
From the concept of *ḥaqq* to the prohibitions of *ribā*, *gharar* and *maysir* in Islamic finance

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Abstract: This paper suggests a juridical interpretation of the prohibitions of *ribā*, *gharar* and *maysir* through the outline of the concept of 'right', *ḥaqq*, in Muslim law. The approach provides a comprehension of the bans alternative to its religious/moral understanding which is still prevalent in academic literature despite the uncertainty inherent in it. In particular, the paper argues that the doctrines of *ribā*, *gharar* and *maysir*, commonly considered as evidence of the religious/ethical bases of Islamic law, express, more precisely, a requirement of efficiency of the contract ('*aqd*') linked to the quantitative and qualitative equilibrium, whose deepest sense may emerge only within the conceptualisation of *ḥaqq* in Islamic justice ('*adl*').

Keywords: comparative law; Islamic law; contract; *ḥaqq*; *ribā*; interest; *gharar*; *maysir*; risk; Islamic finance.

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1 Islamic finance and legal pluralism

In the current globalisation of legal studies, Western law is progressively losing its monolithic centrality in favour of a reality of legal pluralism (Glenn, 2004; Merry, 1988). Asian and African traditional legal systems reappear with their *own* sensibilities, logics and values, while their original features are often contaminated in the process of mutual interaction (Chiba, 1986; Menski, 2006). This process of re-assertion and parallel hybridisation of non-Western traditions emerges not only at the state level, but also in the field of private relations, and is well exemplified by the present law of Islamic finance. Structuring financial products, consistent with both secular regulatory frameworks and

Sharī'ah-standards, in fact, the law of Islamic finance has determined the emergence of a *plural legal system*, affected, both in its theory and practice, by original Islamic categories and Western civil and common laws, each one with its *own* postulates.

In fact, while civil law reflects the centrality of the human will (Niboyet, 1927; Ranouil, 1980) and common law promotes a logic of exchange (Atiyah and Smith, 2005; Pollock, 1911; Treitel, 2007), Islamic law embodies a theory of justice stemming from the divine omnipotence in the creation of the reality, and centred in the fundamental concepts of *ḥukm*, 'rule', 'decree', and *ḥaqq*, 'right' as 'real', 'true'. As a result, *fiqh*¹ contractual categories, in reflecting this justice, strongly differ both from civil and common law in the orientation of the contractual freedom, the theoretical centrality of the object and the doctrines related to the equilibrium/disclosure of the subject matter (prohibitions of *ribā*, *gharar* and *maysir*).

Along with the exclusion of investments in arms, alcohol, casino, tobacco, pornography, and pork, this equilibrium represents the focal principle of Islamic finance.

At any rate, despite its centrality for the validity of Islamic financial transactions, its understanding seems to be covered till today by a thick layer of uncertainty in academic studies, and commonly justified according to a 'moral approach', which interprets Islamic finance as "an assertion of religious law in the area of commercial life, where secularism rules almost unquestioned throughout the rest of the world" (Vogel and Hayes, 1998, p.19), pursuing "a fairer distribution of wealth, greater support for the poor and needy, and less corruption and dishonesty" (Vogel and Hayes, 1998, p.26).

As a valuable alternative to this moral approach, the paper aims at providing a more technical explanation of the prohibitions of *ribā*, *gharar* and *maysir*, in relation to the concept of *ḥaqq* ('right') in Islamic law, as an effect of the divine will (*ḥukm*), establishing a valid distribution of properties in worldly transactions (*al-mu'āmalāt*).

More precisely, the paper explains how, in the Islamic theory of justice (*'adl*), any 'right', *ḥaqq*, holds a 'material' substance and a constant 'volume', and the contract (*'aqd*) constitutes a means to promote social justice through a correct distribution of legal entitlements (*ḥuqūq al-'aqd*) (Section 2).

Since the contract is aimed at establishing an equilibrium, when some parts of these 'rights' (*ḥuqūq*) are not in the correct/due/just place, the necessity of returning them to where they should be arises; thus, the prohibitions of *ribā*, *gharar* and *maysir* can be explained as a consequence of the conceptualisation of *ḥaqq*, requiring a *quantitative* and *qualitative equilibrium* of the counter-values for the validity of the transaction (Sections 3 and 4).

Section 5 concludes, underlining the advantages of this interpretation.

2 Islamic justice (*'adl*): understanding the 'right' (*ḥaqq*) as a result of the divine decree (*ḥukm*)

According to Santillana, in Islām "every question of law is also a matter of conscience, and jurisprudence is based on theology" (Santillana, 1926, p.5). Thus, the Islamic theory of justice (*'adl*) reflects the cultural postulates of Islamic religion, upholding the absolute sovereignty of God in creating the reality: "To Him is due the primal origin of the heavens and earth. When He decreeth a matter, He saith only 'Be', and it is" (Q. II:117).² "The universe does not subsist unless by an eternal creation. There is no laws in

the nature; everything depends, in any instant, on the completely free Will of God” (Chehata, 1965, pp.7, 8); “... everything that occurs, does occur necessarily, but not because in and of itself it must. It occurs necessarily because of God’s prior decree and volition” (Ormsby, 1984, pp.195, 196). At the same time, while God is the only Creator, human beings become responsible by ‘acquiring’ (*kasb, iktisāb*), ‘performing’ the action created by God (Gimaret, 1980; Watt, 1985; Frank, 1983).

The complementary truths of God’s omnipotence and human responsibility, find their joint element in the Revelation of the *Sharī‘ah*,³ the true Guidance: “Indeed, for the Muslim the whole religion itself is in a very real sense a synonym of God’s guidance: Islām is “being rightly guided”” (Netton, 1989, pp.24, 25). The Guidance rests on the recognition of the absolute sovereignty of God’s ruling (*ḥukm*, pl. *ahkām*), to the extent that “the phrases *lā ḥukma illā min allāh* (“Every rule of law is from God”) and *al-ḥākim huwa allāh* (“God is the Lawgiver”) appear throughout the writings [of the whole] of Muslim jurisprudence” (Weiss, 2006, p.36).

Linked to the eternal creation, the divine ‘decree’ (*ḥukm*, from the Arabic root *H-K-M*, “legal consequence of the facts of a case”: Wehr, 1994) enjoys an ontological status, where the ‘rights’ (*ḥuqūq*, sing. *ḥaqq*) become the means thanks to which God *realises* (in the sense of ‘making real, true’) the status established in the rule (*ḥukm*).

Stemming from the Arabic root *H-Q-Q*, “the primary meaning of *ḥaqq* is ‘established fact’ or ‘reality’ (*al-mawjūd al-thābit*), [but] in the field of law its dominant meaning is ‘truth’ or “that which corresponds to facts”. Both meanings are equally prominent, so much that some lexicographers consider the second meaning to be the primary one” (Kamali, 1993, p.342).

“The word *ḥaqq*, in the sense of ‘something legal, true, right, real’ is constant in the pre-Arabic poetry [...]; it appears also, with the sense of ‘truth’ in the proverbs of Arab people. [...] The primitive sense of *ḥaqq* is ‘established fact’ (*al-thābit ḥaqqīqat^m*), from which ‘reality’, and the sense: ‘that corresponds to the facts’, from which ‘truth’ is secondary; its antonym is *bāṭil* (in the two meanings). [...] “*Ḥaqq*, in the first sense, is one of the names of God ..., and it appears several times in the Qur’ān with this meaning, opposed to *bāṭil* [...]. But the usage of *ḥaqq* in the Qur’ān, in the Islamic traditions ... and in the Arabic literature in general is not limited to the divine name; it can designate all the ‘reality’, every ‘fact’, all the ‘truth’; thus, the features of the Last Judgement, of the Paradise and the Hell are *ḥaqq*. Another meaning of *ḥaqq* (pl. *ḥuqūq*), deriving directly from the first sense, is ‘demand’ or ‘right’, as legal obligation ...; this usage of the term is already utterly developed in the Qur’ān. [...] To sum up, the meanings of the root *H-Q-Q*, from that of the ‘carved’ statute, valid and permanent, have extended to the ethical concepts of legal and real and right and true, and developed till including the divine and spiritual reality.” (Macdonald [Calverley], 1975)

Describing the Islamic theory of justice, Geertz recognises that the *ḥaqq* embodies

“a conception that anchors a theory of duty as a set of sheer assertions [that communicated in the *Sharī‘ah*]... in a vision of reality as being in its essence imperative, a structure not of objects but of wills. The moral and ontological change places, at least from our point of view. It is the moral, where we see the ‘ought’, which is a thing of descriptions, the ontological, for us the home of the ‘is’, which is one of demands. [...]

The 'real' here is a deeply moralised, active, demanding real, not a neutral, metaphysical 'being', merely sitting there awaiting observation and reflection; a real of prophets not philosophers. [...]

This connection is made ... by the word itself. For at the same time as it means 'reality', 'truth', 'actuality', 'fact', 'God', and so on, it, or this being Arabic, morphophonemic perpetuations of it, also means a 'right' or 'duty' or 'claim' or 'obligation', as well as 'fair', 'valid', 'just' or 'proper'." (Geertz, 1983, pp.187, 188)

In a nutshell, "in Islamic legal sensibility, to determine the empirical situation is to determine the jural principle. Facts, in other words, are normative; there is no fact/law dichotomy." (Merry, 1988, p.886)

In this way, the performance of a valid act by the agent (the Muslim servant) gives rise to a new setting of *ḥuqūq* ('rights', sing. *ḥaqq*). But, at the same time, any 'right' depends only from God, and God's pity guarantees the just allocation of entitlements for all the mankind: thus, the 'right' of an individual is not in 'competition' with those of others: since they both represent the (same) manifestation of God's Will, they are not "separate portions of universal justice", but, according to a monistic conception which does not conceive a (separate) justice of men distinguished from the justice of God, "shares of the unique, divine, justice".

In other words, God, the only Ruler and Beholder of any justice, defines any *ḥaqq*, which is not the 'right' of a single person, but (both) the right and the obligation, which make sense "only within the *unity* of the two 'elements' [...]. the *ḥuqūq* are not the 'rights' and 'obligations' that serve to connect autonomous elements ... [they] do not *face* (or should we say *oppose*)" (Smirnov, 1996, p.345), but represent the fundamental legal structure of any valid transaction. In this way, the principle of "giving what is due to the just holder" is perceived in the Islamic tradition as 'establishing the right (*ḥaqq*) in its [due/right/just] place (*makān*)' (*taqrīr al-ḥaqq makāna-hu huwa al-'adl*) (Ḥamid al-Dīn al-Kirmānī, d. 1020 A.D.):

"a right is a sort of substance that has a constant volume, of which some parts may happen to be not where they belong, not in the due place; and justice means the necessity of returning them to where they should be. It is not at all by chance that the definition of justice already cited mentions 'establishing the right (*ḥaqq*) in its [due] place': each of the rights due has its own 'place' (*makān*)." (Smirnov, 1996, p.344)

"Alluding to the archetype of the scale, one may say that Western thinking is concerned with the pans of the scales and their contents, while for classical Islamic thought the stress lies on the central balancing pivot. It is making one equal to the other (equality between two necessarily *separate* entities) that is important in the first case, and theoretical discussion tries to determine the accuracy of this equalising and to find the *only* true (always the *one*) decision. In the second case it is the fact of balancing the opposites that is important, this balance being reached by means of the centring and mediating pivot; the theoretical task is to find out how the two might be linked to form a balanced unity and what the conditions are for such a linkage." (Smirnov, 1996, pp.346, 347)

Hence, the ‘materiality’ of the *ḥaqq*, as outlined above, explains why

- The enforceability of the contract (‘*‘aqd*’) requires a constant reference to something existent and certain, either as a specific thing (‘*‘ayn*’) or debt (‘*‘dayn*’).
- *Ḥaqq* always denotes “a beneficiary; a participant in a business deal; a legitimate ‘property right’ share in something, such as a profit, a bundle of goods, a piece of real estate, an inheritance, or an office” (Geertz, 1983, p.189).
- Since the correct distribution of goods is guaranteed by God, legal entitlements (‘*ḥuqūq*’) are not products of human wills (“a power conferred to the person”, like in civil and common laws, Chehata, 1973, p.179), but ‘concrete’ entities, whose ‘place’ is compliant with the *ḥukm*: they are, in other terms, entitlements to concrete property (‘*māl*’), either ‘*‘ayn*’ or ‘*‘dayn*’. As Smirnov (1996) points out, “what is meant is not ensuring the freedom of the subjects of rights, but ensuring something real for the person” (p.344).

In this remarkable materiality,

“the decisive element of the legal relation lies in the object. The object takes place between the two persons who enter into the relationship through it. This relationship, of which the object is the specific term, is constituent of the right. The title that founds the right of the subject is the reason which establishes a link of belonging between him and the object. Once this relationship has been concretely realised, a state of adjustment and of equilibrium has to rule: everything in its [due] place.

The subject ruled by Law is certainly obliged towards the other party but his obligation has no other object than the thing or the act which are due. He is less tied to the other party than obliged towards an objective performance.

The presence of an object between the contracting parties is the feature of the contractual relationship. It gives to the contract its objective nature: through it the concrete realisation of the effects of the contract establishes not only an equilibrium among the persons, but it creates a ‘state of things’ [settlement of entitlement], a social state properly said.” (Chehata, 1968, p.141)

3 From the archetype of the scale to the prohibition of *ribā*

The concept of *ḥaqq*, whose nature depends on God’s Will (‘*ḥukm*’), and the centrality of the object in Islamic scholarship clarify the prohibitions of

- ‘increase’, ‘(unlawful) addition’, ‘growth’ (‘*ribā*’, usually rendered with ‘interest’ or ‘usury’)
- ‘uncertainty’ (‘*gharar*’, also ‘risk’, ‘hazard’, ‘speculation’)
- ‘gambling’ (‘*maysir*’ or ‘*qimār*’).

The centrality of a ‘balanced’ subject matter for any valid ‘*‘aqd*’ implies, in fact, the need for an *equivalence of the counter-values*, which is expressed by the prohibition of ‘increase’, ‘addition’ (‘*ribā*’).

“Broadly, Islamic law finds the binding force of a contract in the notion of equivalence of performances. Therefore, contracts containing reciprocal obligations are the only ones which are wholly irrevocable. The gift is essentially revocable. The same applies to the loan of a movable or an immovable, partnership, bailment and gratuitous agency. It is this notion of mutuality which explains the Islamic theory of interest. Interest of any kind, at any rate whatever, whether for a loan or in any other circumstance is prohibited, so to speak, by definition.” (Chehata, 1970, p.140)

In this regard, the passages of the Qur’ān and the *sunna* regarding *ribā* may be interpreted in relation to the framework of the *ḥaqq*, as the pivotal structure of Islamic scholarship.

In the Qur’ān, the fundamental provisions can be found in the second *sūra*, verses 275–281, and particularly in the passage related to the opposition of trade and *ribā* (“Allāh hath permitted trade and forbidden usury (*ribā*)”, Q. II : 275):

(275) “Those who devour usury will not stand except as stands one whom the Evil One by his touch hath driven to madness. That is because they say: “Trade is like usury”, But Allāh hath permitted trade and forbidden usury. Those who after receiving direction from their Lord, desist, shall be pardoned for the past; their case is for Allāh (to judge); but those who repeat (the offence) are Companions of the Fire: they will abide therein (for ever)”. (276) “Allāh will deprive usury of all blessing, but will give increase for deeds of charity: for He loveth not creatures ungrateful and wicked”. (277) “Those who believe, and do deeds of righteousness, and establish regular prayers and regular charity, will have their reward with their Lord: on them shall be no fear, nor shall they grieve”. (278) “O ye who believe! Fear Allāh, and give up what remains of your demand for usury, if ye are indeed believers”. (279) “If ye do it not, take notice of war from Allāh and His apostle: but if ye turn back, ye shall have your capital sums: deal not unjustly, and ye shall not be dealt with unjustly”. (280) “If the debtor is in a difficulty, grant him time till it is easy for him to repay. But if ye remit it by way of charity, that is best for you if ye only knew”. (281) “And fear the Day when ye shall be brought back to Allāh. Then shall every soul be paid what it earned, and none shall be dealt with unjustly.”

While Yusuf ‘Ali (1975) interprets Q. II : 275 as: “That is because they say: “Trade is like usury” (*albayāu mithlu al-ribā*), but Allāh hath permitted trade and forbidden usury (*waahalla Allāhu albayāa waharrama al-ribā*)”, the literal translation is: “That (is) because they said: “But the selling/trading (is) equal/similar/alike (to) the addition/increase/growth”, and God permitted/allowed the selling/trading and forbade the addition/increase/growth”. The literal meaning should be probably maintained (as we will see later on), since it is more related to the (Islamic) idea of ‘addition’/‘increase’, rather than to the (Western) idea of ‘usury’ or ‘interest’.

Other relevant passages are the following ones:

“ye who believe! Devour not usury [again, better addition/increase/growth], doubled and multiplied; but fear Allāh; that ye may really prosper.” (Q. III:130)

“That they took usury [addition/increase/growth], though they were forbidden; and that they devoured men’s substance wrongfully; – We have prepared for those among them who reject Faith a grievous punishment.” (Q. IV:161)

“That which ye lay out for increase through the property of (other) people, will have no increase with Allāh: but that which ye lay out for charity, seeking the countenance of Allāh (will increase): it is these who will get a recompense multiplied.” (Q. XXX:39)

As far as the *sunna* is concerned, it is reported that the Prophet said:

“*Ribā* is of 73 types. The least of them is like a man having sexual intercourse with his mother.” (*Ibn Mādjā; Hākim*)

“The Messenger of God cursed the one who consumes *ribā*, the one who makes it be consumed, its inscribed, its two witnesses.” (*Muslim; Bukhārī*)

“Gold for Gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, like for like, equal for equal, hand to hand. If these types [*asnāf*] differ, then sell them as you wish, if it is hand to hand.” (*Muslim*)

From these textual references, the *fuqahā'* individuate a *ribāwwi* transaction in any unbalanced distribution of legal entitlements, depending either on actual inequality (*tafāḍul*) or on delay (*nasā'*, *nasī'a*, *nazira*), both considered from a quantitative standpoint.

Thus, in the case of immediate exchange (e.g., contract of *ṣarf*, monetary exchange; barter), the quantitative values have to be identical, and immediate on both the sides of the transfer of possession, in order to avoid any *ribā* of excess, *ribā 'l- faḍl*. In case of a future exchange, or vice-versa, any unjustified delay in the performances is forbidden as *ribā 'l- nasī'a*, *ribā* of delay.

The prohibition of *ribā 'l- faḍl* is based on the *ḥadīth*

“Gold for Gold, silver for silver, wheat for wheat, barley for barley, dates for dates, and salt for salt; like for like, hand to hand, in equal amounts; and any increase is *ribā*” (*Muslim*)

and confirmed by a second *ḥadīth*:

“Bilāl visited the Messenger of God with some quality dates, and the Prophet inquired about their source. Bilāl explained that he traded two volumes of lower quality dates for one volume of higher quality. The Messenger of God said “this is precisely the forbidden *ribā*! Do not do this. Instead, sell the first type of dates, and use the proceeds to buy the other.” (*Muslim*)

In the context of credit transactions, the *fuqahā'* insert also the *ribā al-jahiliyya* (pre-Islamic *ribā*), occurring when the giver offers the taker two alternatives at the maturity date: to settle his debt (*dayn*) or to increase it by double. This was a customary practice in the pre-Islamic era, which found direct prohibition in Q. III:130 (see above).

With reference to *ribā*, El-Gamal (2000) argues that the ban is not based on the avoidance of exploitation of poor debtors, as commonly argued by the supporters of the moral approach to Islamic finance, neither it corresponds to the well-known prohibitions of ‘usury’ or ‘interest’, as historically shaped within the Western legal tradition.

In particular, El-Gamal challenges the translation of the verses. Q. II:278-279 by Yusuf ‘Ali (1975):

(278) “O ye who believe! Fear Allāh, and give up what remains of your demand for usury, if ye are indeed believers.”

(279) “If ye do it not, take notice of war from Allāh and His apostle: but if ye turn back, ye shall have your capital sums: deal not unjustly, and ye shall not be dealt with unjustly.”

“Thus, the English reader who is not familiar with the end of verse 279 “*lā tazlimūna wa lā tuzlamūn*”, reads this translation as a proof that the (sole?) objective served by the prohibition of *ribā* is the avoidance of injustice (in the sense of exploitation of the poor debtor by the rich creditor). However, the meaning of the end of the verse – as explained by ‘Abū Ja‘far, ‘Ibn Abbās, and others ... – is much closer to: “if you turn back, then you should collect your principal, without inflicting or receiving injustice”. The exegetes ... then explain “without inflicting or receiving injustice” as “without increase or diminution”, where both an increase or a decrease of the amount returned relative to the amount lent would be considered injustice.

If we ponder this standard explanation, we see that ‘injustice’ here is a symmetric relation, which depends only on the lent sum and *not* on the relative wealth of the parties, or their respective positions as creditor and debtor. In other words, the ‘injustice’ mentioned here is economical: there is no valid justification for any given increase or diminution, thus such increase or diminution lends itself to injustice.” (El-Gamal, 2000, p.3)

Against the moral interpretation of *ribā* and the mistaken one-to-one rhetorical association of *ribā* with interest, El-Gamal (2006, p.51) underlines the existence of forms of implied ‘interest’ which are *not* the forbidden *ribā* (e.g., the mark-up clause in the contract of *murabāhah*; the fixed rate of return as rent in the lease, *ijārah*), while, at the same time, *ribā ‘l- faḍl*, not involving any temporal element of deferment, since it is related to immediate exchange, cannot be linked to the time-factor of the (Western) ‘interest’/‘usury’.

Thus, the correct understanding of the prohibition of *ribā* is found by El-Gamal (2006, pp.52, 53) in the following analysis by the Mālikī jurist, judge and philosopher Ibn Rushd (Averroës):

“It is thus apparent from the law that what is intended by the prohibition of *ribā* is the excessive inequity it entails. In this regard, equity in certain transactions is achieved through equality. Since the attainment of equality in exchange of items of different kinds is difficult, we use their value in monetary terms. Thus, equity may be ensured through proportionality of value for goods that are not measured by weight and volume. Thus, the ratio of exchanged quantities will be determined by the ratio of the values of the different types of goods traded. For example, if a person sells a horse in exchange of clothes ... if the value of the horse is 50, the value of the clothes should be 50. [If the value of each piece of clothing is five], then the horse should be exchanged for ten pieces of clothing.

As for [fungible] goods measured by volume or weight, equity requires equality, since they are relatively homogenous, and thus have similar benefits. Since it is not necessary for a person owning one of those goods to exchange it for goods of the same type, justice in this case is achieved by equating volume or weight, since the benefits are very similar.”

In the first section, ‘equity’/‘equality’ is achieved through the proportionality of monetary values, and the efficiency of the exchange is dictated following a mark-to-market approach to establishing trading ratios; the second section, dealing with fungibles, identifies equity directly with equality in volume or weight, and avoidance of unnecessary exchanges (that should be replaced by trading to the ratio of market prices).

In both cases the prohibition of *ribā* entails an *excessive injustice* in the *exchange*, which may reduce the efficiency of the transaction, since just prices and trading ratio are those which maximise allocative efficiency. In the end, the rationale of *ribā* rests on providing a ‘fair compensation’ for the values provided by each contracting parties, realising a *quantitative equilibrium*, which is not based on the avoidance of exploitation of the poor, but “obtained by fairly compensating each party for value of its goods as determined by the marketplace” (El-Gamal, 2000, p.7). Hence, the prohibition of *ribā* is animated by a rationale of efficiency, and not of morality.

The argument finds further support, from a juristic standpoint, in the previous conceptualisation of the ‘right’ (*ḥaqq*) as “a sort of substance that has a constant volume, of which some parts may happen to be not where they belong, not in the due place; and justice means the necessity of returning them to where they should be” (Smirnov, 1996, p.344).

The metaphor of the scale clarifies the concept of *ribā* in the following terms: any *ḥaqq* cannot be legally valid without the maintenance of an instantaneous equilibrium between its two sided; this implies a ‘symmetric relation’, an ‘equality’, a ‘proportionality of value’, where any increase or decrease implies injustice and inefficiencies, independently of the relative wealth of the parties, or their positions of creditor or debtor.

Therefore, in the case of an immediate exchange (*ribā 'l- faḍl*, *ribā* of excess), any (unlawful) ‘increase’, ‘addition’ (*ribā*) on the one pan is responsible for a defective legal structure, in the sense of ‘unlawful addition’ as *quantitative inequality*. Moreover, this equilibrium must be guaranteed also in deferred transfers of properties, any unlawful addition (*ribā*) due to a delay, being responsible, again, for a defective *ḥaqq* (*ribā 'l- nasī'a*, *ribā* of delay). From this perspective, *ribā al-jahiliyya* becomes particularly deplorable, since it combines quantitative inequalities both because of a delay and because of an imbalanced restitution.

Finally, the juridical interpretation of *ribā* as efficient equilibrium in the counter-values, supported in this paper, is also confirmed by the classical jurist al-Kāsānī (d. 1189 A.D.), who indicates the aim of the contracting parties in the equality of the reciprocal commitments:

“Equality ... is the aim of the contracting parties (*al-musāwāt ... matlūb al-'āqidayn*) ... The entirety of the sold object is to be considered equivalent to the entirety of the price (*kull al-mabī'yu 'tabar muqābalan bi-kull al-thaman*), and the entirety of the price equivalent to the entirety of the sold object. Any increment (*ziyāda*), whether in price or in the object which has no corresponding equivalent, would be an additional value without compensation ..., and this is the meaning of usury (*ribā*).”

Moreover, it matches with the definition of *ribā* given by Saleh (1992):

“*Ribā*, in its *Sharī'ah* context, can be defined, as generally agreed, as an unlawful gain derived from the quantitative inequality of the counter-values in any transaction purporting to effect the exchange of two or more species (*anwa'*, sing. *naw'*), which belong to the same genus (*jins*) and are governed by the same efficient cause (*'illa*, pl. *'ilal*). Deferred completion of the exchange of such species, or even of species which belong to different genera but are governed by the same *'illa*, is also *ribā*, whether or not the deferment is accompanied by an increase in any one of the exchanged counter-values.

That being the case, usurious transactions were classified into two categories:

- a *ribā 'l- faḍl* [*ribā* of excess], which is produced by the unlawful excess of one of the counter-values as described above
- b *ribā 'l-nasī'a* [*ribā* of delay], which is produced by delaying completion of the exchange of the counter-values, as also described above, with or without an increase or a profit" (p.16).

4 Uncertainty in the distribution of *ḥuqūq al-'aqd* and the prohibitions of *gharar* and *maysir*

Dealing with the prohibitions of *gharar* and *maysir* (*al-qimār*), it must be stressed that a defective *ḥaqq* may also depend on

- A the undetermined content of the pans of the scale, due to the ignorance (*jahāla*) on any material aspect of the transaction or the non-existence ('*adam*) of the object (*gharar*)
- B the consensual agreement on gambling or aleatory contract (*maysir*).

With reference to the concept of *gharar*, Kamali (1999) underlines that

“literally meaning fraud (*al-khid'a*), *gharar* in transactions has often been used in the sense of risk, uncertainty and hazard. [...] *Gharar* ... includes both ignorance over the material attributes of the subject matter and also uncertainty over its availability and existence. Al-Sarakhsī has thus stated that *gharar* in a contract or transaction exists when its consequence are hidden and unknown to the contracting parties (*al-gharar mā yakūnu mastūr al-'aqibah*)” (p.200).

In this regard, the term *gharar*, usually translated as ‘risk’, can be probably better understood as related to a ‘danger of loss’, in accordance with the semantic root *GH-R-R*, ‘to deceive’, ‘to mislead’: *gharar*, then, is ‘risk’, ‘hazard’, ‘jeopardy’, ‘danger’, ‘peril’. And, in fact, *tadlīs* (=cheating in trade) and *ghabn* (=fraud and deception) are among the categories of *gharar*.

However, the positions of the scholars on the point are divergent: while El-Gamal (2001) translates *gharar* with ‘risk’ and, correspondingly, *bay' al-gharar* with ‘trading in risk’, Zahraa and Mahmor (2002) point out that “the Arabic word *al-gharar* means danger (*al-khatar*), that denotes the exposure to perish without prior knowledge” (p.385) and refer to Al-Sarkhasī, Al-Shīrādhī and Al-Ramlī, who define *gharar* as “what the consequence of which is hidden or unknown” (*mā kāna mastūr al-'āqibah*).

While the term *gharar* does not appear in the Qur'ān, the Sunna reports that the Prophet “forbade the sale of an escaped slave or animal, the sale of a bird in the air or a fish in the water, the sale of what the vendor is not in a position to deliver, [...] the sale of the young still unborn when the mother is not part of the sale, the sale of milk in the udders and the sale of the stallion’s sperm” (Saleh, 1992, p.106), because of the fear of *gharar*.

Numerous *ahādīth* relate to the matter:

“The Prophet has forbidden the sale in which uncertainty (*gharar*) exists.”
(*Muslim; Ibn Mādja; Abū Dawūd; Al-Tirmidhī*)

“The Prophet forbade sale of ... the ‘stroke of the diver’ [*darbat al-ghā’is*, apparently, sale in advance of the yield of a diver’s stroke, whatever it was].”
(*Ibn Mādja*)

“Do not buy fish in the sea, for it is *gharar*.” (*Ibn Ḥanbal*)

“The Prophet forbade sale of what is in the wombs, sale of the contents of their udders, sale of a slave when he is runaway, ...” (*Ibn Mādja*)

“[T]he Prophet forbade the sale of grapes until they become black, and the sale of grain until it is strong.” (*Bukhārī; Muslim; Abū Dāwūd; Tirmidhī*)

“Whoever buys foodstuffs, let him not sell them until he has possession of them.” (*Bukhārī*)

“The Messenger of God forbade the [sale of] the copulation of the stallion.”
(*Bukhārī*)

“He who purchases food shall not sell it until he measures it [*yaktālahu*].”
(*Muslim*)

Differently from *gharar*, we find a direct reference to *maysir* in the Qur’ān:

“O ye who believe! Intoxicants and gambling [games of chance: *maysir*], (dedication) of stones, and (divination by) arrows, are an abomination, – of Satan’s handiwork: eschew such (abomination), that ye may prosper”. “Satan’s plan is (but) to excite enmity and hatred between you, with intoxicants and gambling, and hinder you from prayer: will ye not then abstain?” (Q. V:90–91)

According to some commentators, the verses refer to a complex game played at the time of the Prophet, by which lots were drawn for parts of a slaughtered camel with those who lost paying for all its cost; in this sense, Wehr (1994) describes *maysir* as “an ancient Arabian game of chance (forbidden by the Qur’ān) played with arrows without heads and feathering, for stakes of slaughtered and quartered camels”. The majority of the scholars, anyway, believe that the term *maysir* describes gambling in general. In the *sunna* the word *qimār* (from the root *Q-M-R*, ‘to gamble’) is more common, with the same meaning. For instance, it is narrated that the Prophet said: “Whosoever says to another: “come let’s gamble” should give in charity [as a form of expiation for intending to gamble]” (*Bukhārī*).

Once again, the doctrines of *gharar* and *maysir*, usually depicted as evidence of the moral nature of Islamic finance and law, find an alternative interpretation within the logic of *ḥaqq*.

In all the cases on *gharar*, in fact, the lack of sufficient knowledge on the contractual subject matter deprives the parties of the necessary *certainty* to enter the transaction and being consciously responsible for their actions. In other terms, the *‘aqd* is deprived of the full disclosure on the *ḥaqq* to which it refers; therefore, its consequences are hidden and potentially dangerous for both the contracting parties, independently from their respective wealth/danger of being exploited.

Thus, according to Saleh (1992) “all sorts of transactions where the subject-matter, the price or both, are not determined and fixed in advance [lack of disclosure], are under a suspicion of *gharar* according to *Sharī‘ah* standards” (p.63). After the examination of

the explanatory examples and definitions reported by the traditions of each School, he concludes that

“observance of the following three rules should, in principle, avert *gharar* in any given transaction:

- a there should be no want of knowledge (*jahl*) regarding the existence of the exchanged counter-values
- b there should be no want of knowledge (*jahl*) regarding the characteristics of the exchanged counter-values or the identification of their species or knowledge of their quantities or of the date of future performance, if any
- c control of the parties over the exchanged counter-values should be effective.” (Saleh, 1992, p.66)

The level of abstraction and uncertainty becomes even higher in the case of aleatory transactions (prohibition of *maysir*), which are functionally directed to a random distribution of properties among the contracting parties, with a likely disequilibrium in the final setting of entitlements, and unconsciousness on the *ḥuqūq al-‘aqd*. Determining the rise of doubts on the factual existence and the equality on the distribution of properties, contracts affected by *maysir* are deemed void, inexistent, null (*bāṭil*).

As argued for the prohibition of *ribā*, the logic behind *gharar* and *maysir* is objective and not morally-oriented: their bans, in fact, appear as requirements related to the contractual object, i.e., to the *certainty* of the subject matter and the equilibrium of *ḥaqq*, and not instruments to promote the protection of the poor in the exchange.

From this standpoint, whereas the prohibition of *ribā* may be interpreted in relation to the *quantitative equilibrium* of the counter-values, those of *gharar* and *maysir* seem to be linked to a *qualitative equilibrium* due to the *lack of uncertainty* on the *object*.

5 Conclusions: equality in the ‘*aqd* and Islamic finance

The paper has outlined the prohibitions of *ribā*, *gharar* and *maysir* in relation to the concept of *ḥaqq*. This approach inserts the bans in their *own* normative context, the cultural postulates of Islamic law, distinguishing the notion of *ribā* (as any unjustified increase for which no compensation is given) from the Western concepts of ‘interest’ or ‘usury’, and specifying the concepts of *gharar* and *maysir* from the notions of ‘risk’ and ‘gambling’.

In this way, the reason of the ‘*aqd* is found in the juridical requirement of a *quantitative and qualitative equilibrium*, which represents an alternative (and more tenable) understanding of the moral interpretation of Islamic contract law, still prevalent in academic literature.

In fact, the major shortcoming of the moral approach to Islamic finance and law is that it risks promoting a confusion of the logic of Western civil and common law (where the rights are ‘powers conferred to the person’ – a conception derived from Christian ethics) and Islamic *fiqh* (where the *ḥaqq* is a product of the divine *ḥukm*).

On the contrary, Islamic contract law has to be necessarily contextualised *within* its own juristic ethics, where values have no objective existence that can be perceived by human reason, but are whatever God commands in his *ḥukm* (“the [moral] end of [human] action is to serve God”, Ibn Ḥanbal proclaims).

These values are realised in the *ḥaqq*, and specified in the prohibitions of *ribā*, *gharar* and *maysir*, which represent a logical consequence of a conception of justice where ‘rights’ do not compete one against the other, like in the Western tradition, but are ‘shares’, ‘portions’ of the unique, divine justice, according to an ontological status of the action to which human beings should adhere.

Only within these cultural postulates, does the equivalence of the performances as the condition of enforceability of the *‘aqd* show its deepest root: the conceptualisation of the *ḥaqq* as the fundamental structure of the Islamic normative discourse (*‘adl*), specified in the quantitative (*ribā*) and the qualitative (*gharar* and *maysir*) equilibrium of the counter-values.

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Notes

¹In the text, I use *fiqh* (lit. 'understanding') as synonymous of 'Islamic law' or 'Muslim law'.

²Parallel texts in Q. III:47, 59; VI:73; XVI:40; XXXVI:82; XL:68.

³Literally 'the road leading to water', the Way, the Path.