988 as quoted in Khan et al. 2011; Kamali 2000, p. 151; Saleem 2013, p. 4). *Gharar* and *maysir* are extensively discussed in Sections 3 and 4, respectively.

2 Indeed, the domain of *fiqh* is not limited to worship rituals and morals; it includes legislation for a wide range of issues that emerge in the modern world. The economy is one of the areas that overwhelmingly attracts the attention of Islamic jurists and scholars due to its advancements in recent decades. It has become an important topic of debate among Islamic scholars.

3 A key challenge in the Islamic legal system is establishing a balance between reasoning and divine revelation. A group of jurists believe that the human intellect is incapable of distinguishing good and bad and understanding the rationale behind religious revelation beyond indications in the divine text. Human intellect can, at best, decipher the intention of scriptural scripture. Therefore, the divine text should not be dominated by the human mind. This view mandates observing the scriptural injunctions formalistically, as it believes that the objective of the revelation is completely incorporated into the divine text. On the other extreme, rationalists believe that we should set aside revelation in favor of secular legislation because human beings can distinguish between right and wrong. Several Islamic scholars have sought to find a better harmony between reasoning and revelation. A group of such scholars, e.g., Riḍā, uses the notion of *maṣlaḥa*—which is controversial for traditional jurists—to set aside the divine orders in favor of human needs when there is a severe conflict between the divine scripture and life affairs. This approach is called "religious utilitarianism" by Hallaq (1997). Please refer to Hallaq (1997, pp. 212–54; 2009, pp. 500–8) for further details. It is worth noting that the term "formalism" is defined by Hamoudi (2007) as follows: " . . . *an interpretive methodology relying almost entirely on logic (and excluding more contextual and experientially based techniques) to derive clear and specific rules whose application in particular factual contexts is non-controversial, without regard to whether those rules serve any particular end.*" El-Gamal (2006) juxtaposes "form" with "substance" when he discusses the features of Islamic law. Rudnyckyj (2019, pp. 86–87) uses the terms "formal operation" and "formalist approach" in describing the establishment of Islamic finance.

4 The volume of the Islamic financial services industry was estimated to be USD 3.06 trillion in 2021 (IFSB 2022, p. 12).

5 Many Muslims expect Islamic finance, as a religious alternative system, to be a paradigm with ethical consideration in its center and a fundamental approach to Islamizing the economy. (Saeed 1999, p. 17; Saeed 2011, pp. 55–56) indicates that in Islamic finance, scriptural injunctions are treated as legal concepts and their ethical aspects are overlooked.

6 This is similar to the adoption of purposivism in common law.

7 In his seminal book, he critically discusses the stand view of influential scholars, e.g., Ashmawi, Rahman, and Shahrur, who support the liberalist approach to the understanding of Islamic scripture in the modern world.

8 Some scholars refer to the verses in *Qur'ān* that discourage Muslims from dealing with delusions (e.g., 45:35). However, in such verses, *gharar* is not explicitly mentioned.

9 Abu Zahra, al-Zuhaili, Fazlur Raman, al-Sarakhsi, and al-Shirazi have a similar view. Please refer to Abdullah (2013, pp. 91–92) for further details.

10 This view is very close to the definition of *gharar* by authoritative jurists in the *Shīa* school of thought. Please see (Alizadeh Asl and Musawian 2016) for further details.

11 This is in line with the classical definition of "risk" as a "measurable" uncertainty (Knight 1921, p. 20).

12 He defines "pure" risk as a risk over which one has little control.

[13] He implicitly argues that trading "peace of mind" has no basis in *fiqh*.

[14] Please see Obaidullah (2005, pp. 128–33) for further details.

[15] El-Gamal (2001, 2006) and Obaidullah (2005, p. 177) point out that *salam* is also subject to *gharar*, yet it is allowed by Islamic jurists since it is necessary for society. This is based on the legal maxim entitled "necessities make forbidden things canonically harmless", which is a corollary of one of the five main legal maxims of Islamic law, i.e., "hardship begets facility" (Saiti and Abdullah 2016b). Please refer to Kizilkaya (2021) for a thorough discussion of legal maxims in Islamic law.

[16] Please refer to Kunhibava and Shanmugam (2010, p. 344), Obaidullah (2005, p. 177), and resolution no. 63/1/7 of the Islamic Fiqh Academy (Islamic Development Bank 2000, pp. 132–33) for further details. Some Islamic scholars believe that forwards, futures, and options are impermissible as they are subject to the injunction against *bayʿ al-kālī bil-kālī* (Obaidullah 2005, p. 177; El-Gamal 2006, p. 87; Injadat 2014, p. 243; Musawian and Meysami 2017, pp. 295–99). However, Kamali (1996) disagrees with them and points out that there is a divergence between different schools regarding the definition of *bayʿ al-kālī bil-kālī*. He also claims that the reliability of the *ḥadīth* attributed to the Prophet Muhammad that bans *bayʿ al-kālī bil-kālī* is questioned by some scholars. Masoominia (2010, pp. 121–29) underscores that there is no conclusive agreement about the authenticity of this *ḥadīth* among prominent jurists. Nonetheless, since the *ḥadīth* has been reported in all main Islamic schools of thought, there is a conclusive agreement by Islamic jurists about the stricture. There are also some debates regarding the purpose of the stricture. Many scholars believe that the injunction is a preventative measure to block bypassing the stricture against *ribā* (Masoominia 2010, pp. 126–29; Injadat 2014, p. 243).

[17] For further details, please refer to resolution no. 63/1/7 of Islamic Fiqh Academy (Islamic Development Bank 2000, p. 131) and Kunhibava and Shanmugam (2010, pp. 341–43).

[18] For more details, please refer to Khan (1988); Kamali (1996, 1997, 1999, 2007); Bacha (1999); Smolarski et al. (2006); the resolution of Shariah Advisory Council of Securities Commission Malaysia in its 13th meeting on 19 March 1998 (Securities Commission Malaysia 2007, p. 35) among others.

[19] Please see the resolution of the Shariah Advisory Council of Bank Negara Malaysia in its 49th meeting on 28 April 2005 (Bank Negara Malaysia 2010, p. 138) and Musawian and Meysami (2017, (2), pp. 295–99). Some *Shīʿa* jurists suggest a reconciliation agreement (*aqd al-solh*) as the second solution (Musawian and Meysami 2017, (2), pp. 295–99). This solution is not acceptable to *Sunni* jurists since they believe that a reconciliation agreement can be only used when there is a dispute between the parties. In contrast, those *Shīʿa* jurists argue that this agreement can be applied even when there is no dispute (Zanjani 1998, (3), p. 520).

[20] For instance, Kamali (1996, 1997) indicates that many Islamic jurists declare that futures and options are impermissible because they do not comply with the Islamic law governing sale contracts as the exchange of money (*māl*) against insurance or options, which are a kind of intangible assets and do not have concrete existence, is questionable based on the existing Islamic law. In addition, such jurists argue that these products contain the elements of *gharar* and *maysir*. However, he criticizes these views by pointing out that futures and options are new phenomena and cannot be appraised within the structure of traditional Islamic law. They are designed for hedging and risk-reduction purposes, and therefore they are not subject to *gharar* and *maysir*.

[21] In English law, for instance, the intention of the offeror must be inferenced objectively; that is, the interpretation that a reasonable person makes, in the position of offeree, from the statement of the offeror. The law distinguishes "a statement of intention" from "a supply of information" and "an invitation to treat" (McKendrick 2019, pp. 27–35). An offer cannot be accepted without knowing the offer. There can be no contract without knowledge about the offer (McKendrick 2019, p. 37). The offeree must state her agreement to each of the terms of the offer and the acceptance must be communicated to the offeror (McKendrick 2019, pp. 35–36). The law explains the methods of acceptance in detail (McKendrick 2019, p. 38). An agreement with uncertain or vague terms is not considered a valid contract by the court (McKendrick 2019, pp. 49–54). An agreement should be complete, i.e., should cover all major elements, and no major element should be left open and outstanding. This criterion ensures the certainty of essential elements of a contract (McKendrick 2019, pp. 54–55). In addition, an agreement is a valid contract if it contains a lawful and sufficient consideration. That is, the law requires "mutuality," i.e., something should be offered by each party of the agreement (McKendrick 2019, pp. 67–76). Without a lawful and sufficient consideration, the promises of a contract are not enforceable. Moreover, the law explains in detail the illegality of a contract under the law. A contract to commit an illegal action or an action contrary to good morals is considered illegal and unenforceable (McKendrick 2019, pp. 297–305). Please refer to case studies on the essentials of a valid contract for further details, e.g., https://www.lawteacher.net (accessed on 15 January 2023) or https://www.mylawman.co.in/ (accessed on 15 January 2023).

[22] The modern laws governing financial products are not always perfect. For instance, that lack of transparency in over-the-counter derivatives markets is considered one of the contributing factors to the financial crisis of 2007–2008 (Brunnermeier 2009), which was ultimately addressed by conventional regulators in the Dodd–Frank Act. Islamic jurists have introduced the "Islamic" version of financial derivatives; however, they could have contributed to improving the conventional laws governing transparency in the derivatives markets.

[23] This was a debate in other countries, in particular about the use of derivatives in sectors with cyclical returns such as agriculture. Since it was difficult to distinguish wagering from the hedging purposes of using derivatives, the judicial power had no choice but to legitimate derivatives. The fact that we cannot distinguish speculators from genuine hedgers is also underscored by Islamic scholars such as Kamali (1996). In the US, for instance, there was a long-standing debate in the last three decades of the nineteenth

century about the permissibility of futures trading. Opponents claimed they were merely fictitious dealings as traders set off the contracts without physical delivery. However, proponents argued that futures provided hedging and liquidity to farmers. In order to balance between "public morality" and "legitimate purpose of commerce", the Illinois court in 1875 announced that futures trading was legitimate so long as at least one party intended to deliver the commodity at the time of entering the contract (the doctrine of "contemplate delivery"); otherwise, it was a "wagering" contract. The law did not require the delivery of a corporeal object, as contemplation of one party to deliver the commodity allowed the contract to be legally set off. This law created a challenge for the judges regarding how to establish the original intention of traders. Ultimately, in 1905, the Supreme Court legitimated futures trading and announced that a "set off" had all the effect of "delivery". Please refer to Levy (2006) for more details.

[24] Extant literature extensively documents market anomalies and shows that various reasons can cause prices to depart from their fundamental values.

[25] A weak *ḥadīth* is the one in which all its narrators are not identified as trustworthy.

[26] This can also be the view of many *Sunni* jurists.

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