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GHARAR

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Norms Relating to Gharar

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The Arabic word *gharar* means risk, uncertainty, and hazard. Unlike *riba*, *gharar* is not precisely defined. *Gharar* is also considered to be of lesser significance than *riba*. While the prohibition of *riba* is absolute, some degree of *gharar* or uncertainty is acceptable in the Islamic framework. Only conditions of excessive *gharar* need be avoided.

The concept of *gharar* has been broadly defined by the Islamic scholars in two ways. First, *gharar* implies uncertainty. Second, it implies deceit. The Quran has clearly forbidden all business transactions, which cause injustice in any form to any of the parties. It may be in the form of hazard or peril leading to uncertainty in any business, or deceit or fraud or undue advantage. Apart from the above simplistic definition of *gharar*, some definitions of *gharar* seem to have a parallel in the concept of uncertainty in conventional finance. *Gharar* is defined by the Hanafi jurist al-Sarakhsi as any bargain in which the result of it is hidden. Ibn Juzay, the well-known Maliki jurist provides a list of ten cases, which constitute, in his view, cases of forbidden *gharar*. These cases are described as follows:

- a. Difficulty in putting the buyer in possession of the subject-matter; such as the sale of stray animal or the young still unborn when the mother is not part of the sale.
- b. Want of knowledge (*jahl*) with regard to the price or the subject matter, such as the vendor saying to the potential buyer: "I sell you what is in my sleeve."
- c. Want of knowledge (*jahl*) with regard to the characteristics of the price or of the subject-matter, such as the vendor saying to the potential buyer: "I sell you a piece of cloth which is in my home." or the sale of an article without the buyer inspecting or the seller describing it.
- d. Want of knowledge (*jahl*) with regard to the quantum of the price or the quantity of the subject-matter, such as an offer to sell "at today's price" or "at the market price."
- e. Want of knowledge (*jahl*) with regard to the date of future performance such as an offer to sell when a stated person enters the room or when a stated person dies.
- f. Two sales in one transaction, such as selling one article at two different prices, one for cash and one for credit, or selling two different articles at one price, one for immediate remittance and one for a deferred one.
- g. The sale of what is not expected to revive, such as the sale of a sick animal.
- h. *Bai al-hasah*, which is a type of sale whose outcome is determined by the throwing of stones.
- i. *Bai munabadha*, which is a sale performed by the vendor throwing a cloth at the buyer and achieving the sale transaction without giving the buyer the opportunity of properly examining the object of the sale.
- j. *Bai mulamasa*, where the bargain is struck by touching the object of the sale without examining.

From the above, it is clear that *gharar* does not have a single definition and is a fairly broad concept. Below we attempt to classify the various expositions of *gharar* into several categories.

Settlement Risk

Traditional explanations of *gharar* are often in terms of settlement risk (also called counterparty risk in conventional parlance). Such risk is seen to be present when the seller has no control over the subject matter. A typical example is a sale without taking possession. This follows from the following hadith.

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Ibn Abbas reported Allah's Messenger (pbuh) as saying: He who buys food grain should not sell it until he has taken possession of it. Ibn Abbas said: "I regard every thing as food (so far as this principle is concerned)."

Based on the above, some traditional authors defined *gharar* as arising due to non-existence of the subject matter of exchange. This line of reasoning was questioned by others who argued that *gharar* is present when the seller is not in a position to hand over the subject matter to the buyer, irrespective of whether this is in existence or not. The reason for the prohibition of *gharar* is the risk or uncertainty, which casts a shadow on the delivery of subject-matter and settlement of the contract, rather than the non-existence of the subjectmatter. This definition of *gharar* is consistent with the permissibility of the contract of *salam* or advance sale by Shariah, which involves sale of a nonexistence object. A *salam* sale, however, requires several conditions to be met that ensure timely delivery of the subject matter even if it is non-existent at the time of contracting.

Jurists have enumerated the following cases to highlight the existence of *gharar*.

Sale of fish in the water: The sale of fish in the water, which is not yet caught is null and void as it is not in a state of property. Also the sale of a fish which the vendor may have caught and afterwards thrown into a large pond from which it cannot be taken without difficulty is null and void, because here the delivery is impractical.

Sale of a bird in the air: The sale of a bird in the air or of one which after having been caught is again set at liberty is null, because in the one case it is not property and in the other the delivery is rendered impractical.

Sale of catch by a game catcher: It is not lawful for a game catcher to sell what he may catch at one pull of his nets, because the subject of the sale contains elements of *gharar*. He may or may not catch anything at all.

In all above cases, *gharar* is synonymous with settlement risk when the latter is excessive.

Inadequacy and Inaccuracy of Information

Uncertainty may be caused by lack of adequate value-relevant information (*jahl*). The ahadith of the Prophet (pbuh), which elaborate upon *gharar* owing to doubt and uncertainty due to lack of information, are as follows.

- Sale of fetus in the womb: Ibn Umar reported that the people of pre-Islamic days used to practice *habal-al-habala*, which implies that a man would buy the unborn offspring of a she camel. Allah's Messenger (pbuh) forbade that transaction.
- *Bai al-mulamasah* and *bai al-munabadhah*: Abu Hurayrah reported that two types of transactions had been forbidden by Prophet; *al-mulamasah* and *al-munabadhah*. As far as *mulamasah* transaction is concerned it is that when a man can feel a garment but is not allowed to unfold it or examine what is in it, or he buys by night and does not know what is in it and *munabadhah* is that a man throws his garment to another and the other throws his garments without either or them making any inspection.

Based on the above, scholars of fiqh have described *gharar* as involving want of knowledge (*jahl*) with regard to the price, the subject matter, or with regard to the characteristics of the price or of the subject-matter, the date of settlement of contract etc.

Gharar also refers to possibility of deceit, fraud, which may be due to deliberate withholding of value-relevant information by either party in a contract. The Quran warns against possibility of fraud and deceit. It states:

- (He has enjoined on you) that you use full measure and a just balance. We charge every person only with a much responsibility as he can bear. (6:152).
- Woe to those who deal in fraud, who when they take their measure from others take it fully, and when they measure or weigh for them give less than what is due. (83: 1-3).

- (Shuayb said) “And O my people! Give just measure and weight, nor withhold from the people the things that are their due. Commit not evil in the land with intent to do mischief, that which is left for you by Allah is best for you if you are believers.” (11: 85-86)

It is therefore, clear that a business transaction in which either of the parties has an intention to deceive is forbidden by the Quran. In conventional financial parlance, the parties to a contract must make accurate and adequate disclosure of all value-relevant information. There are also clear prohibitory commandments by the Prophet (pbuh) with regard to fraud and deceit (*gharar*) in business transactions.

- The Prophet (pbuh) passed by a man who was selling grain. He asked him “How are you selling it?” The man then informed him. The Prophet (pbuh) then put his hand in the heap of grain and found it was wet inside. Then he said, “He who deceives other people is not one of us.”
- The Prophet (pbuh) said, ‘When you enter into a transaction, say ‘there should be no attempt to deceive.’”

Examples of such sale mentioned in the hadith are as follows.

- Sale of Milk in the Udder: The Prophet (pbuh) said: “Do not retain milk in the udders of a camel or goat so as to exaggerate its yield. Anyone who buys a musarraah has the choice, after having milked it, to return it with a measure of dates.”
- Najash Sale: The Prophet (pbuh) said, “Do not go in advance to meet the traveling grain dealers to buy their goods, nor should one of you sell over the head of another nor increase the price to excite another to buy najash.”

The above situations and conditions indicating and explaining unacceptable forms and levels of *gharar*, thus, imply that *gharar* in a contract is essentially related to availability of information pertaining to its possible outcomes for both parties. All parties to the contract must be informed enough to make reasonable estimates of the outcomes. The absence of information for either party may be due to deliberate action of the counterparty. It may also be due to contracting under a situation of uncertainty with mutual consent. In both cases, the contract becomes susceptible to prohibition. Thus information is central to the Islamic system of contracting. Absence of adequate and accurate information (*jahl*) is a source of *gharar*. Islam emphasizes the need to protect the informationally weaker party. It is this concern that perhaps underlies the hadith that prohibits a sale whereby a townsman meets a tribesman outside the market place and buys the tribesman’s goods at a price cheaper than the price prevailing in the market, thus taking advantage of the seller’s ignorance of the market price; or the hadith under which the informationally disadvantaged party gets an option to rescind the contract subsequent to the time to contracting. However, as stated earlier, the exact level of *gharar*, which comes under prohibition is open to interpretation. For instance, *gharar*, which is customarily practiced and tolerated by people is allowed, as there is no harm from the possibility of *gharar*. Its presence is immaterial, difficult to distinguish or to be specified. For instance, in the case of a paid public bath, the water used and the time spent in the bath is different from person to person. In such case there is no possibility of *gharar* therein, as people customarily tolerate such practice.

Complexity in Contracts

Gharar also refers to undue complexity in contracts. Shariah does not permit interdependent contracts. For instance, “combining two sales in one” is not permitted according to a number of authenticated hadiths.

As Siddiq Al-Darir ((1993) writes,

"jurisprudents are agreed this is binding and they have accordingly judged that a person should not combine two sales in one. ..." two sales in one" means that a single contract relates to two sales whether in the form that one of them is concluded by the seller saying "I sold you this item at a hundred in cash today and at a hundred and ten a year hence" and the buyer says "I accept" without specifying at which price he buys the item; with the two men going their separate ways on the understanding that the sale is binding on the buyer at either price. Alternatively, the two sales are concluded jointly as when the seller says, "I sell you my house at such a price if you sell me your car at such a price". Such a sale is forbidden because of gharar in the contract: the person who sells the item at a hundred in cash and at a hundred and ten a year hence does not know which of the two sales will take place and he who sells his house

provided the other would sell him his car does not know whether this contract will be accomplished or not since the fulfillment of the first sale is conditional upon the fulfillment of the second. Gharar exists in both cases: in the first case, the sale price is not specified; in the second, the sale may or may not take place."

Jurists, therefore, require that in composite products, such as, *ijarathumma- al-bai* or lease-purchase, parallel *salam* or parallel *istisna*, the multiple contracts must be independent of each other.

Pure Games of Chance (*Al-Qimar & Al-Maisir*)

The term *gharar* is also used in the context of pure games of chance. The following Quranic verses form the basis of prohibition of contracting under conditions of uncertainty or games of chance.

- ye who believe! intoxicants and gambling, sacrificing to stones, and (divination by arrows, are an abomination, - of Satan's handiwork: eschew such (abomination), that ye may prosper. (3:90)
- Satan's plan is (but) to excite enmity and hatred between you, with intoxicants and gambling, and hinder you from the remembrance of Allah, and from prayer: will ye not then abstain? (3:91)
- They ask thee concerning wine and gambling. Say: 'In them is great sin and some profit, for men; but the sin is greater than the profit.' They ask thee how much they are to spend; say: 'what is beyond your needs'. Thus doth Allah make clear to you His signs: in that ye may consider. (4:219)

From the above, it is clear that the Quran prohibits contracting under conditions of uncertainty and gambling (*qimar*). The two words, uncertainty and gambling are not synonymous, though related. Uncertainty is same as *gharar* and under such conditions, exchange or contracting is reduced to a gamble. It is interesting to note here that a major objection of contemporary scholars against forwards, futures and options contracts is that these are almost always settled in price differences only. Hence, these are used more as tools of gambling than as tools of risk management. The former two are also supposed to involve settlement risk. However, note that settlement risk is significant only in case of forwards. Modern futures and options markets involve little settlement risk.

Interestingly, the classical *istisna* contract is also a forward contract but is held permissible. The reason seems to be that this contract with the manufacturer of the product by a buyer involves insignificant settlement risk, as the contract is with the manufacturer himself. It cannot be used for gambling too.

The Prohibition of Gharar

Mahmoud Amin El-Gamal¹

There are numerous hadith forbidding *Gharar* sales, and specific instances thereof. One commonly cited hadith was narrated by Muslim, Ahmad, Abu Dawud, Al-Tirmidh, Al-Nas'ai, Al-Darami and Ibn Majah on the authority of Abu Hurayra (mAbpwh) (translation of the version in Muslim) that

The Prophet (pbuh) prohibited the pebble sale and the Gharar sale.

A good translation of *Gharar* is risk or uncertainty.² Professor Mustafa Al-Zarqa' defined it as follows: *Gharar* is the sale of probable items whose existence or characteristics are not certain, due to the risky nature which makes the trade similar to gambling.

Many classical examples of *Gharar* were provided explicitly in the hadith. They include the sale of fish in the sea, birds in the sky, an unborn calf in its mother's womb, a runaway animal, the semen and unfertilized eggs of camels, un-ripened fruits on the tree, etc. All such cases involve the sale of an item which may or may not exist. In such circumstances, to mention but a few, the fish in the sea may never be caught, the calf may be still-born, and the fruits may never ripen. In all such cases, it is in the best interest of the trading parties to be very specific about what is being sold and for what price. For instance, Ahmad and Ibn Majah narrated on the authority of Abu-Sa'd Al-Khudriy (mAbpwh):

The Prophet (pbuh) has forbidden the purchase of the unborn animal in its mother's womb, the sale of the milk in the udder without measurement, the purchase of spoils of war prior to their distribution, the purchase of charities prior to their receipt, and the purchase of the catch of a diver.

The last prohibition in this hadith pertains to a person paying a fixed price for whatever a diver may catch on his next dive. In this case, he does not know what he is paying for. On the other hand, paying a fixed price to hire the diver for a fixed period of time (where whatever he catches belongs to the buyer) is permitted. In this case the object of sale (the diver's labor for -say- one hour) is well defined. In many cases, *Gharar* can be eliminated from contracts by carefully stating the object of sale and the price to eliminate unnecessary ambiguities. In contemporary financial transactions, the two areas where *Gharar* most profoundly affects common practice are insurance and nancial derivatives. Jurists often argue against the financial insurance contract, where premia are paid regularly to the insurance company, and the insured receives compensation for any insured losses in the event of a loss. In this case, the jurists argue that the insured may collect a large sum of money after paying only one monthly premium. On the other hand, the insured may also make many monthly payments without ever collecting any money from the insurance company. Since insurance or security itself cannot be considered an object of sale (c.f. Al-Zuhayl (1997, vol.5, pp.3415-3420) for more details), this contract is rendered invalid because of the forbidden *Gharar*. Of course, conventional insurance also suffers from prohibition due to Riba since insurance companies tend to invest significant portions of their funds in government bonds which earn them Riba.

The other set of relevant contracts which are rendered invalid because of *Gharar* are forwards, futures, options, and other derivative securities. Forwards and futures involve *Gharar* since the object of the sale may not exist at the time the trade is to be executed. As we are going to see, Islamic Law permits certain exceptions to this rule through the contracts of *salam* and *istisna*. However, the conditions of those contracts make it very clear that contemporary forwards and futures are not permitted under Islamic law. Classical jurists called such contracts where both the price and the goods were to be delivered at a future date *al-bay al-mudaf*, e.g. "I sell you this car for so much at the beginning of the next month", and considered them non-concluded and thus invalid. Contemporary options were also discussed by traditional jurists, e.g. "I sell you my house for so-much if my father returns", and called it a suspended conditional sale. They have also rendered such sales invalid due to *Gharar* (c.f. *Al-Gharar wa 'Atharuhu fi Al Uqud* by Siddiq Al-Amin (pp. 137-149) for a full discussion).

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² The term risk (Italian: *risco*, French: *risque*) is derived from the Latin roots *re* = back and *secare* = cut, thus reflecting the potential for a sailor to have his ship cut by hitting a rock. In other words, "risk" means "danger of loss". This is precisely the meaning of the Arabic term *Gharar*. The literal meaning of the term *Gharar* according to Qadi 'Iyad. (c.f. Al-Qarafi (n.d., vol.3, p.266)) is: "that which has a pleasant appearance and a hated essence".

Towards An Objective Measure Of Gharar In Exchange

Sami Al-Suwailem¹

This paper develops a framework for analyzing gharar based on economic aspects of game theory. The framework is consistent with Shari'ah maxims as well as individual gharar transactions widely studied in classical fiqh resources. In addition, the framework brings insights into explaining different fiqhi positions on controversial gharar contracts. When extended to contemporary practices, the measure helps understanding the logic of instrument design, and where violation of Islamic rules exactly lies. The moral, ethical, and social aspects of this framework show the deep consistency between Islamic rules of exchange and general Islamic principles of human behavior.

1. Introduction

Although the legal aspects of *gharar* are well established in Islamic jurisprudence, researchers in Islamic finance constantly face the dilemma of defining the concept and its precise meaning. For example, Zaki Badawi (1998, p. 16) writes: "The precise meaning of *Gharar* is itself uncertain. The literature does not give us an agreed definition and scholars rely more on enumerating individual instances of *Gharar* as substitute for a precise definition of the term." Frank Vogel (1998, p. 64) expresses a similar tone: "As with *riba*, fiqh scholars have been unable to define the exact scope of *gharar*." These claims might well be exaggerating, but they point to the need for further contemporary formulation of the subject. This paper is an attempt to develop an objective criterion to identify and measure *gharar* in exchange. It is shown that a *gharar* transaction is equivalent to a zero-sum game with uncertain payoffs. The measure helps economists view *gharar* within an integrated theory of exchange under uncertainty, so that it can be easily communicated to non-Muslim economists. Further, it provides a quantitative measure of *gharar* that can potentially be applied to innovative risky transactions. A Shari'ah-based measure is also developed, and the two criteria are shown to coincide and integrate each other.

2. Concepts and Definitions

2.1. Game

This term is used in game theory for a variety of settings and arrangements among two or more players. In this paper it means an exchange between two persons, the objective of which is to gain economic profits. In fiqh terminology, it is for-profit *mu'awadha*. In daily life the term "game" is used to describe a contest rather than an exchange. The difference between the two should be clear: An exchange implies a transfer of wealth from one party to the other in return for utility or a certain asset. In contests no exchange takes place; each player is seeking his own benefit through his own performance. The two meanings get mixed when gambling is considered. More on this point later.

2.2. Zero-sum Game

This is a game in which whatever one party gains is what the other loses. As such, zero-sum games are rare in practice because magnitude of gains need not match that of losses, and the utility function of one party differs from that of the other. Thus we are not interested in such games per se; rather, we are interested in the general case where a player's payoffs cannot increase without reducing the other player's payoffs. Such games are called "strictly competitive games," where preferences of each party are diametrically opposed to the other's, so one party can win only if the other loses. Game theorists, however, show that, from a strategic point of view, any two-person strictly competitive game is equivalent to a two-person zero-sum game, so that the former can always be expressed in a zero-sum form (Friedman, 1990, pp. 79-80; Binmore, 1994, pp. 276-277). From now on, we use the term "zero-sum game" to indicate strictly competitive games, without implying that utilities of the two parties are identical.

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Another way to describe a zero-sum game is that all outcomes of the game are Pareto optimal. There is no outcome in the game that both players prefer. No room for cooperation between players in such games (Friedman, 1990, pp. 20-21).

Strictly competitive games are sometimes called pure conflict games, constant-sum games, or perfect-negative-correlation games.

Nonzero-sum games are games that include win-win, win-lose and lose-lose outcomes. Some games include only win-win and lose-lose outcomes. These are called pure cooperative or pure coordination games. (These should not be confused with games that allow binding commitments, also called cooperative games, as compared to noncooperative games, whereby agents are motivated rather by self-interest. Our focus here is on the latter type.) Games with mixed outcomes (win-win, win-lose) are sometimes called mutual-dependence, mixed-motive, or bargaining games (Schelling, 1980, pp. 88-89).

2.3. Normal Exchange

Simple exchange of goods or services under certainty can be beneficial for both parties. As microeconomic theory shows, both parties gain from exchange as long as both are utility (or profit) maximizers. This is achieved when marginal utility of the good for the buyer is greater than or equal to its price, and the marginal cost for the seller is less than or equal to the price. Otherwise, exchange does not take place.

If, for any reason, the price turns out to be greater than the buyer's marginal utility, but exceeds the seller's marginal cost, the buyer loses while the seller wins. Similarly, if the price turns out to be less than the marginal cost, but exceeds the buyer's marginal utility, the buyer wins but the seller loses. Still yet, both parties might lose when the price is higher than the marginal utility of the buyer, and lower than the marginal cost of the seller. Therefore, exchange is a game in which players might possibly end with win-win, win-lose, or loses-lose outcomes.

In the light of this discussion, we can view the set of Islamic rules and regulations concerning exchange as conditions for promoting cooperative behavior and avoiding conflict of interests. This is not to say that only cooperative games are permissible. A necessary requirement for a transaction to be permitted is the possibility of cooperation, as in nonzero-sum games. It is left to players to achieve cooperation in such games through rational decision making. Strictly competitive games, however, exclude this possibility by design, and thus, no matter how rational players are, one can win only at the expense of the other.

2.4. Risk

Economists usually differentiate between the terms "risk" and "uncertainty." According to Knight (1921), risk describes situations in which probabilities of different events can be "objectively" measured. Uncertainty describes situations where such measurement is infeasible. However, according to Takayama (1993, p.258), if subjective probabilities are used instead, and axiomatic approach is employed, the distinction between risk and uncertainty "seems to have become mostly irrelevant." Throughout this paper the terms "risk" and "uncertainty" are used interchangeably. Our interest, however, is in how Islam views risk.

In general, risk as such, like hardship, is not desirable for its own sake. Hardship is desired only when involved benefits more than offset associated hardship. Similarly, risk becomes desirable only when it stimulates productive efforts and value-adding activities. However, this does not mean that any decision to take risk is prohibited. Mudharabah involves considerable risk, yet it is perfectly Islamic. Thus there must be something more than uncertainty or risk that influences the desirability of a given transaction. As we show below, it is the payoff structure that makes the difference.

3. Gharar And The Zero-Sum Measure

Fuquaha make it clear that gambling is a game in which one party wins while the other loses. Since gambling represents the pure form of *gharar*, it is natural to argue that *gharar* contracts in general have the same property. That is, a *gharar* transaction is simply a zero-sum game with uncertain payoffs. Among the early explanations of *gharar* is that of Imam Malik. In *Muwatta'*, he states: "Included in *gharar* and risky transactions is the case in which a man whose camel is lost, or his slave has escaped, the price of which is (say) fifty dinar, so he would be told by another man: I will buy it for twenty dinars. Thus if the buyer finds it, the seller loses thirty dinars; if not, the buyer loses twenty dinars".

Ibn Taymiah clearly explains: “*Gharar* describes things with unknown fate. Selling such things is *maysir* and gambling. This is because when a slave runs away, or a camel or a horse is lost, his owner would sell it conditional on risk, so the buyer pays much less than its worth. If he gets it, the seller would complain: you have ‘gambled’ me, and got the good with a low price. If not, the buyer would complain: you’ve gambled me and got the price I paid for nothing. This will lead to the undesired consequences of *maysir*, which is hatred and enmity, besides getting something for nothing, which is a sort of injustice. So *gharar* exchange implies injustice, enmity and hatred.” Ibn al-Qayyim writes: “*Gharar* is the possibility of existence and non-existence. Its sale is forbidden because it is a sort of gambling, which is *maysir*. Allah forbade it because of eating other’s wealth for nothing, and this is injustice that Allah has forbidden. It becomes gambling when one party gets a reward (benefit) while the other might not get it, so this becomes illegal, like the sale of runaway slave, [I]t is sold for less than its price. If it is found, the seller regrets, if not, the buyer regrets.”

3.1. Risk and the Payoff Structure

It should be emphasized that Islam does not prohibit a contract just because it involves risk. Only when risk is a channel to make one party profits at the expense of the other that it becomes *gharar*. Ibn Taymiah makes this clear: “It is well known that Allah and his Messenger did not prohibit every kind of risk. Nor all kinds of transactions that involve the possibility of gain or loss or neutrality are prohibited. What is prohibited among such kinds is eating wealth for nothing, even if there were no risk, not that risk as such is prohibited.”

وأما المخاطرة، فليس في الأدلة الشرعية ما يوجب تحريم كل مخاطرة، بل قد علم أن الله ورسوله لم يحرم ما كل مخاطرة، ولا كل ما كان متردداً بين أن يغنم أو يغرم أو يسلم. وليس في أدلة الشرع ما يوجب تحريم جميع هذه الأنواع نصاً ولا قياساً. ولكن يحرم من هذه الأنواع ما يشتمل على أكل المال بالباطل. والموجب للتحريم عند الشارع: أنه أكل مال بالباطل، كما يحرم أكل المال بالباطل وإن لم يكن مخاطرة، لأن مجرد المخاطرة محرم. (ابن تيمية [1]، ٥٧٦).

This statement makes it clear that, although risk as such is undesirable, the reason *gharar* is prohibited is that it involves eating wealth of others for nothing, not mere risk. A zero-sum game expresses exactly this concept, because the winner in such games gains by taking away from the payoff of the other party, forcing him to lose.

3.2. *Gharar* and Delusion

If risk is not the reason for prohibiting *gharar*, why is it that the Prophet (ﷺ) mentions the word “*gharar*”? The reason is that no rational person would accept to engage into a game in which he will certainly lose. He does so only if it is not known a priori who will win and who will lose. Given the possibility of gain, each party hopes that he will be the winner, and that what makes it *gharar*.

Taking a risk with the hope of winning is not unethical; in fact it is essential for human life. However, such hope becomes unethical when it necessarily means the wish that someone else loses, since there is no way that both can win in zero-sum games.

We now might be able to understand the essence of the term *gharar*. In Arabic, it means risk that implies delusion and deception. Interestingly, *qimar* also implies deception (Rosenthal, 1975, p. 2). Since risk tempts the two parties to play a zero-sum game, this temptation is a sort of delusion that is implied by *gharar*.

3.3. Enmity and Conflict of Interest

The Qur’an explains the reason behind prohibiting *maysir* and gambling: “Satan only wants to plant enmity and hatred among you through wine and *maysir*”. Ibn Taymiah relates enmity to the payoff structure: “In a *gharar* sale, one party obtains something, while the other is under risk, which leads to regret of one of them, and their dispute.”

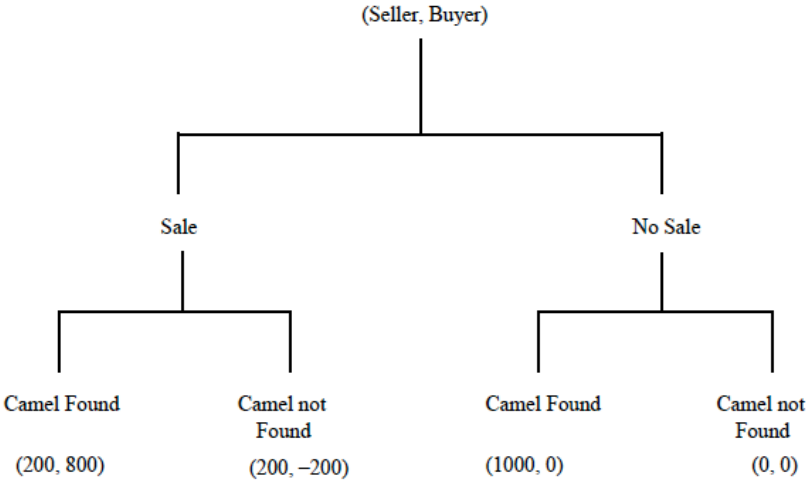
Zero-sum games, by definition, are games in which interests of both parties are in direct opposition. It represents a fertile ground for hatred and enmity. Thus, the above framework is consistent the Qur’anic view of the matter.

According to Vogel (1998, p. 91), there are two views on why *gharar* is prohibited. One is to avoid “enmity,” in which case a broad scope of risky transactions becomes valid. The other is that it is prohibited to avoid “ignorance or non-existence.” This view implies a restrictive scope of valid transactions. A zero-sum criterion falls within the former view, yet it encompasses the essential features of the latter, as will be shown later.

3.4. Measure of Loss

A crucial aspect of the zero-sum measure is that it is based on gains and losses of each player. How can we decide on the criterion by which one is considered losing or gaining? For example, it might be argued that seller of a lost camel does not lose anything. Since the camel is already lost, he does not lose by selling it. In fact, his level of wealth is higher than without sale even if the camel is found. So how can he be a loser?

The answer is that he loses a potential gain that he was entitled to had he not sold the camel. To clarify this point, suppose the camel is worth 1000 dinar, and that the camel is found by pure chance. Suppose that the seller believes the chance of finding the camel is 20%. Then he will not accept a price less than $0.2(1000) = 200$. If the chance is 40%, then he will ask for 400 instead. Why? Because this is what the seller is giving up. What the buyer benefits from the contract is what the seller gives up as a forgone profit. Had the owner not sold the camel, he could have found it himself and enjoyed its full market price. So if the camel is found, the seller loses the difference between its market value, which he was entitled to, and the price he received, i.e. $200 - 1000 = -800$, which is exactly the same amount that the buyer wins. If the camel is not found, the seller wins the price, 200, that the buyer loses. So it is a zero-sum game where one party wins only at the expense of the other. To elaborate, consider the following decision tree.



Numbers in parentheses denote payoffs for the seller and the buyer, respectively. If the owner does not sell and the camel is found, he gets 1000, the value of the camel. If it is not, he gets nothing. If he decides to sell he gets 200 regardless of the camel being found or not. The buyer, however, gets 800 (= 1000 – 200) if the camel is found, but gets –200 if it is not.

To compute wins and losses, simply subtract payoffs for each player in case of no sale from those in case of sale. So for the seller, net payoff if the camel is found is $200 - 1000 = - 800$. If the camel is not found, net payoff is: $200 - 0 = 200$. Similar computations for the buyer lead to the following table of net payoffs:

	Seller	Buyer
Found	-800	800
Not Found	200	-200

This clearly shows how sale of a lost camel is a zero-sum game, even in the absolute sense (payoffs always add to zero).

Note that the seller was entitled to this profit, and it is not merely a forgone opportunity. Losing an opportunity for profit is costly, but losing profit that you were entitled to is even more costly. This difference has been supported by several experimental studies documenting “loss aversion” (Tversky and Kahneman, 1986, 1991). Loss aversion implies that “displeasure of losing a sum of money exceeds the pleasure of winning the same amount” (ibid, 1986, p. 74). This means that the disutility of losing 800 by the seller if the camel is found counts more than its absolute value.

3.5. Regret Theory

Losing entitled profit is closely related to the concept of “regret,” developed by Loomes and Sugden (1982) and Loomes (1988), as an approach to decision under uncertainty. Regret is defined as the difference between the payoff when decision d (to sell) is taken as compared to decision d' (not to sell), given the state of the world i (the camel is found or not found). If the camel’s owner decides to sell (at a discounted price) and the camel is found, he regrets losing ownership and the full price of the camel. If the camel is not found, the buyer regrets the paid price. By taking regret into account, therefore, the seller is considered a loser because he was entitled to a higher level of wealth.

3.6. Formal Measure

To sum up, measure of loss is based on the difference between payoffs obtained when the contract is signed and those if it is not, for each state of the world. The contract is the sole reason for this difference, and thus gains and losses are attributed to it. A player considers himself a winner if, given the state of the world, this difference is positive.

The exchange is considered a zero-sum game when the following condition holds:

$$(1) \quad v_i^A \geq 0 \text{ if, and only if, } v_i^B < 0, \forall i.$$

3.7. Measure of *Gharar* in Nonzero-sum Games

Nonzero-sum games are games with mixed outcomes: win-win, win-lose, or lose-lose. In such games it is unclear a priori whether players intend to play a cooperative or a competitive game. In this regard *fiqh* scholars state three conditions for tolerable risk. According to these conditions, involved risk must be:

1. Negligible
2. Inevitable
3. Unintentional

The first condition is equivalent to saying that probability of failure is sufficiently small. It also implies that the magnitude of loss should be limited. As the magnitude of potential loss rises, the degree of certainty necessary to consider such loss diminishes, as al-Ghazali points out.

The second is stating that the game allows for win-win outcomes, so that a beneficial exchange can be performed. However, this beneficial exchange cannot be achieved without assuming the risk of failure, and thus risk becomes inevitable.

The third condition can be rephrased as requiring that win-win outcomes are preferred to win-lose outcomes. If a player’s objective is to win in cases where the other player loses, then he is seeking the zero-sum part of the game. If the objective is to seek the win-win outcome, then this is a beneficial transaction. But how can we measure the objective of a game?

A simple approach is to apply expected utility rule, where utility of each outcome is weighted by its probability. For player A, define:

$$(2) \quad \Gamma_A(d) = \sum_{i \in \omega} p_i y_i^A - \sum_{i \in \omega'} p_i y_i^A,$$

By appropriately quantifying these measures researchers can assess whether a transaction contains a “high degree of *gharar*”, or if it is intended by the traders. A modern approach to measure *gharar* thus can be developed. If both parties are seeking the win-lose outcome, it becomes a *gharar* transaction. If only A does, and B is unaware of that, say because of informational asymmetry regarding probability

distribution, it becomes a deception. In this case player A might be ethically accountable, though the court might not rule the contract void.

If B is aware of A's objective, he will not accept to engage into such a game except on the same ground as A does. The reason is that, for player B, there is no incentive to cooperate if A refuses to do so. Since A prefers to compete rather than to cooperate, B will respond in a reciprocal manner. This is supported by reciprocal behavior documented in experimental economics (e.g., Fehr et al., 1997). Note that equation (2) is general enough to include zero-sum games.

4. Shariah-Based Measure Of *Gharar*

The zero-sum measure is clearly based on economic understanding of exchange. Here we seek a criterion stated by *Shari'ah* rules and maxims. Not surprisingly, but contrary to a common belief, there exists a well defined and clear measure of *gharar* in *Shari'ah*: It is the established hadith "liability justifies utility or return".

4.1. Liability Justifies Return

Generally speaking, almost all unlawful transactions violate this maxim, including *gharar*. The term "liability" in the hadith by its nature involves risk. It means assuming the risk of loss or damage of the asset such that it is no more beneficial or utilizable.

The "liability justifies utility" maxim establishes the principle of "justice" in Islamic economics. Rights and obligations must be balanced, and this balance is essential for proper economic incentives. It can be easily seen that eating other's money for nothing necessarily implies imbalance between rights and obligations for each party. That is, the zero-sum structure is unjust, as Ibn Taymiah points out.

4.2. Classification of *Gharar*

This maxim implies two fundamental properties of normal exchange:

- (1) Exchanged utility is certain, and
- (2) both the right to use the utility and the obligation to bear its liability are held by the same agent.

Examination of *gharar* contracts shows that violation of one of these two conditions, but not both, renders the transaction illegal. This implies that there exists two classes of *gharar* transactions:

1. When the utility exchanged is uncertain at the time of contracting, while its liability is assumed by the buyer. Examples include sale of a lost camel or runaway slave, pebble sale, and sale of diver's or hunter's hit. The utility of exchanged asset in such sales is uncertain at the time of contracting, but the buyer bears the liability the moment he pays the expected price. Rights and obligations of each party are imbalanced as ex post value of the asset diverges from expected price. So if the camel is found, the buyer's utility would exceed his liability; if not, liability exceeds utility. The opposite is true for the seller.
2. When the connection between utility and liability is broken, so the owner becomes entitled to the utility without assuming its liability, which is another form of imbalance between rights and obligations. An example is the commercial insurance contract, whereby liability of insured asset is exchanged for a premium. The insured party (policy holder) enjoys the asset's utility without assuming its liability, thus his rights and obligations are unbalanced. Further discussion of this contract is presented later.

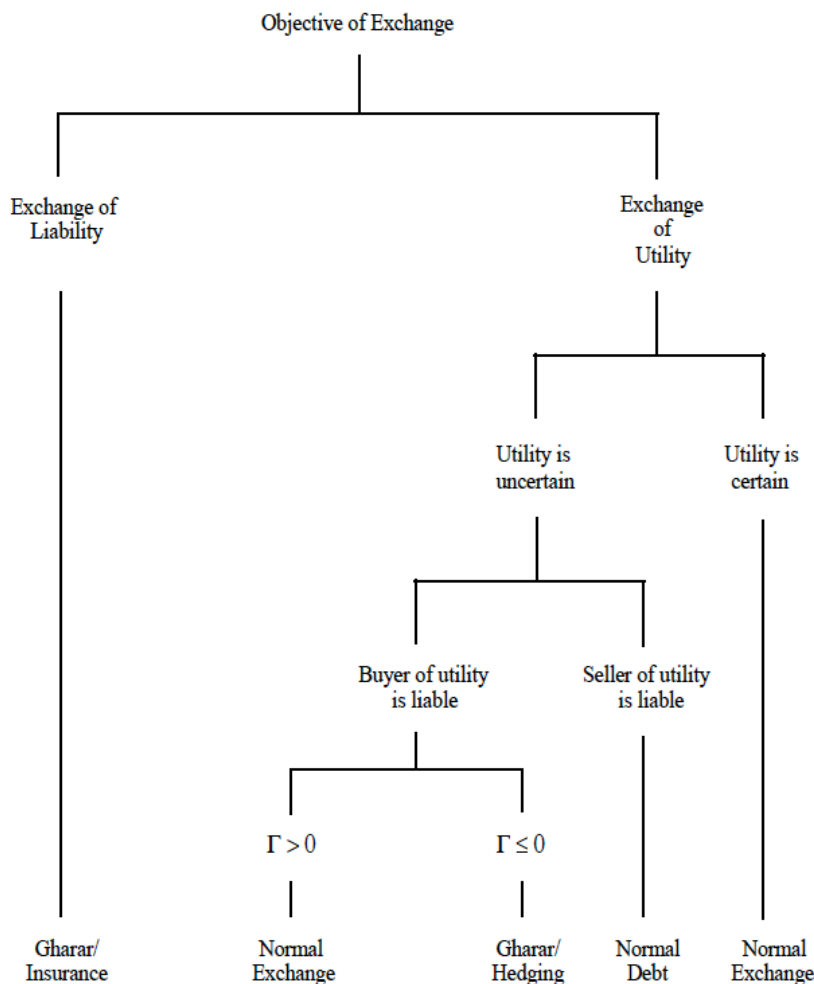
The difference between this class and the former is that, in the second, the original asset or utility is kept in the hand of its owner, and no transfer of ownership takes place. The owner therefore enjoys any upside gain in its value. In contrast, in the first category, the seller is giving up any gain in the asset's value.

These two categories coincide with "hedging" and "insuring" in modern terms. According to Bodie and Merton (1998), hedging is to reduce one's exposure to a loss by giving up of the possibility of a gain. Insuring means paying a premium to avoid losses without giving up gains. "When you hedge, you eliminate the risk of loss by giving up the potential for gain. When you insure, you pay a premium to eliminate the risk of loss and retain the potential for gain." (pp. 224, 225). Thus the first class of *gharar* coincides with hedging, while the second coincides with insurance.

4.3. Logical Deduction of Classes of *Gharar*

We can deduct the two classes mentioned earlier as follows:

The objective of a given exchange is either exchange of liability or exchange of utility. The former is *gharar* (insurance). If utility is exchanged, it is either certain or uncertain. The former is normal exchange. If exchanged utility is uncertain, its liability is held by either the seller or the buyer. The former is a debt contract (including *salam*), while the second is *gharar* (hedging), given $\Gamma \leq 0$. (See the following graph).



4.4. The Zero-sum Measure

The two classes of *gharar* mentioned above can be inferred from the structure of risk preferences of the two parties involved in exchange. Generally speaking, an agent might be (or, more accurately, behaves as if he is) risk averse, risk neutral, or risk taker. Since, in zero-sum games, what one wins is what the other loses, the payoff function of one player is the negative of the other (Binmore, 1992, p. 238). So if one party is risk averse, so that his payoff function is concave, the other must be risk taker, and his payoff function will be convex. (The negative of a concave function is convex.) If one is risk neutral (with a linear payoff function) the other must also be risk neutral. (The negative of a linear function is also linear.) So either both players are risk neutral, or one is risk averse while the other is risk taker.

In the first class of *gharar*, whereby an uncertain asset like a lost camel is exchanged, each party is facing the possibility of gain or loss. The seller gains if the camel is not found, but loses if it is found. The opposite is true for the buyer. Although it is customary to view the seller as a hedger and the buyer as a speculator, by taking regret into account, each is effectively speculating. Each party “hopes” that luck will be on his side. The two parties are facing risk symmetrically, so they can be viewed as if they are risk neutral. (The second derivative of the payoff function might be close to zero for both parties).

In case of insurance, it can be shown that the insured party faces less risk than the seller of a lost camel. Both are giving up uncertainty in exchange for certainty, but the insured gives up only potential losses, while the seller gives up potential losses and potential returns. The insured therefore is taking less risk than the seller. By the same token, the insurer is taken greater risk than the buyer of an uncertain asset, as the buyer faces potential returns and losses, while the insurer faces potential losses only. Consequently, the insurer is taking greater risk than the insured. It follows that the first class of *gharar* can be modeled with symmetric risk preferences, while the second class can be modeled with asymmetric risk preferences. The two types of risk distribution therefore are consistent with the above mentioned two classes of *gharar*.

Therefore, the *Shari'ah* based measure of *gharar*, as implied by “liability justifies return” maxim, neatly coincides with the zero-sum measure, as well as with contemporary finance.

5. Survey Of Some *Gharar* Contracts

This section surveys major contracts considered in classical fiqh sources as *gharar*. It can be seen that, generally, scholars take different positions on nonzero-sum contracts, while they unanimously forbid zero-sum games. We start first with nonzerosum games.

5.1. *Ja'alah*

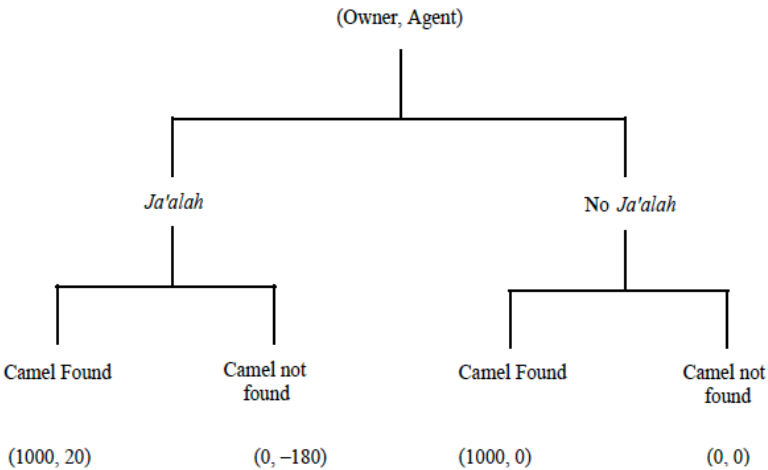
Ja'alah is a contract in which a principal hires an agent for performing a certain task, e.g. searching for a lost camel. If the task is successful (the camel is found), the principal pays the agent an agreed upon wage. If not, the agent gets nothing. The majority of scholars accept *ja'alah*, while the Hanafi school considers it as *gharar*.

To analyze *ja'alah* within the framework of exchange, we can view it as a labor contract (*ijarah*) whereby wage payment is conditioned on successful performance. That is, *ja'alah* is a conditional *ijarah*, as scholars point out.

Let us start from the successful outcome. If the camel is found, the owner will pay the agent a certain amount, w , depending on how much the owner values the agent’s labor, l . Valuation reasonably depends on the contribution of search to probability of success. So if search improves likelihood of success by 20%, labor can be valued at $.2(1000) = 200$. Suppose that owner’s valuation is $v(l) \leq 200$. Suppose further that search costs the agent $c(l) \geq 180$.

Obviously, wage will be determined such that $c(l) \leq w \leq v(l)$. Assume that the two parties agree on $w = 200$. If the camel is found, exchange of labor takes place. The owner’s utility becomes $v(l) - w = 0$, while the agent’s utility is $w - c(l) = 20$, and thus both parties benefit from such an exchange. If the camel is not found, the agent loses his labor while the owner gets nothing. Now consider the value of the camel. If the camel is found, the owner gains its market value, 1000, otherwise he gets nothing. The following tree presents the payoffs.

For the owner, if the camel is found, he gets 1000 (the value of the camel) minus 200 (price of search) plus 200 (value of search) = 1000. If the camel is not found the owner’s payoff is 0. For the agent, if the camel is found he gets 200 (value of search) minus 180 (cost of search) = 20. If not, he loses 180.



From the decision tree we can compute net payoffs matrix:

	Owner	Agent
Camel found	0	20
Camel not found	0	-180

Therefore, *ja'alah* allows both parties to win if search is successful, so cooperation is feasible in such a game. This is in contrast to *gharar* sale where there is no room for cooperation, as discussed earlier.

5.1.1. Shari'ah Ruling

In the light of this discussion we might understand the different positions of fiqh scholars on *ja'alah*. The Hanafi school considers *ja'alah* as *gharar*, while the other three schools (Maliki, Shafi'i, and Hanbali) consider it permissible. The Hanafi scholars looked at the case when performance is not successful, whereby the agent loses, and, even worse, the principal might benefit from the agent's effort. Since this is a win-lose outcome, they therefore considered *ja'alah* as *gharar*. The majority looked at the cooperative outcome whereby both parties can win. Maliki scholars, however, were aware of the possibility of the win-lose outcome, and thus required that agent's work shall not benefit the principal if the final outcome is not achieved. An example is digging a water well, whereby the principal might benefit from digging even if water is not found. The Shafi'is do not require the same, and allow *ja'alah* for such types of work, while Hanbalis appear neutral. Thus the three schools do not agree on excluding the win-lose outcome, but they all make it clear that *ja'alah* is acceptable because both parties can benefit from it, i.e. because of the win-win outcome.

Consequently, if the objective of the contract is the cooperative outcome, *ja'alah* shall be acceptable, as the majority of scholars believe. If, on the other hand, the win-lose outcome is more likely, so that the zero-sum part of the game dominates, the game becomes more of a *gharar* transaction, consistent with the Hanafi's position. The zero-sum measure therefore is rich enough to allow for different fiqh opinions, yet informative enough to discriminate among these positions.

5.2. Bay' al-Urboun

Bay' al-urboun is a sale contract with a down payment or urboun. By paying urboun, the buyer has the right to complete the transaction, in which case the down payment applies towards the price, or to cancel the deal, whereby he loses the down payment. Muslim scholars have different views on *bay' al-urboun*. Hanbali school accepts it while the other main three reject it (Al-Suwailem, 1996).

The majority of scholars consider urboun as a *gharar* sale because of the unsuccessful outcome. If the transaction is not concluded, the buyer loses the down payment paid to the seller for nothing. They consider it a sort of "eating wealth of others for nothing", which is purely a zero-sum outcome. The Hanbali position can be rationalized the same way *ja'alah* is. Since the contract becomes a normal exchange if the transaction is completed, in which case both parties can win, it shall be acceptable as long as the objective is to achieve that cooperative outcome. If the objective is the competitive outcome, it is more of a *gharar* sale, and thus shall be forbidden. In other words, urboun is a nonzero-sum game and thus can be evaluated based on a suitable measure of its value of cooperation.

We can see therefore why fiqh schools take different positions on this contract. Later (Section 6), we see how we can evaluate the relative applicability of each fiqh position regarding urboun to some modern transactions.

5.3. Sale of Immature Fruit

Zayd bin Thabit reported: "People used to trade fruits at the time of the Prophet, peace be upon him. When time of harvesting comes a seller would say: It failed to mature, it was infected. So people engaged in disputes. When such disputes became widespread, the Prophet said: "Don't sell until maturity appears," as a recommendation to cut down disputes." (Bukhari).

Sale of fruit (*bay' al-thimar*) has been extensively discussed in the literature. It involves a risky payoff where it is possible to have a win-win or a win-lose outcome. If fruit matures normally, it becomes a normal exchange where both parties benefit. If not, the seller wins the price while the buyer loses the

fruit. Deciding which outcome becomes the objective of traders depends on likelihood of maturity, which is an empirical matter. If immaturity is highly likely, exchange tends to produce win-lose outcomes more than the win-win ones. So probably this is why the Prophet intervened only after disputes became widespread, indicating that the transaction became a zero-sum game, and consequently prohibited it.

This implies that if, for some types of fruits or crops, it becomes evident that immaturity after a certain stage is rare, then subsequent exchange of such crops shall not be considered as *gharar*. That is, “appearance of maturity” is an empirical concept, which can be measured using proper measurement techniques, as indicated earlier. This dimension of *gharar*, therefore, is flexible and might vary depending on the environment, available technology, type of fruit or crop, etc. Hence the zero-sum measure can be applied uniformly to all risky games. Those games that appear to be more cooperative than competitive (i.e. $\Gamma > 0$) have better chances to be accepted, and vice versa.

5.4. Sale of Hidden Fruit

Selling existing but unseen fruit, like carrots or onions still hiding in soil, is an example of a nonzero-sum game, and is subject of controversy among Muslim scholars. Maliki and Hanafi schools allow such sale, while Shafi'i and Hanbali don't.

Insightful reasoning for acceptance comes from Ibn Taymiah, stating that experts are able to infer the quality of hidden fruits from its visible parts, and thus can decide whether the transaction is for the benefit of the two parties or is it *gharar*. “Reference in all matters is to the pious among the experts”. Ibn al-Qayyim goes a step further: “To consider this (particular transaction) as *gharar* is not to the faqih (as such). It is experts who decide whether it is *gharar* and gambling or not.”

Further, Ibn Taymiah reasons, such transaction is essential for normal life. If such fruit has to be extracted prior to exchange, it might get spoiled before being sold. Soil provides a normal preserving environment for the fruit.

These two points translate into two criteria: Probability of success, and utility of the outcome. When experts decide it is more likely that the fruit is mature and free from disease, they are assessing the probability of the successful outcome. Viewing such exchange as essential is equivalent to saying that the utility generated is high. A single measure combining the two is the expected utility measure, as implied by the formula of Γ presented earlier.

5.5. Gambling

The most obvious form of pure *gharar* is gambling, which is clearly a zero-sum game with risky payoffs. Usually, gambling describes games of chance rather than games of skill.

Although gambling is usually motivated by pleasure, the same payoff structure is found in other risky transactions motivated by “real” incentives. We know that *maysir* was practiced among Arabs to help the needy and give the poor. Yet the Qur'an openly condemned such behavior. Hence, intentions alone, whether to seek pleasure or to help the needy, do not justify the payoff structure of gambling and *maysir*. The distinction between gambling and *gharar* transactions therefore is reduced, and economists are aware of the common structure found in both. In fact, according to Goodman (1995, pp. x-xi), the increasing growth of gambling business in recent years is viewed within the “broader context of a troubling shift in the American economy—the growing tendency to rely on economic ventures of chance, as opposed to those involving skill and real work” (emphasis added).

5.5.1. Gambling vs. Contests

It is insightful to review the position of majority of Muslim scholars on for-profit contests of skill. If players are providing the prize, then the majority of scholars require the participation of a neutral player, who does not contribute to the prize; otherwise it becomes *qimar* or gambling. This can be understood only if gambling is a zero-sum game, so the presence of a neutral player makes it a nonzero-sum game, and therefore acceptable. Further, if one player commits a prize but the other doesn't, then the majority of scholars consider such a game acceptable, since it does not involve gambling. Again, it is clear that if only one player commits the prize, it is no longer a zero-sum game, since the committed party may win, in which case the other party does not lose. Thus many legal details of contests can be understood within this framework.

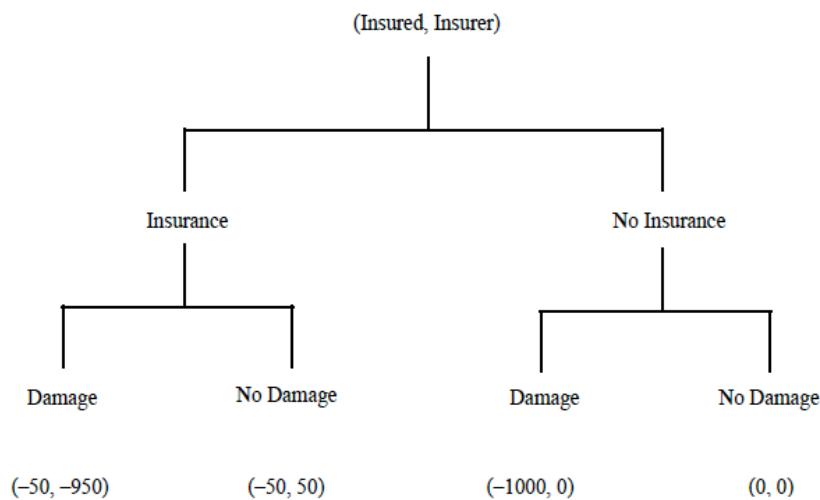
5.5.2. Lotteries vs. Stock Markets

In many respects, stock markets are viewed as gambling casinos. As we shall see later, many practices in these markets are considered *gharar*, and therefore bear a strong resemblance to gambling. A legitimate question, however, arises concerning the difference between buying a lottery ticket and buying a share in the stock market. A clear difference is that a lottery is a zero-sum game: The winner of a lottery wins only at the expense of the others. In a stock market, all participants might win when economic conditions are favorable. Collective winning in a lottery is impossible, but feasible in a stock market. Thus the former is a zero-sum game but the latter is not.

5.6. Insurance

Insurance is an exchange of liability for a premium. One party pays the other for assuming the risks of a certain asset, such that if it is damaged the owner is compensated for it. According to Arrow (1971, p. 134), insurance is an “exchange of money for money, not money for something which directly meets needs.” Since it is an exchange of the same countervalue (money), the difference between the premium and compensation will be necessarily for the benefit of one party at the expense of the other. However, the contract is designed such that only chance decides who is the winner. If damage actually occurs, it will cost the insurance company more than the premium, and the company clearly is worse off, while the insured becomes better off than not contracting. If damage does not occur, the insured loses the premium to the benefit of the insurance company. There is no outcome in insurance contract in which both parties become better off *ex post* than not contracting, and thus preferences of the two parties are in direct opposition.

To see how insurance is a zero-sum game, consider the following example. Suppose an agent wants to insure a machine for 1000. Suppose the insurance premium is 50. If the machine is damaged, the insurance company shall pay the agent $1000 - 50 = 950$. If not, it keeps the premium. The following tree shows the payoffs in different states.



If damage occurs, the agent is better off being insured. If damage does not occur, he is better off not to be insured, as he loses the premium for nothing. Net payoffs for each party is as follows:

	Insured	Insurer
Damage	950	-950
No Damage	-50	50

There is no outcome in which both parties win. If one gains by signing the contract, the other must lose. Consequences of this conflict of interest in the insurance contract are well studied by economists, as the following subsection explains.

5.6.1. Moral Hazard and Adverse Selection

When would a person be better off signing an insurance contract? Obviously, if he thinks that damage is not negligible. But this means that high risk persons will seek insurance more than low risk ones, which is against the interest of the insurer.

This is the well-known adverse selection problem. But conflict of interest does not end here. Suppose that the person has signed the insurance agreement. If, later on, the utility of the insured asset becomes less than its insurance value, the insured will be better off if damage occurs. The same will happen if productivity of the asset declines, because of depreciation for example, or if the market value of the asset drops below the insurance value. In all these cases, the insured will be better off if damage occurs. This is the well-known moral hazard problem. Thus we can see how conflict of interest stimulates undesired behavior, leading to economic inefficiency.

Because of moral hazard and adverse selection, economic studies show that insurance market ceases to be efficient, and “optimality will not be achieved either by the competitive system or by an attempt by the government to simulate a perfectly competitive system.” (Arrow 1971, p. 220; also see: Varian, 1992, pp. 455-457). Moral hazard, according to Arrow, is the most important factor explaining the limitation of insurance as a mechanism for risk shifting (ibid, p. 142). Under full insurance, “productive activity and risk-bearing can be divorced,” but such system is “bad because it reduces incentives” for risky enterprises (ibid, pp. 138, 143).

5.6.2. Shari’ah Ruling

Against widespread conception, insurance is not a new contract. It has been studied by fuqaha about 1200 years ago. Fuqaha call it *mu’awadha ala-dhaman*. Ash-hab, an early follower of Imam Malik, explains:

It is not acceptable that a person says to another: guarantee (or insure) this good for me to a certain date, and I pay you so and so. This is because ... it is gambling and gharar . If the insurer knows that the good will be damaged or spoiled he would not have accepted to insure it even for twice as much as he is paid. And if the insured knows that the good will be safe he would have not accepted to insure it for even a dirham. Don’t you see that if the good is not damaged the insurer would get the insured’s money for nothing, while if it is damaged he becomes liable for its value for no ownership nor benefits he obtains?

Ibn Rushed, the grandfather, reports that it is a matter of consensus that *dhaman* shall not be exchanged for a premium.

5.7. Forward Contract

In a forward contract the seller and the buyer agree to carry out exchange at a predetermined price and quantity in a future date. As such, forward contract has been known to Muslim scholars for a long time, and they unanimously consider it illegal. Forwards are used to hedge against deviations of the spot market price from a predetermined level.

Consider currency forwards, a typical hedging arrangement. A seller agrees to sell £1 for \$2 at a later date. The objective is to protect himself from variations in exchange rates. Clearly, if the spot exchange rate at the specified date goes up to \$2.2, the seller loses \$.2 per sterling to the benefit of the buyer. Conversely, if the spot exchange rate drops to \$1.7, the seller gains \$.3 per sterling at the expense of the buyer. Hence, variations in the exchange rate will benefit one party but hurts the other. Of course, the rate might stabilize around the agreed upon level, but if both parties expect it to be stable, there would have been no reason to engage into the contract in the first place. The objective of the contract is to hedge against price risk, so if an investor is quite certain about future price path he might carry the entire transaction unhedged (Teweles and Jones, 1987, p. 5). Given the contract is signed, this means that the two parties are seeking hedge against price variations. But these variations can only help one party at the expense of the other. Thus, forward can be viewed as a zero-sum game with risky payoffs.

In general, a forward can be viewed as a reciprocal insurance arrangement. The seller insures the buyer against upward deviations, while the buyer insures the seller against downward deviations. This is clear in currency forwards, but it is also true for commodities forwards, where one party guarantees the price while the other guarantees the quantity. The reason is that total expenditures on the deal is fixed and guaranteed by both parties. For example, a producer might order 1000 unit of a certain input commodity, for 20 each, with a total cost = 20,000. After the contract is signed, he discovers a new technology that allows him to attain the same level of output with 30% less of inputs, i.e. with only 700 units. Given total costs, this translates into 30% reduction in price, from 20 to 14 (700 x 20 = 1000 x 14). The cost of 6000 is borne by the buyer, and the seller is totally insured against it.

Therefore, the seller insures the buyer against upside deviations; in exchange, the buyer insures the seller against downside deviations. This shows that forward is a zero-sum game: If price changes one party wins but the other loses.

5.7.1. Islamic Forwards

What about *salam* and deferred payment sale? These are also exposed to price risk. Are they also zero-sum games?

Unilateral forward or delayed sale involves physical exchange of one countervalue, and thus is considered as a type of normal sale. In contrast, a forward contract is not accounted for as a sale or exchange in the balance sheet or income statement. It is a hedging mechanism against variations in price. In fact, a forward can be performed as a pure insurance arrangement without any physical exchange. At maturity date the seller can simply compensate the buyer for upside shift in spot price, and let the buyer obtain the commodity from the spot market. If the spot price at maturity goes down, the buyer pays the seller the difference. This clearly shows that the primary objective of a forward is hedging not physical exchange.

5.7.2. Benefits of Exchange

In a delayed sale (whether *salam* or deferred price payment), there is a physical exchange of one countervalue. This real exchange affects the structure of the payoffs for the two players, and thus makes it differ from forwards.

In a deferred payment sale, *bay ajel*, actual delivery to the buyer benefits both the buyer and the seller. For the seller, it helps reducing the inventory, establishing a market share, and more important, entitles the seller for a higher price than the spot market. This is not necessarily true in a forward contract, where the fixed price usually is the spot price at time of contracting (Vogel and Hayes, 1998, p. 223). Hence, the deferred payment sale allows the seller to hedge against future price variations by raising the deferred payment sale price above spot price, and this guarantees the seller a minimum level of profits. In forwards, the hedge is implemented through reciprocal insurance, in which no party is guaranteed any profit upfront.

The buyer benefits from physical delivery by utilizing the good throughout the duration of the contract, allowing him to generate income to repay the debt. Besides, the possibility of default of the seller is eliminated altogether, as compared to a forward arrangement.

Actual delivery therefore does have economic significance, and this significance represents a cushion against price variations. A price rise in *bay ajel* benefits the buyer, but does not necessarily result in a net loss for the seller, because of the benefits explained above, not the least of which is the price premium due to deferred payment. The opposite is true for the buyer in case of a price fall. This means that these benefits of exchange provide a range within which spot price at maturity might fluctuate, yet both parties still benefit from the contract, producing win-win outcomes. This is in contrast to forward where the predetermined price is the only value that spot price at maturity can take that presents a win-win outcome.

In a *salam* contract, the actual upfront payment of the price by the buyer relieves his balance sheet as accounts payable decrease, and entitles him to a lower price than the spot market. For the seller, he benefits from the financing facility, as well as eliminating the possibility of default of the buyer, as compared to a forward agreement. These benefits extend the space of win-win outcomes to a range of values that spot price at maturity can take, rather than being a single point as in forward contract.

5.8. Riba: Interest-based Debt

Debt contracts have the distinguishing property that principal can be utilized only if it is totally consumed. This makes repayment inherently uncertain. Once the principal is consumed, there is no guarantee it will come back, let alone the additional interest. However, such uncertainty involves the possibility of generating returns that might or might not exceed the principal and interest due, especially if loan is used for investment purposes. The hope that realized return will exceed defined liability is what makes the borrower accept to pay 1200 in exchange for 1000, and it is the same reason, as we saw before, that makes a speculator accept a *gharar* contract. If realized returns exceed interest, the borrower wins but the lender loses. If not, the borrower loses but the lender wins.

5.8.1. *Riba* as an Insurance Mechanism

Arrow (1971, p. 134) considers “the closest analog [to insurance] in ordinary economic theory is a bond or a note, an exchange of money now for money later.” Stiglitz (1994, p. 186) argues that (interest-based) credit can be viewed as “a special form of insurance relationship: the lender provides an insurance policy, such that if the borrower’s resources are less than the amount owed, the lender agrees to pay the borrower the difference (which the borrower then immediately repays to the lender).” But the analogy is not totally satisfactory. Here we present a more intuitive view, where the lender is viewed as the insured, rather than the insurer. To make things clear, consider the following table:

	Insured	Lender
Subject	tangible asset	fungible asset
Risk of subject	born by insurer	born by borrower
Benefits	utility of the asset	interest
Costs	insurance premium	generated returns

Hence, the premium that the lender pays is the foregone (uncertain) benefits of the loan. These forgone benefits are the opportunity cost for the lender. If realized returns obtained by the borrower are high, the premium that the lender is paying becomes high, and vice versa. That is, if the borrower becomes better off because of high returns, the lender becomes worse off. Thus, *riba* contract can be viewed as a zero-sum game with uncertain payoffs.

5.8.2. *Riba* and *Gharar*

Advocates of interest frequently argue that interest is justified as a compensation for the forgone profits. But this reasoning only reinforces the above argument. *Riba* becomes an exchange of a known price (interest) for an unknown quantity (forgone profits), which is a perfect example of *gharar*. This shows that *riba* and *gharar* are in fact two faces of the same coin, which establishes the consistency and integrity of Islamic rules of exchange.

6. Applications Of The Zero-Sum Measure

Here we present some modern financial arrangements, and see how the zero-sum measure applies to them:

6.1. Options

An option on a certain asset is either the right, but not the obligation, to buy the asset (a call option), or the right to sell the asset (a put option) at a predetermined price and within some predetermined time period upon payment of a stated fee (Ingersoll, 1994). Options bear a strong family resemblance to insurance policies and are often bought and sold for the same reasons (Francis, 1991).

At the surface, a call option looks very similar to *bay' al-urboun*, discussed earlier. Minor modifications of both the option contract (make the premium part of the security price) and of *bay al-urboun* (define a maturity date, or *ajal*) would make the two identical. But is this enough to conclude the permissibility of options?

There is a fundamental difference between a financial option and *urboun*. *Urboun* can be viewed as a “real option” (see Dixit and Pindyck, 1994), in which the decision to exercise the option depends on real variables affecting the buyer’s payoffs rather than the asset’s price. A consumer might buy an option on a car, say, not to monitor its price, but to have enough time to examine it and see whether it fits his needs. If so, it is a normal exchange in which both parties win.

A financial option, on the other hand, is bought to monitor the price of the underlying asset; if it appreciates the option is exercised, otherwise it is killed. Price movements, however, cannot make both parties better off. If price appreciates, the buyer (of a call option) wins; if not, the seller wins. This is so because price enters the payoff function of each party with opposite signs. In any financial option therefore there is a winner and a loser; there is no way that both can win. A real option on the other hand does not exclude the possibility of mutual gain, since the payoffs of players are independent of each other.

It is clear therefore that both types of options imply uncertainty, but a real option has the possibility of mutual gain, where this possibility is excluded from a financial option. The latter therefore is a zero-sum game, while the former is not. Given the different views of *fukah* regarding *urboun*, the permitting view of the Hanbali school can be applied to real options, while the majority’s view can be applied to financial

options. This shows how the zero-sum measure can reconcile different *fiqhi* positions by bringing insights into the payoff structure and nature of the contract considered.

6.2. Revenue Sharing

Musharakah is considered the most desirable form of financing in Islamic economics. The widely adopted form is profit-sharing, where profits, defined generally as the difference between revenues and costs, is shared between the financier and the entrepreneur according to an agreed upon percentage.

Another form of *musharakah* is to share revenues rather than profits. This is based on the well known arrangement *muzara'ah* (sharecropping). Scholars realize that the farmer might incur some costs, but these costs are not deducted from the final product; they are the farmer's responsibility. This creates the possibility of win-lose outcomes when the farmer's share in output is less than the costs he spent. Yet sharecropping is permissible because it allows for mutual gain. Interests of the two parties are in harmony so both are better off to win together.

Granted, the same principle can be applied to current business financing. A financier would advance, say, 1000 to a company whose average annual revenues, say, is 900. Revenue sharing is arranged as follows. The financier obtains 1/3 of revenues for 4 years. This is equivalent to 300 annually, or 1200 for the whole period in expected terms. Since revenues are uncertain, the financier is not guaranteed even his capital. Revenues might decline in one year to 600, so the financier's share in that year drops to 200. Or it might rise to 1200, where financier's share reaches 400, and so on.

What makes revenue sharing preferred to profit sharing?

First, revenues are much easier to observe and measure than profits. Accounting practices allow for varieties of cost measures that can be used to reduce final profits. Islamic financiers frequently complain about the improper practices in hiding profits, and thus are very reluctant in applying *musharakah* for this reason. Sometimes the bank is able to control company's revenues, but not its costs. Second, revenue sharing imposes restrictions on the company's spending, and creates incentives for it to contain its costs. The result is better performance and thus better return for both parties. The company on the other hand benefits from keeping the bank out of examining all details of its work, thus avoids unnecessary disclosure of inside information.

Some researchers consider revenue sharing as *gharar*. The reason is that, because costs are not shared, the company might end up with losses while the financier obtains positive profits. For example, the company's costs might be 800. Using the above numbers, this means that net profits for the company will be $(2/3)(900) - 800 = -170$. This means that the two parties are not bound to win together and lose together. A possibility for win-lose outcome is created by using revenues rather than profits as a subject of sharing.

This possibility cannot be denied, but cannot be escaped either. Profits do not have a definite measure. Some consider gross profits, some net income, while some consider a proprietary measure by excluding certain costs items from income statement. Effectively, any measure of profits creates the possibility of win-lose outcomes due to the sophisticated accounting procedures.

More important, the mere possibility of a win-lose outcome is not sufficient to describe an arrangement as *gharar*. Just as in sharecropping, revenue sharing aligns the interests of the two parties, so both are better off to reach win-win outcomes. It becomes *gharar* only if it is in the best interest of each party to win when the other loses.

7. Significance Of The Zero-Sum Measure

7.1. Pareto Optimality

An important result of characterizing *gharar* as a zero-sum transaction is derived from Pareto criterion. Since playing a zero-sum game cannot make both parties better off, this means that it is Pareto optimal not to play such a game. This result shows that avoiding *gharar* contracts cannot make rational economic agents worse off. Thus it can be safely argued that applying Islamic measures imposes no loss of efficiency. Although the Pareto criterion has been criticized as a measure of welfare, it is reasonable to suppose that the desired welfare state must be at least Pareto optimal (Sen, 1987, p. 35).

7.2. Life is not a Zero-sum Game

Most situations in practical life are nonzero-sum games. There are plenty of instances where parties in conflict can end in win-win situations. Pure conflict is only a special case, while instances in which conflict (win-lose) and cooperation (win-win) coexist are more common than otherwise (Shelling, 1980, ch. 1, 4). In such situations, people usually prefer cooperation and coordination to conflict (Bierman & Fernandez, 1998, pp. 18-19; Schelling, ch. 3). That is, they prefer to choose the win-win part of the game, rather than the win-lose part, even if the winner in the latter might gain more than in the former. Thus prohibiting *gharar* is not harmful to economic life; in fact it is beneficial in shifting the focus of economic agents from direct opposition to possible cooperation.

Some view business as war: "It is not enough to succeed. Others must fail." But this view of the world is certainly not realistic. Axelrod (1984, p. 190) writes: "We are used to thinking about competitions in which there is only one winner, competitions such as football or chess. But the world is rarely like that. In a vast range of situations mutual cooperation can be better for both sides than mutual defection." Brandenburger and Nalebuff (1996, pp. 3-5) write: "there are few victors when business is conducted as war. The typical result of a price war is surrendered profits all around. ... In fact, most businesses succeed only if others also succeed. ... It's a mutual success rather than mutual destruction. It's win-win. ... In business, your success doesn't require others to fail—there can be multiple winners. ... You don't have to blow out the other fellow's light to let your own shine."

By viewing life as a zero-sum game, the whole society becomes a zero-sum society, where a continuous war is taking place among its members (Thurow, 1980). In the end, there is no winner in such an environment, and all fighters eventually lose.

7.3. The Winner-take-all Society

When the zero-sum structure extends to a group of players, rather than only two, it becomes like a lottery: Thousands compete for a single prize, and the winner takes it all while the rest is doomed to lose.

Frank and Cook (1995) explain how western societies are becoming more of a "winner-take-all" societies. In such an environment, opportunities are distributed unequally such that only few can win, and those who do get the lion's share of the pie. This has the undesired effect of concentrating wealth in the hands of the few, while the majority suffers poverty.

Although the authors do not mention the zero-sum structure as such, they show how the economy is becoming more like sports, which are merely zero-sum games: "In effect, the reward structure common in entertainment and sports—where thousands compete for a handful of big prizes at the top—has now permeated many other sectors of the economy." The authors argue that "cooperative agreements to reduce the size of the top prizes and curb some forms of competition need not lead to socialist squalor. On the contrary, such agreements are the key to a more equitable and prosperous future" (p. viii).

7.4. Relative vs. Absolute Payoffs

Rationality requires a player to maximize his own payoffs according to his own value system, regardless of other players (Binmore, 1992, p. 237; Schelling, 1980, p. 4). In a zero-sum environment, in contrast, payoffs are relative across players: Those who win only do when others lose. As Axelrod (1984) points out, relative performance measures lead to envy, and envy leads to attempts to rectify any advantages the other player has attained. "Asking how well you are doing compared to how well the other player is doing is not a good standard unless your objective is to destroy the other player. ... When you are not trying to destroy the other player, comparing your score to the other's score simply risks the development of selfdestructive envy." (p. 111). Rawls (1971) notes that envy becomes pervasive in societies where the social system is regarded as "a conventionally established and unchangeable zero-sum game" (p. 538). Choi (1993, p. 137) writes: "The more the social production process is viewed as a zero-sum game, the higher the envy barrier. If the social pie is seen as fixed in size, one individual's gain in distribution is another person's loss."

A zero-sum environment, therefore, embraces unethical behavior. This is true no matter how noble or honorable players in fact are. Direct opposition of interests in such games forces rational players to consider relative rather than absolute performance, so they behave as if they were envious. Nothing prevents envy in this case from flourishing as a consequence of such behavior. By prohibiting zero-sum contracts, Islamic rules therefore set up the proper environment for cooperative and ethical behavior.

7.5. Asymmetric Information and Conflict of Interests

Although informational asymmetry is a fact of life, contract design can either mitigate or exacerbate this problem. When payoff functions of the two sides of the contract are in direct opposition, it is in the best interest of each party to hide information from the other in order to defeat him. According to Schelling (1980), players intentionally deceive their types and prevent information on their intentions to be signalled to the other player, to the extent of adopting randomized strategies. “So the ‘rational strategies’ pursued by the two players in a situation of pure conflict ... should not be expected to reveal what kind of behavior is conducive to mutual accommodation, or how mutual dependence can be exploited for unilateral gain” (p. 84). “With a minimax solution, a zero-sum game is reduced to a completely unilateral affair. One not only does not need to communicate with his opponent, he does not even need to know who the opponent is or whether there is one. A randomized strategy is dramatically anti-communicative; it is a deliberate mean of destroying any possibility of communication, especially communication of intentions, inadvertent or otherwise. It is a mean of expunging from the game all details except the mathematical structure of the payoff, and from the players all communicative relations” (p. 105). Binmore (1992, pp. 352-353) points that “rational players with a sequence of two-player, zero-sum games to play will act so as to ensure that their past play will not help the opponent predict their future play. This is because, whatever is good for one player in a two-player zero-sum game is necessarily bad for the other.” As information becomes more asymmetric, moral hazard and adverse selection problems only get worse.

Cooperative agreements, on the other hand, promote communication between players thus reducing informational asymmetry. “In the pure-coordination game, the player’s objective is to make contact with the other player...; in the minimax strategy of a zero-sum game—most strikingly so with randomized choice—one’s whole objective is to avoid any meeting of minds, even an inadvertent one.” (Schelling, 1980, p. 96.) Better communication between players improves economic efficiency since full information environments allow first best solutions to be attained.

7.6. Honesty vs. Rationality

Rationality requires profit maximizing, and there is nothing wrong in that. A nonzero-sum game provides players with a structure in which all can win, yet each is behaving rationally. That is, mutual benefit can be obtained without compromising rationality. Honesty with others in such setting does not contradict rationality, and thus we can rightfully ask players to be honest and not to deceive others.

In zero-sum games, however, this is impossible. By maximizing his own payoffs, each party in such games necessarily hurts the other, and there is no way that one can be honest with others. The reason, as explained earlier, is that they are in direct opposition. Being honest means that one will provide his opponent the chance to win only at his expense. Rationality and honesty in zero-sum games cannot coexist.

A good example is insurance contract. Pauly (1968) shows how moral hazard arises in such contracts, and consequently optimality of insurance will not be achieved. Kenneth Arrow (1971, pp. 221-222) comments:

One of the characteristics of a successful economic system is that the relations of trust and confidence between principal and agent are sufficiently strong so that the agent will not cheat even though it may be “rational economic behavior” to do so. The lack of such confidence has certainly been adduced by many writers as one cause of economic backwardness. The lesson of Mr. Pauly’s paper is that the price system is intrinsically limited in scope by our inability to make factual distinction needed for optimal pricing under uncertainty. Nonmarket controls, whether internalized as moral principles or externally imposed, are to some extent essential for efficiency.

There is no question that honesty is essential for efficiency; the question, however, arises as to what extent should we expect trust and honesty to control economic behavior in order to achieve efficiency. According to Arrow, there is no limit to such control, and honesty is required even if it is against “rational economic behavior.” But this is not a realistic view. Demanding absolute honesty at the expense of self interest is self defeating, since honest players in a zero-sum environment will be always losing and therefore be excluded from the game, so only dishonest players are left. “We may hope that trust will come about as a by-product of a good economic system (...), but one would be putting the cart before the horse were one to bank on trust, solidarity and altruism as the preconditions for reform.” (Elster and

Moene, 1989, p. 5.) We need a system that establishes the balance between honesty and rationality, and Islamic principles achieve this balance. By eliminating zero-sum transactions and establishing a nonzero-sum environment, agents are provided the opportunity to maximize their payoffs without necessarily hurting their counterparts. In this environment, honesty can be as rewarding as dishonesty, and agents can attain maximum payoffs without compromising moral values. This balance is a distinguishing feature of Islamic principles in general, and of Islamic economics in specific.

7.7. Ex ante vs. Ex post

Theoretically, many *gharar* contracts can be mutually beneficial but only ex ante, i.e. at the time of contracting. But this by no means implies that they are still so after uncertainty is revealed or ex post. For example, at time of contracting the buyer of a lost camel might believe that probability of success is 0.2, so that expected value of the camel is 200, and this might be an acceptable price for both parties. But ex post the value is either 1000 or zero, so one party wins the difference while the other loses it. Many analytical tools used in main stream economics are designed only for ex ante optimality. “Ex post, the wonderful unanimity for a Pareto-improving redistribution (that is, one which increases everyone’s expected utility) no longer exists.” (Eeckhoudt and Gollier, 1995, p. 219).

Alternative schools of economic thought place greater weight on the ex post aspect of decision. For example, the transaction cost approach emphasizes the ex post institutions of contract, with special attention to private ordering and self-enforcing, as compared to court ordering and legal-enforcement (Williamson, 1985, p. 18; also see below). Modern evolutionary theory, including evolutionary games, studies how economic behavior develops through long sequences of trials and errors. Accordingly, choice emerges via ex post natural selection. Amartya Sen (1998) argues that evolutionary ex post selection approach can compliment “reflective” or ex ante selection emphasized by main stream economics.

The inconsistency between ex ante and ex post optimality is closely related to the concept of dynamic or time inconsistency (Cukierman, 1994; Machina, 1989, p. 1637). If it is not in the interest of an agent to carry out his commitment ex post, then such commitment is not credible from an economic point of view. That is, breach of promise becomes a “rational” decision. A good example is the forward contract.

As explained earlier, a forward contract serves as a hedge or insurance arrangement. A farmer can sell future crop for a prespecified price to hedge against fluctuations in spot price at time of delivery. This arrangement, however, is prone to time inconsistency, and it is for this reason that futures markets developed. Smith (1994, p. 182) puts it in a clear language:

Consider the prototypical farmer who ... expects to reap a certain quantity of wheat at harvest time, but fears a fall in its price. To hedge against the risk of a fall in price, she negotiates a forward contract with a miller, by which she agrees to deliver a fixed amount of wheat of a specified quality at the time of harvest at a predetermined (forward) price. Now suppose that the spot price of wheat falls before the harvest. The miller would like to escape from the forward contract, since she could now purchase the wheat at a lower price. The farmer is unwilling to let her do so, however, since the forward contract guarantees him the higher price at harvest. The miller hunts for a third party to whom she can sell the contract, a speculator who would be willing to bet that spot prices will rise by harvest time. (Emphasis added).

By selling the forward contract in a standardized form, futures market is created. The problem with forward, as compared to *salam*, is that any deviations of the spot price from the contract price will make either party willing to “escape from the contract.” In *salam*, in contrast, the upfront payment allows the buyer to gain from the discounted price, while the seller benefits from the financing facility. These benefits counter-affect possible fluctuations in spot price, thus reducing the problem of dynamic inconsistency.

The gap between ex ante and ex post optimality is what makes the decision maker regret his decision. By imposing dynamic consistency, regret therefore is minimized, and contracts have better chances to be honored. By eliminating strictly competitive games, Islamic rules produce dynamically consistent economic relationships, where both parties can benefit ex ante and ex post.

7.8. Self-enforcement vs. Legal Enforcement

Except for spot exchange, any agreement is simply a promise to deliver or to pay in a future date or conditional on a certain event. Such promises must be credible, or otherwise the agreement will not be

honored (Baird et al., 1994, p. 51). Credible agreements are those in which it is in the best interest of both parties to execute it ex post. Such agreements are called self-enforcing agreements (Williamson, 1985, p. 168). Absent of legal enforcement, a dynamically inconsistent contract cannot be fulfilled. A buyer of a lost camel would not be willing to pay 200 if, just after signing the agreement, he finds that the camel has already died. The same argument applies to the seller if the camel is found safe. Similarly, it is not in the best interest of an insurance company to compensate a policy holder for an amount that is ten times the premium paid. Left to its own interest, therefore, insurance company will prefer not to pay. In the long run, of course, breaching promises is self-defeating; but short run gains do influence economic behavior and, in the long run, can lead to unstable solutions.

Both *gharar* and non-*gharar* contracts have to conform to their respective legal requirements at the time of agreement. The difference, however, emerges after the contract has been signed. *Gharar* contracts are dynamically inconsistent, and therefore it is not in the best interest of both parties to fulfill the contract; they have to rely on the legal institution to enforce it. Non-*gharar* contracts in contrast can be fulfilled by self-interest of involved parties. Although legal enforcement is necessary in both environments, *gharar* contracts are less dependent on self-interests and more dependent on legal enforcement.

A good example is found at the time of the Prophet, when disputes on selling immature fruit became widespread and drew the attention of the Prophet, as explained earlier. Such disputes arouse because one party was taking away the other's money for nothing, which is a zero-sum transaction. After imposing the condition that fruit shall be sold only after maturity appears, likelihood of win-win outcomes dominated, and therefore disputes must have been reduced effectively. This clearly shows that, other things equal, *gharar* contracts impose higher legal costs than Islamic contracts.

7.9. Cooperation vs. Competition

Economists define a game of chance as a game in which payoffs depend on events uncontrollable by players, while in a game of skill, in contrast, payoffs are controllable. Although both types involve uncertainty, skill improves likelihood of success and thus such games are value-creating.

However, creating value requires cooperation between players, while distribution of value induces competition. "Business is cooperation when it comes to creating a pie and competition when it comes to dividing it up." (Brandenburger and Nalebuff, 1996, p. 4.) "Trading partners derive mutual benefits from cooperation in production from which their incomes are ultimately derived, but they compete over proceeds of production because what one gets the other cannot have. But there may be a trade off. ... The trade-off can be seen, in effect, as one between short-term self-interest in the share of the pie and a longer-term interest shared with others in the size of the pie." (Burchell and Wilkinson, 1997, p. 219.)

This implies that value-creating games, or games of skill, should be modeled as cooperative games rather than as competitive games. It is therefore improper to play value-creating games in a zero-sum setting. Some *gharar* contracts might involve skill, like search for a lost camel or sale of a diver's hit. However, a *gharar* contract is structured to reward luck and skill on equal terms, providing no incentive for optimal effort. Such setting makes the party facing risk rely more on costless luck than on costly skill. A buyer of a lost camel assumes all risks of the camel, both controllable and uncontrollable, and thus he becomes more sensitive to uncontrollable events than the agent in *ja'alah*. Modeling skill games in a strictly competitive framework therefore diminishes realized value due to substitution of luck for skill. A cooperative model creates optimal incentives for skill and thus allows for the full potential value to be realized.

7.10. Risk and Stability in Islamic Economy

A widely held view is that cooperative arrangements, like *musharakah* or *ja'alah*, are suitable for high-risk environments, while *riba* and direct sale are suitable for less risky ones. Although this might be true in some cases, it is not always so. To see this, consider the following question: When would an owner of a lost camel choose *ja'alah* over sale? Similarly, when would a financier choose *riba* over *mudharabah*? One determinant of the choice problem is the probability of success. It can be shown that, other things equal, if the owner or lender is sufficiently confident in success, each is better off choosing cooperative (*ja'alah* or *mudharabah*) over competitive agreements. In this way he can enjoy the upside returns that cannot be shared under fixed price compensation.

The design of cooperative games exposes the two parties to risk of failure, but this does not imply that, in equilibrium, risky projects are chosen. To the contrary, because of this exposure, the two parties will voluntarily choose the project with the lowest probability of failure. In risky competitive games, in contrast, one party is shielded from risk, while the other faces the entire risk, and thus he is better off ex ante carrying the riskiest project. This conflict of interest between the two parties leads to the well known problem of moral hazard. Several studies show that *riba*, for example, involves conflict of interest. These include Townsend (1979), Stiglitz and Weiss (1981), and Williamson (1986), among others. Bernanke and Gertler (1989) show how conflict of interest can lead to dynamic business cycles. Thus *gharar* contracts, because of conflict of interest, promote risky behavior (i.e. moral hazard) and therefore feeds aggregate instability of the economy.

Today's economy is a high risk economy. It is becoming more and more like a giant financial market, and the traditional distinction between real and financial economies is disappearing (Mandel, 1996). Despite the proliferation of risk management tools and instruments, volatility and instability are increasing rather than decreasing (Bernstein, 1996, p. 329; *The Economist*, 10/22/99, pp. 97-98). From our point of view, a major factor behind the higher tendency for taking risk is the zero-sum structure embedded in many derivatives and financial instruments. Eliminating *gharar* therefore is a necessary step towards achieving economic stability.

8. Conclusion

The Islamic principle behind most illegal contracts is eating others' money for nothing. A zero-sum exchange reflects precisely this concept: It is an exchange in which one party gains by taking away from the other party's payoff, leading to a win-lose outcome. However, a rational agent will not accept to engage into a certainly losing game; only if loss is uncertain and gain is probable, that such game is played. Hence uncertainty or risk is what tempts rational agents to engage into an exchange which they know in advance that only one will gain from it while the other must lose. This temptation is best described by the term *gharar*, which means deception and delusion. It follows that a *gharar* contract is characterized as a zero-sum game with uncertain payoffs. This paper argues that such measure well defines *gharar* transactions.

The paper also develops a *Shari'ah* based measure derived from the hadith: Liability justifies return or utility. It is shown the these two measures coincide and integrate each other. A quantitative formula is developed to examine *gharar* in nonzero-sum games, which helps formalizing conditions of unacceptable risk or excessive *gharar* mentioned by fiqh scholars.

An examination of well known *gharar* contracts shows how the zero-sum measure is satisfied. The measure helps explaining why fuqaha take different positions on controversial nonzero-sum contracts, while unanimously prohibit strictly zero-sum contracts. Extending the measure to modern applications generates interesting results on how a certain contract, like the option contract, might or might not be *gharar*, depending on the structure of payoffs for the two players.

The economic significance of the zero-sum measure provides insights into the Islamic view of economic behavior. Elimination of zero-sum arrangements can be viewed as a paradigm governing Islamic principles of exchange. Not only this paradigm is internally consistent, it is also consistent with rationality as defined by Neoclassical economics. Consequently, modern analytical tools are readily available for Muslim economists without compromising Islamic principles.

There is much to be studied and analyzed, and I hope that this paper presents a proper starting point for building a coherent theory of exchange in Islamic economics.

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Uncertainty (Ketidakpastian) dan Antisipasinya Dalam Perspektif Keuangan Islam

Afdawaiza¹

Abstrak: Dalam Islam mengambil resiko apapun adalah suatu yang dibolehkan bahkan dipuji. Hal ini dikarenakan tindakan yang seperti ini akan mendorong pertumbuhan dan pengembangan ekonomi. Resiko akan menciptakan nilai tambah untuk menciptakan usaha-usaha yang kreatif. Di sisi lain, ketidakpastian adalah suatu hal yang intrinsik dalam semua aktivitas ekonomi. Dalam hal resiko yang dapat dikontrol, hasil yang tidak pasti dari bentuk resiko ini sebenarnya digerakkan oleh sebab-sebab yang pasti yang dapat mempengaruhi atau mengontrol kemungkinan hasilnya. Jika seorang agen ekonomi ingin mendapatkan hasil dari suatu usaha yang bersifat tidak pasti, maka ia harus melakukan usaha-usaha yang nantinya bisa mendatangkan keuntungan. Artinya, hasil dari ketidakpastian tersebut sangat ditentukan oleh usaha yang dilakukan.

Pendahuluan

Hidup di dunia akan selalu berhadapan dengan kondisi ketidakpastian. Ketidakpastian ini nantinya akan memunculkan resiko. Karena selalu ingin hidup aman dan tenang, maka kebanyakan orang takut menanggung resiko. Namun semua tahap kehidupan mengandung resiko. Ke mana pun mengelak dari resiko, maka di situ pun akan ditemukan resiko yang lainnya, karena resiko merupakan bagian yang tidak terpisahkan dari kehidupan. Bahkan dikatakan bahwa tidak ada hidup tanpa adanya resiko, sebagaimana halnya tidak ada hidup tanpa ada kematian. Jadi dengan demikian, setiap hari manusia menghadapi resiko, baik sebagai perorangan maupun sebagai perusahaan. Orang berusaha untuk melindungi diri dari resiko, demikian pula badan usaha pun harus berusaha melindungi usahanya dari resiko². Resiko muncul karena ada kondisi ketidakpastian. Investasi bisa mendatangkan keuntungan, bisa juga menyebabkan kerugian. Ketidakpastian tersebut menyebabkan munculnya resiko. Dengan demikian pembicaraan mengenai ketidakpastian berarti berbicara mengenai resiko. Resiko itu sendiri merupakan buah dari ketidakpastian.

Islam sangat mendorong manusia untuk melakukan usaha nyata dan kegiatan produktif. Islam mendorong masyarakat untuk melakukan kegiatan investasi.³ Sebagai usaha yang dilakukan oleh manusia, tentunya akan selalu berhadapan dengan sejumlah ketidakpastian dan resiko, karena resiko dan ketidakpastian ada di mana-mana, dan memang seperti itu karakter dari suatu usaha. Dalam masalah investasi, investor akan selalu berhadapan pada sejumlah kemungkinan, seperti kemungkinan untuk untung, rugi atau tidak rugi dan juga tidak untung (impas).

Masalah ketidakpastian dan resiko ini menjadi penting dalam pembicaraan masalah keuangan, karena sangat berpengaruh terhadap bentuk kebijakan yang diambil berkaitan dengan investasi, misalnya. Selama ini, usaha-usaha yang dilakukan oleh kalangan ekonomi konvensional untuk menghadapi ketidakpastian tersebut, dilakukan dengan merubah kondisi yang tidak pasti tersebut menjadi kondisi yang pasti dalam hubungannya dengan return, misalnya dengan menerapkan suku bunga atas sejumlah modal yang telah diinvestasikan. Kondisi ini bisa saja dan tentunya akan membawa kepada kerugian salah satu pihak⁴.

Dalam konteks ekonomi Islam, resiko dan ketidakpastian ini dirujuk dengan pembicaraan gharar dalam masalah fiqh. *Gharar* berarti juga menghadapi suatu kecelakaan, kerugian, dan atau kebinasaan. Dan *taghrir* adalah melibatkan diri dalam sesuatu yang *gharar*. Dikatakan *gharara binafsihi wa maalihi taghriran* berarti 'aradhahuma lilhalakah min ghairi an ya'rif (jika seseorang melibatkan diri dan hartanya dalam kancah *gharar* maka itu berarti keduanya telah dihadapkan kepada suatu kebinasaan yang tidak diketahui olehnya). Ketika *gharar* juga dikatakan sebagai sesuatu yang bersifat ketidakyakinan (uncertainty), maka jual-beli *gharar* berarti sebuah jual-beli yang mengandung unsur ketidaktahuan atau ketidakpastian (*jahalalah*) antara

¹ Dosen Fakultas Ushuluddin UIN Sunan Kalijaga Yogyakarta; Asy-Syir'ah Jurnal Ilmu Syari'ah dan Hukum Vol. 45 No. II, Juli-Desember 2011

² Angelo M Vernados, *Islamic Banking & Finance in South-East Asia, Its Development & Future* (Singapura: Fulstand Offset Printing, tt), hlm. 54

³ Syafii Antonio, *Bank Islam, dari Teori ke Praktek* (Jakarta: Gema Insani Press, 2007), hlm. 60

⁴ Penjelasan tentang bagaimana bentuk usaha yang dilakukan dalam menghadapi kondisi ketidakpastian ini dalam bidang keuangan, dapat dilihat buku J. Fred Weston dan Thomas E. Copeland, *Manajemen Keuangan*, terj. Kirbrandoko dkk (Jakarta: Erlangga, 1996), atau R. Agus Sartono, *Manajemen Keuangan* (Yogyakarta: BPFE, 1996), atau Mamduh Hanafi, *Manajemen Resiko* (Yogyakarta: AMP YKPN, 2006)

dua pihak yang bertransaksi, atau jual-beli sesuatu yang obyek akadnya tidak diyakini dapat diserahkan⁵. Dengan demikian, transaksi jual-beli sesuatu yang tidak pasti (*gharar*) tersebut dilarang dalam Islam, karena termasuk kategori perbuatan *maysir* atau perjudian (spekulasi). Hal ini berdasarkan hadis Nabi dalam riwayat Bukhari yang berbunyi:” Rasulullah melarang jual beli lempar krikil dan jual beli *gharar*”.⁶

Sudah menjadi pengetahuan umum bahwa bisnis adalah pengambilan risiko, karena risiko selalu terdapat dalam aktivitas ekonomi, sebagaimana prinsip dasar dalam bisnis, yaitu *no risk, no return*. Selain karena alasan *riba*, prinsip ini juga membawa implikasi penolakan terhadap bunga dalam pinjaman, karena menolak unsur resiko dalam aktivitas bisnis. Namun permasalahannya adalah, jika secara sederhana risiko disamakan dengan ketidakpastian (*gharar*), sementara segala transaksi yang mengandung *gharar* adalah dilarang, maka hal ini akan menjadi rumit. Kenyataannya, justru keunggulan dari sistem ekonomi Islam itu adalah adanya penghargaan terhadap ketidakpastian tersebut, sehingga institusi *riba* diharamkan. Selain itu, justru dengan adanya ketidakpastian maka kegiatan investasi sangat didorong. Berdasarkan hal ini, menjadi penting untuk melakukan upaya penajaman tentang apa yang dimaksud dengan resiko, ketidakpastian (*uncertainty*), sehingga menjadi jelas perbedaannya dengan *gharar*. Ketika hal ini tidak bisa dibedakan, maka ekonomi Islam akan kesulitan untuk menjawab masalah investasi dan spekulasi dalam bisnis berkaitan dengan status hukumnya, karena semuanya mengandung unsur ketidakpastian. Tulisan ini selanjutnya akan berusaha untuk memberikan penjelasan tentang bagaimana ekonomi Islam menjelaskan dan menyikapi masalah *gharar*/ketidakpastian/ resiko ini serta bagaimana implikasinya terhadap akad. Dengan penjelasan masalah ini, diharapkan akan menjadi terang batasan antara transaksi yang dibolehkan dengan yang dilarang.

Resiko: Pengertian dan Macam-macamnya

Sebagaimana yang telah ditegaskan di atas, bahwa pembicaraan ketidakpastian tidak terlepas dari pembicaraan resiko, karena resiko itu sendiri muncul disebabkan adanya kondisi ketidakpastian, sehingga ada yang menyamakan antara resiko dengan ketidakpastian, sebagaimana yang akan dijelaskan pada macam-macam pengertian resiko di bawah ini. Dengan demikian, fokus pembicaraan selanjutnya tentang ketidakpastian ini akan diarahkan pada pembicaraan resiko sebagai substansial ketidakpastian.

Berbagai definisi dapat diberikan kepada kata resiko, namun secara sederhana pengertiannya senantiasa dihubungkan dengan kemungkinan akan terjadinya akibat buruk atau akibat yang merugikan. Beberapa definisi akan dijelaskan di bawah ini beserta penjelasannya. Perlu diingatkan juga bahwa subjek resiko begitu kompleks dan terdapat dalam berbagai bidang yang berbeda sehingga tidak mengherankan jika terdapat berbagai pengertian yang berbeda pula. Karena itu, sebelum dapat menangani resiko dengan baik, maka terlebih dahulu harus diketahui dengan tepat apa yang dimaksud dengan resiko. Ada yang mendefinisikan resiko dengan the chance of loss (peluang kerugian). Ada juga yang mendefinisikan dengan possibility of loss (kemungkinan kerugian). Ada juga yang mendefinisikannya dengan uncertainty (Resiko adalah ketidakpastian).⁷ Meskipun tampak berbeda antara satu definisi dengan definisi lainnya, semuanya sepakat dalam hal bahwa resiko dihubungkan dengan kemungkinan terjadinya akibat buruk yang tidak diinginkan atau tidak terduga. Dengan kata lain, kemungkinan itu sudah menunjukkan adanya ketidakpastian. Ketidakpastian merupakan kondisi yang menyebabkan tumbuhnya resiko. Kondisi yang tidak pasti itu sendiri timbul karena beberapa sebab, antara lain:⁸ (1) Jarak waktu dimulai perencanaan atas kerugian sampai kegiatan itu berakhir. Makin panjang jarak waktu makin besar ketidakpastiannya. (2) Keterbatasan tersedianya informasi yang diperlukan, dan (3) Keterbatasan pengetahuan/ketrampilan/teknik mengambil keputusan.

Ketidakpastian itu sendiri banyak tingkatannya. Ada beberapa tingkat ketidakpastian dengan karakteristiknya masing-masing:⁹

1. Tidak ada ketidakpastian (pasti) dengan karakteristik hasil bisa diprediksi dengan pasti. Contohnya hukum alam. Pada tingkatan pertama ini, kondisi kepastian sangat tinggi, hasil bisa diprediksi dengan relatif. Kita bisa memprediksikan dengan pasti bahwa bumi mengitari matahari selama 360-365 hari (setahun)

⁵ Frank E. Vogel dan Samuel L. Hayes, Hukum Keuangan Islam, Terj. M. Shobirin, dkk. (Bandung: Nusamedia, 2007), hlm. 112

⁶ Muslim, Sahih Muslim (Beirut: Dar al-Fikr: 1412/1992), II: 4. Hadis Nomor 1513

⁷ Herman Darmawi, Manajemen Resiko (Ttp: Bumi Aksara, tt), hlm. 18-20

⁸ Ibid., hlm. 21

⁹ Mamduh Hanafi, Manajemen ..., hlm. 2-6.

2. Ketidakpastian objektif, dengan karakteristik hasil bisa diidentifikasi dan probabilitas diketahui. Contohnya permainan dadu. Ada enam kemungkinan angka yang akan diperoleh, yaitu 1,2,3,4,5 dan 6. Masing-masing mempunyai nilai kemungkinan keluar 1/6.
3. Ketidakpastian subjektif, dengan karakteristik hasil bisa diidentifikasi tetapi probabilitas tidak diketahui. Contohnya investasi. Identifikasi hasil dan probabilitasnya (kemungkinan) sangat sulit dilakukan. Jika sejumlah dana diinvestasikan, maka berapa besar kemungkinan kerugian yang akan dialami. Jika terjadi kerugian, kerugian yang bagaimana yang akan dialami. Begitu juga sebaliknya.
4. Sangat tidak pasti, hasil tidak bisa diidentifikasi dan probabilitas tidak diketahui. Contohnya eksplorasi angkasa. Tidak bisa diketahui, hasil apa yang akan diperoleh dari eksplorasi angkasa.

Resiko beragam jenisnya, mulai dari resiko kecelakaan, kebakaran, resiko kerugian, fluktuasi kurs, perubahan tingkat bunga dan lain sebagainya. Meskipun demikian, resiko dapat dikelompokkan ke dalam dua tipe, yaitu:¹⁰

1. Resiko murni (pure risk), adalah resiko di mana kemungkinan kerugian ada akan tetapi kemungkinan keuntungan tidak ada. Contohnya adalah resiko banjir dan kecelakaan. Banjir yang menghantam rumah, akan sangat merugikan. Akan tetapi rumah berdiri di tempat tertentu tidak secara langsung akan mendatangkan keuntungan tertentu. Di samping individu yang terkena dampaknya, masyarakat secara keseluruhan juga akan dirugikan.
2. Resiko spekulatif, adalah resiko di mana kita memperkirakan terjadinya kerugian dan juga keuntungan. Potensi kerugian dan keuntungan dibicarakan dalam jenis resiko ini. Contoh dari tipe resiko ini adalah usaha bisnis. Dalam bisnis, kita mengharapkan adanya keuntungan di samping ada potensi kerugian. Resiko spekulatif bisa juga dinamakan dengan resiko bisnis. Kerugian akibat resiko spekulatif akan merugikan individu tertentu tetapi akan menguntungkan individu lainnya. Misalkan suatu perusahaan mengalami kerugian, akan tetapi perusahaan lain barangkali akan memperoleh keuntungan dari situasi tersebut. Resiko inilah yang menjadi objek dari ketidakpastian dalam makalah ini.

Resiko dalam Masalah Keuangan

Berdasarkan definisi resiko yang telah dipaparkan di atas, maka dapat dikatakan bahwa resiko didefinisikan sebagai bahaya atau petaka, kemungkinan menderita rugi atau mengalami kerusakan. Jadi resiko mengacu pada kemungkinan terjadinya peristiwa yang tidak menguntungkan. Dalam hal keuangan, jika seseorang membeli saham spekulatif misalnya, berarti ia mengambil resiko menderita rugi dengan harapan mendapat untung yang setimpal.

Sebagai gambaran atas resiko yang terkandung pada aktiva keuangan misalnya, anggaplah seorang investor membeli obligasi pemerintah jangka pendek seharga Rp100 juta dengan mengharapkan tingkat pengembalian sebesar 10%. Dalam hal ini, tingkat pengembalian atas investasi yaitu 10% dapat diperkirakan secara tepat dan investasi tersebut dinyatakan bebas resiko. Akan tetapi jika uang sejumlah nominal di atas diinvestasikan pada sebuah perusahaan minyak yang akan mengebor minyak di tengah lautan, maka hasil investasi tersebut tidak dapat diperkirakan secara tepat. Mungkin ada yang menganalisis situasi tersebut dan menyimpulkan bahwa tingkat pengembalian yang diharapkan, dalam rumusan statistik adalah 20 persen, tetapi investor tersebut juga harus ingat bahwa tingkat pengembalian sebenarnya dapat berkisar antara +1000 persen sampai -100 persen misalnya. Karena ada bahaya yang besar bahwa tingkat pengembalian yang diharapkan tidak tercapai, maka saham tersebut dinyatakan sebagai saham yang relatif riskan (beresiko).¹¹

Dengan demikian resiko investasi terkait dengan kemungkinan bahwa tingkat pengembalian tidak sebesar yang diharapkan, makin besar kemungkinan tersebut, makin riskan investasinya. Dapat dijelaskan bahwa tingkat pengembalian yang diharapkan adalah tingkat pengembalian yang diharapkan akan direalisasikan dari suatu investasi.¹²

Lalu bagaimana manajemen keuangan menghadapi keadaan yang seperti disebutkan di atas. Salah satu cara yang ditempuh perekonomian konvensional untuk menyelesaikan resiko investasi ini adalah menerapkan instrument suku bunga sebagai biaya dari uang.¹³ Suku bunga adalah: "harga yang dibayar atas modal

¹⁰ Ibid., hlm. 6-9. Bandingkan dengan Mohd. Daud Bakar, "The Problem of Risk and Insurable Interest in Takaful: A Jurisprudential Analysis", Proceedings Islamic Finance: Challenges and Opportunities in the Twenty-First Century, Fourth International Conference on Islamic Economics and Banking, Loughborough University, UK, August, 13-15, 2000.

¹¹ J. Fred Weston dan Eugene F Brigham, Dasar-dasar Manajemen Keuangan, terj. Alvonsus Sirait (Jakarta: Penerbit Erlangga, tt), hlm. 115-116

¹² R. Agus Sartono, Manajemen Keuangan, hlm. 149-151

¹³ J. Fred Weston dan Eugene F Brigham, Dasar-dasar Manajemen Keuangan, hlm. 80-82

pinjaman, dan dividen serta keuntungan modal merupakan hasil dari modal ekuitas". Berikut ini akan dibahas faktor-faktor yang mempengaruhi permintaan dan penawaran modal investasi, yang dengan demikian akan mempengaruhi biaya dari uang (*cost of money*).

Empat faktor yang mendasar yang mempengaruhi biaya dari uang adalah (1) peluang produksi, (2) saat mengkonsumsi yang dikehendaki (3) resiko dan (4) inflasi). Untuk mengerti cara kerja empat faktor ini, mungkin akan dapat dipahami melalui ilustrasi berikut ini:¹⁴

Penduduk suatu pulau yang terpencil, hidupnya dari ikan. Mereka mempunyai alat pancing yang membuat mereka dapat hidup dengan cukup sejahtera, akan tetapi mereka masih ingin untuk dapat menangkap lebih banyak ikan. Anggaplah Mr. A mendapat gagasan cemerlang untuk membuat jaring ikan yang akan melipatgandakan hasil tangkapannya, akan tetapi diperlukan waktu satu tahun untuk menyempurnakan rancangannya, menjalin jaring tersebut, mempelajari cara menggunakannya secara efisien, dan Mr A akan mati kelaparan sebelum ide tersebut terwujud. Karena itu dia mungkin akan mengatakan kepada Mr B dan Mr. C dan sejumlah penduduk lainnya bahwa jika mereka memberinya seekor ikan setiap harinya, dia akan mengembalikan dua ekor setiap hari pada tahun berikutnya. Jika ada yang menerima tawaran Mr. A berarti ikan yang diberikan kepada Mr. A merupakan tabungan, tabungan ini akan diinvestasikan dalam jaring ikan, dan tambahan ikan yang dihasilkan jaring tersebut (hasil) akan merupakan pengembalian atas investasi (*return on investment*).

Berdasarkan ilustrasi di atas jelaslah bahwa makin tinggi perkiraan produktivitas jaring ikan tersebut, makin tinggi pula hasil pengembalian yang diharapkan dari investasi yang bersangkutan dan makin banyak juga yang ditawarkan Mr. A kepada calon investornya. Dalam ilustrasi di atas diasumsikan Mr A yakin akan mampu dan karena itu telah menawarkan tingkat pengembalian 100%, yakni dia menawarkan untuk mengembalikan dua ekor ikan atas setiap satu ikan yang diterimanya. Mungkin saja dia telah menyodorkan tawaran yang lebih kecil, misalnya 1.5 ikan, ini berarti tingkat pengembalian yang diterima investornya adalah 50 persen.

Seberapa besar daya tarik dari tawaran Mr. A akan sangat tergantung pada saat mengkonsumsi yang mereka kehendaki. Misalnya Mr B mungkin merencanakan akan berhenti bekerja sehingga mungkin saja bersedia menjual ikannya saat ini untuk memperoleh ikan dalam jumlah yang sama di masa mendatang (*on a one-for one basis*). Di pihak lain, Mr C mungkin mempunyai istri dan beberapa anak sehingga dia tidak bersedia "meminjamkan" ikannya saat ini jika tidak bersedia mengganti ikannya tiga kali lipat pada waktu yang akan datang. Dalam hal ini Mr C mempunyai preferensi waktu yang tinggi sedangkan Mr B mempunyai preferensi waktu yang rendah. Perhatikan juga, bahwa jika taraf hidup masih rendah maka preferensi untuk mengkonsumsi makin tinggi dan penyediaan modal akan sukar.

Resiko yang terkandung dalam pembuatan jaring ikan tersebut yang berarti sama dengan resiko atas kemampuan Mr A untuk melunasi pinjamannya, juga mempengaruhi tingkat pengembalian yang dikehendaki investor. Makin tinggi resiko makin tinggi tingkat pengembalian yang dikehendaki.¹⁵ Dalam masyarakat yang lebih kompleks, juga banyak perusahaan seperti yang dijalankan oleh Mr. A, ada banyak ragam barang dan penabung. Selanjutnya, masyarakat menggunakan uang sebagai alat tukar dan bukan barter dengan ikan. Jika uang, dan bukan ikan yang digunakan, maka nilainya di masa datang, yang dipengaruhi juga oleh inflasi, perlu mendapat pertimbangan. Makin tinggi tingkat inflasi yang diperkirakan, makin besar tingkat pengembalian yang dituntut.

Jadi dapat dilihat, bahwa suku bunga yang ditawarkan pada penabung pada dasarnya sangat tergantung pada (1) tingkat pengembalian yang diharapkan produsen akan diperoleh dari modal yang ditanamkan, (2) saat mengkonsumsi yang lebih disukai oleh konsumen/penabung (preferensi waktu dalam mengkonsumsi), (3) resiko yang terkandung dalam pinjaman tersebut, dan (4) tingkat inflasi yang diperkirakan. Tingkat pengembalian yang diharapkan produsen dari investasi usahanya menjadi patokan tertinggi dari kemampuannya untuk memberi imbalan terhadap tabungan, sedangkan saat yang dikehendaki konsumen untuk mengkonsumsi menentukan berapa besar konsumsi yang direlakan

¹⁴ Ibid., hlm. 81

¹⁵ R Agus Sartono, Manajemen Keuangan, hlm. 154

untuk ditunda pada berbagai tingkat bunga yang ditawarkan oleh produsen (peminjam). Resiko yang tinggi dan inflasi yang tinggi akan mendorong naiknya suku bunga.¹⁶

Inflasi ini selanjutnya akan dijadikan acuan lagi untuk menentukan bunga simpanan yang lebih tinggi. Bila tingkat keuntungan yang diharapkan oleh para investor dan pengusaha lebih rendah dari suku bunga yang berlaku, maka dapat dipastikan mereka para pengusaha akan enggan melakukan investasi. Secara teoretis, dalam sistem keuangan konvensional, seorang akan melakukan investasi sampai pada tingkat marginal efisiensi dari modal (*marginal efficiency of capital*) sama dengan tingkat pengembalian pembayaran bunga karena perilaku investasi bergantung pada tingkat suku bunga dan tingkat ekspektasi keuntungan. Semakin tinggi suku bunga, maka semakin rendah tingkat investasi. Hal ini tentunya akan memperburuk masalah pengangguran, karena orang malas untuk melakukan investasi.¹⁷

Berdasarkan uraian di atas, maka dapat disimpulkan bahwa dalam setiap usaha, apalagi kegiatan investasi, akan selalu berhadapan dengan sejumlah kondisi ketidakpastian yang mengandung sejumlah resiko. Semakin tinggi tingkat ketidakpastian/resiko yang dipikul oleh investor, maka akan semakin tinggi pula biaya dari resiko tersebut. Yang terjadi dalam perekonomian untuk mengantisipasi sejumlah resiko adalah menerapkan institusi suku bunga sebagai jaminan untuk menghadapi sejumlah resiko. Dengan suku bunga, maka sejumlah resiko yang diprediksikan pada masa yang akan datang akan dapat diatasi dan dikompensasikan.

Permasalahan inflasi dan nilai waktu dari uang, akan dapat dijawab oleh suku bunga ini. Namun, satu kritikan yang paling besar terhadap sistem bunga ini adalah bahwa, suku bunga hanya didasarkan pada asumsi yang bersifat merugikan. Padahal dalam setiap usaha dan investasi, tidak hanya kerugian saja yang akan dihadapi akan tetapi juga sejumlah keuntungan. Sementara yang menjadi dasar untuk menetapkan suku bunga, hanya faktor kerugian saja yang dipertimbangkan untuk menetapkan besar kecilnya sejumlah kompensasi yang akan ditetapkan. Dengan bahasa yang lugas dapat dikatakan bahwa dalam perekonomian, faktor kerugian adalah hal yang sama sekali harus dihilangkan dalam hitung-hitungan ekonomi. Hal ini berdasarkan asas rasionalitas bahwa setiap individu adalah rasional dan tidak menginginkan mendapatkan resiko.¹⁸

Dengan demikian, dengan lugas dapat dikatakan bahwa dalam perekonomian konvensional, ketidakpastian itu diakui ada dalam setiap aktivitas bisnis. Akan tetapi, keadaan ketidakpastian tersebut harus dihilangkan dengan mengubahnya menjadi sesuatu yang pasti melalui institusi bunga, meskipun dengan merugikan salah satu pihak.

”Ketidakpastian” Dalam Keuangan Islam¹⁹

a. Hakikat Ketidakpastian

Untuk memulai pembicaraan ini, maka perlu dibedakan dua bentuk resiko, yaitu (1) resiko yang tidak dapat dikontrol, di mana pengambil keputusan tidak mempunyai kontrol apapun terhadap bentuk resiko ini. (2) Resiko yang dapat dikontrol dan dapat dipengaruhi oleh pembuat keputusan (*agent ekonomi*).²⁰

Dalam Islam mengambil resiko apapun adalah suatu yang dibolehkan bahkan dipuji. Hal ini dikarenakan tindakan yang seperti ini akan mendorong pertumbuhan dan pengembangan ekonomi. Resiko akan menciptakan nilai tambah untuk menciptakan usaha-usaha yang kreatif. Artinya, resiko dalam hal ini dapat berguna sebagai motivasi untuk menciptakan usaha-usaha yang kreatif. Tentunya resiko dalam hal ini adalah resiko yang dapat dikontrol, dan resiko seperti inilah yang diperbolehkan untuk dilakukan. Hanya resiko yang dapat merangsang dan menstimulasi usaha-usaha produktif saja yang diperbolehkan dalam Islam.²¹

¹⁶ J. Fred Weston dan Eugene F Bringham, Dasar-dasar Manajemen Keuangan , hlm. 82

¹⁷ A. Mansur, “Konsep Uang dan Bank: Studi Komparatif antara Ekonomi Konvensional dan Ekonomi Islam”, dalam Ontologi kajian Islam , Seri 9, Juli 2005, hlm. 206-207

¹⁸ R. Agus Sartono, Manajemen Keuangan ..., hlm. 147

¹⁹ Untuk pembahasan ini, penulis lebih banyak merujuk pada tulisan Sami Ibrahim al-Suwailem, “Decision Under Uncertainty, An Islamic Perspective”, Proceedings Islamic Finance: Challenges and Opportunities in the Twenty-First Century, Fourth International Conference on Islamic Economics and Banking, Loughborough University, UK, August, 13-15, 2000, hlm.135-148

²⁰ Ibid., hlm. 136

²¹ Bandingkan kembali dengan tingkat dan macam-macam resiko yang telah dijelaskan pada bagian pendahuluan di atas.

Ketidakpastian adalah suatu hal yang intrinsik dalam semua aktivitas ekonomi. Dalam hal resiko yang dapat dikontrol, hasil yang tidak pasti dari bentuk resiko ini sebenarnya digerakkan oleh sebab-sebab yang pasti yang dapat mempengaruhi atau mengontrol kemungkinan hasilnya.²² Sehingga, jika seorang agen ekonomi ingin mendapatkan hasil dari suatu usaha yang bersifat tidak pasti, maka ia harus melakukan usaha-usaha yang nantinya bisa mendatangkan keuntungan. Inilah makna dari sabda nabi kepada sahabatnya: “Ikatlah unta itu, setelah itu bertakwalah”. Orang tidak akan tahu apakah unta yang telah diikat itu akan tetap berada di tempatnya semula, akan tetapi agar unta tersebut tetap berada di tempatnya, maka yang harus dilakukan adalah perbuatan-perbuatan dan usaha yang dapat membuat unta tersebut tetap berada di tempatnya. Artinya, hasil dari ketidakpastian tersebut sangat ditentukan oleh usaha yang dilakukan.

Karakteristik yang terdapat dalam keberanian untuk menghadapi resiko adalah unsur tanggung jawab. Unsur inilah yang membedakan antara *taking risk* dengan *taking chance*.²³ Mengambil keputusan terhadap resiko yang dapat dikontrol ini, keberhasilannya sangat tergantung kepada perhitungan dari *decision maker* nya. Itulah sebabnya dikatakan bahwa resiko akan menstimulasi orang untuk melakukan hal-hal yang bersifat kreatif agar mendapatkan *return*, sebagaimana yang diinginkan. Untuk mencapai hasil yang diharapkan tersebut, maka seorang agent ekonomi tidak hanya mengandalkan peluang yang ada, akan tetapi harus disertai dengan usaha-usaha yang produktif untuk mewujudkan hasil yang diinginkan. Ketika hanya semata-mata mengandalkan peluang yang ada tanpa diikuti oleh usaha kreatif, maka pada saat itu, agen ekonomi sudah terjebak pada sifat perjudian dan *gharar* (*zero-sum game*), dan itu adalah dilarang.²⁴ Ketika seorang *agent* ekonomi melihat sebuah kesempatan dan peluang, maka yang seharusnya dilakukan adalah usaha kreatif sebagai wujud tanggungjawab dari pilihannya, bukan semata-mata mengandalkan kesempatan dan peluang. Itulah sebabnya dikatakan bahwa ketidakpastian sebuah usaha, keberhasilannya sangat ditentukan oleh tindakan dan upaya-upaya yang dilakukan.

Barangkali, inilah maksud dari pembagian resiko dalam hubungannya dengan hasil yang diperoleh, yaitu (1) Resiko pasif, bersifat *game of chance*, yang hanya mengandalkan faktor keberuntungan. (2) Resiko *responsive* yang memungkinkan adanya distribusi probabilitas hasil keluaran dengan hubungan kausalitas yang logis. Hal ini bisa diasosiasikan dengan *game of skill*. Hubungan antara *game of chance* dengan *game of skill* menunjukkan hubungan suatu transaksi investasi itu halal atau haram (dibolehkan atau dilarang).²⁵

b. Ketidakpastian Dalam Wacana Fiqih dan Implikasinya Terhadap Aktivitas Ekonomi

Ketika membahas macam-macam resiko sudah dijelaskan bahwasanya kegiatan investasi dan usaha adalah wilayah yang termasuk ke dalam resiko spekulatif, di mana terdapat potensi keuntungan di samping potensi kerugiannya. Resiko spekulatif ini dinamakan juga dengan resiko bisnis.

Islam mengajarkan kepada umatnya untuk melakukan usaha nyata dan produktif. Islam mendorong seluruh masyarakat untuk melakukan investasi dan melarang membungakan uang. Ada perbedaan yang sangat mendasar antara investasi dengan membungakan uang, yaitu:²⁶

1. Investasi adalah kegiatan usaha yang mengandung resiko karena berhadapan dengan unsur ketidakpastian. Dengan demikian perolehan kembalinya (*return*) tidak pasti dan tidak tetap.
2. Membungakan uang adalah kegiatan usaha yang kurang mengandung resiko karena perolehan kembalinya berupa bunga yang relatif pasti dan tetap.

Dari perbedaan di atas, jelas terlihat bahwasanya resiko atau ketidakpastian adalah sesuatu yang inheren dalam sebuah usaha bisnis atau investasi.

Dalam Bahasa Arab, resiko dan ketidakpastian terwakili oleh kata-kata *gharar*. Tidak ditemukan pengertian yang jelas mengenai *gharar* ini. Hal ini terlihat dari beragamnya definisi yang dijelaskan

²² Sami Ibrahim al-Suweilem, *Ibid* ., hlm. 137

²³ *Ibid*.

²⁴ *Ibid* ., hlm. 144

²⁵ Muhammad, *Dasar-dasar Keuangan Islam* (Yogyakarta: Ekonisia UII, 2004), hlm. 107

²⁶ Muhammad Syafii Antonio, *Bank Syariah, Dari Teori ke Praktek* (Jakarta, Gema Insani Press, 2001), hlm. 59-60

oleh para *fuqaha*²⁷ yang semuanya mengarah pada pengertian keadaan ketidakjelasan.²⁸ Dalam konteks hukum dan bisnis, maka *gharar* dapat diartikan dengan turut serta/ambil bagian dalam usaha komersil yang tidak jelas, tanpa pengetahuan yang cukup atau lainnya untuk menjalankan usaha yang penuh resiko.²⁹

Bisnis adalah pengambilan resiko, karena resiko selalu terdapat dalam aktivitas ekonomi. Ditambah lagi, adanya prinsip dasar, *no risk no return*. Selain karena alasan *riba*, prinsip ini juga membawa implikasi penolakan terhadap bunga pinjaman dan juga sekuritas yang dianggap *risk-free*. Kalau kemudian, resiko ini secara sederhana disamakan dengan ketidakpastian (*uncertainty*) dan ketidakpastian dianggap *gharar* dan itu adalah dilarang, maka masalahnya menjadi tidak jelas/kabur. Oleh karena itu, perlu diadakan pembedaan pengertian yang jelas antara *gharar*, resiko atau ketidakpastian. Memang tidak mudah mendefinisikan masalah ini, karena dalam literatur keuangan dan investasi, resiko ini didefinisikan hampir sama saja dengan defenisi lainnya.³⁰

Penjelasan yang cukup representatif tentang *gharar* dan resiko yang disamakan dengan *uncertainty* adalah disampaikan oleh Heidjen, sebagaimana yang dikutip oleh Muhammad dalam bukunya, Dasar-dasar Keuangan Islami, sebagai berikut:

”Resiko, memiliki preseden historis dan dapat dilakukan estimasi probabilitas untuk tiap hasil yang mungkin muncul. *Structural uncertainty* adalah kemungkinan terjadinya suatu hasil bersifat unik, tidak memiliki preseden di masa lalu, akan tetapi terjadi dalam logika kausalitas. *Unknownables* menunjuk pada kejadian yang secara ekstrim kemunculannya tidak terbayangkan sebelumnya. Dengan demikian, kasus *gharar* akan banyak terjadi pada kasus terakhir”³¹

Di atas telah dijelaskan terdapat tingkatan ketidakpastian mulai dari ketidakpastian yang bisa diprediksikan kemungkinan hasilnya, sampai kepada ketidakpastian yang sama sekali tidak bisa diprediksikan akan hasilnya. Berdasarkan perbedaan tingkat ketidakpastian ini, maka bisa dimaklumi kenapa dalam *fiqh* terjadi perdebatan tentang diskusi *gharar* ini, jika diterapkan dalam permasalahan aktivitas ekonomi. Dengan demikian juga terjadi perdebatan tentang statusnya, sah atau tidaknya. Hal ini terlihat dalam pembahasan objek akad dalam transaksi, apakah harus ada atau tidak pada waktu dilakukannya akad.

Menurut pendapat mayoritas *fuqaha*, barang yang belum ada tidak dapat menjadi objek akad, sebab hukum dan akibat akad tidak mungkin bergantung pada sesuatu yang belum terwujud. Di kalangan para *fuqaha*, syarat ini masih terjadi selang sengketa tentang keabsahannya. Imam Malik misalnya memandang sah akad yang sifatnya melepaskan hak atau harta tanpa imbalan (*tabarru'*) terhadap benda-benda yang mungkin eksis di masa mendatang, meskipun pada waktu akad masih belum eksis, seperti wakaf, wasiat, hibah dan sebagainya.³² Ibn Taimiyyah, pengikut mazhab Hanbali, juga memandang sah akad yang objeknya belum ada dalam berbagai bentuknya, selagi dapat dipastikan tidak akan menimbulkan persengketaan di kemudian hari. Masalahnya dalam akad yang seperti ini bukan ada atau belum adanya objek akad, akan tetapi apakah akan mudah menimbulkan persengketaan di kemudian hari. Dengan kata lain, apakah unsur *gharar*-nya dipastikan tidak ada.³³

Meskipun terdapat perbedaan pendapat di kalangan *fuqaha* tentang syarat ini, secara umum adanya persyaratan bahwa objek harus telah eksis pada waktu akad terjadi, memang diperlukan bagi akad-akad yang memerlukan kepastian. Misalnya, jual beli binatang dalam kandungan tidak boleh dilakukan sebab ada kemungkinan bahwa objek akad yang belum ada tersebut, ada kemungkinannya dalam keadaan mati. Dalam hal akad tidak memerlukan kepastian seketika, dan berdasarkan atas pengalaman yang telah menjadi adat kebiasaan yang diterima umum, bahwa kepastian di masa mendatang akan diperoleh, maka syarat adanya objek akad pada waktu akad diadakan, bisa

²⁷ Untuk melihat variasi pendapat *fuqaha* tentang pengertian *gharar* ini, dapat dilihat Wahbah al-Zuhaili, *al-Fiqh al-Islami wa Adillatuhu* (Damaskus: Dar al-Fikr, t.t.), IV: hlm. 435-437

²⁸ Muhammad Syakir Sula, *Asuransi Syari'ah: Konsep dan Sistem Operasional* (Jakarta: Gema Insani Pers, 2004), hlm. 47-48

²⁹ Angelo M. Vernados, *Islamic Banking & Finance in South-East Asia ...*, hlm. 54

³⁰ Muhammad, *Dasar-dasar ...*, hlm. 106

³¹ *Ibid.*, hlm. 107

³² Ibn Rusyd, *Bidayah al-Mujtahid wa Nihayah al-Muqtasid* (Beirut: Dar al-Ma'rifah, 1981), II: 324

³³ Ibn Taimiyyah, *Fatawa Ibn Taimiyyah* (Ttp: Maktabah Ibn Taimiyyah, tt), XX: 543

diperlukan. Objek akad cukup diperkirakan akan ada di masa mendatang, seperti dalam hal akad bagi hasil, pesan membuat barang dan lain sebagainya.³⁴

Lebih tegas lagi, Ibn al-Qayyim al-Jauziyyah menyatakan pendapatnya tentang maksud *gharar* tersebut dengan membedakan antara 'barang yang tidak eksis' dengan 'ketidakpastian' yang menimbulkan keraguan eksisnya benda tersebut di masa akan datang. Ia menekankan bahwa yang dilarang syariat bukanlah karena tidak atau belum eksisnya objek akad akan tetapi lebih kepada unsur ketidakpastiannya.³⁵ Dengan demikian, objek akad yang tidak ada pada waktu akad namun dapat dipastikan ada di kemudian hari, maka akadnya tetap sah. Sebaliknya, objek yang tidak ada pada waktu akad dan tidak dapat dipastikan adanya di kemudian hari maka akadnya tidak sah.³⁶

Dalam konteks legislasi moderen, pembahasan tentang unsur *gharar* atau spekulasi lebih banyak mengartikan *gharar* tersebut dengan unsur ketidakpastiannya, bukan eksistensi barangnya, dan ini sangat berbeda dengan pembahasan *fuaqaha* klasik yang pada umumnya lebih menekankan pada aksisnya objek akad waktu transaksi sehingga tidak membolehkan transaksi atas barang yang tidak ada pada waktu penutupan akad, meskipun sebagian mereka mengecualikan akad *salam*, *istisna* dan sewa menyewa. Hal ini dapat dilihat dalam sejumlah Kode Sipil sejumlah Negara di wilayah Timur tengah, seperti Mesir, Irak, Qatar, Jordania dan Kuwait.³⁷

Berkaitan dengan perbedaan pandangan ulama tentang *gharar* ini, Frank L. Vogel dan Samuel L. Hayes memberikan penjelasan dengan menyusun transaksi yang dilarang dalam hadis Nabi sebagai dasar pelarangan *gharar*, sesuai dengan tingkat resikonya. Ia menyatakan bahwa ada beberapa hadis yang menjelaskan *gharar* yang berciri resiko dan ketidakpastian pada awalnya. Beberapa hadis tersebut adalah:³⁸

1. Rasulullah melarang jual beli dengan batu kerikil (*al-hasah*, yaitu jual beli dengan melemparkan batu kerikil untuk menentukan mana barang yang akan dijual) dan *gharar*.
2. Janganlah kalian membeli ikan yang masih berada di air karena jual beli benda seperti itu mengandung unsur penipuan.
3. Rasul melarang menerima upah dari perkawinan binatang jantannya.
4. Rasulullah melarang jual beli kandungan di dalam perut binatang ternak, menjual susu yang berada di dalam teteknya, menjual hamba yang lari dan menjual hasil penyelam (*darbatul ghais*), yaitu menjual hasil selaman di muka, apapun yang ditemukan.
5. Barang siapa yang membeli bahan makanan, biarkanlah ia tidak menjualnya sampai memilikinya.
6. Barang siapa membeli bahan makanan maka janganlah menjualnya sehingga ia menimbangnya.
7. Nabi melarang menjual anggur hingga hitam dan biji-bijian hingga keras.

Berdasarkan hadis-hadis tersebut, maka ia menyusun transaksi-transaksi yang dilarang tersebut berdasarkan tingkat resikonya sebagai berikut:³⁹

1. Spekulasi murni. Hadis di atas menggambarkan beberapa transaksi yang tampaknya diketahui sepenuhnya yang ditunjukkan oleh bentuk jual beli "hasil menyelam" atau lontaran batu apapun

³⁴ Ahmad Azhar Basyir, *Asas-asas Fiqih Muamalah* (Yogyakarta: UII Press, 2000), hlm. 51-52

³⁵ Ibn al-Qayyim al-Jauziyyah, *I'lam al-Muwaqqi'in*, (Beirut: Dar al-Jil, 1970), I: hlm. 357-351

³⁶ Penjelasan mengenai variasi pendapat ulama tentang *gharar* ini, mulai dari yang terlalu ketat sampai pada yang fleksibel dengan mengakomodir perkembangan zaman, dapat dilihat Syamsul Anwar, *Hukum Perjanjian Syariah, Studi tentang Teori Akad dalam Fiqih Muamalah* (Jakarta: Rajawali Press, 2007), hlm. 193-200

³⁷ Kode Sipil Irak tahun 1951, pasal 129 (1) berbunyi: Objek suatu obligasi boleh jadi tidak (belum) eksis pada waktu pelaksanaan akad asalkan keberadaannya di masa mendatang dimungkinkan dan apabila dipastikan dengan cara menghilangkan ketidakpastian (*jaahl*) dan resiko (*gharar*). Qatar juga mengikuti langkah ini sebagaimana yang tertuang dalam Hukum Sipil dan Komersil tahun 1971 pasal 33. Kode Sipil Jordania ayat (1) merilis peraturan yang sama dengan Qatar. Dalam pasal 161 ditegaskan lagi bahwa *gharar* disetarakan dengan ketidakpastian yang tinggi. Kuwait juga mengikuti langkah yang sama dengan menegaskan dalam Kode Sipil tahun 1980 pasal 168. Mhd. Syahnan, "Larangan Spekulasi (Gharar) dalam Kode Sipil Negara-negara Arab: Suatu Analisis Sejarah Sosial-Ekonomi" dalam *Jurnal Studia Islamica*, Vol. 2 Nomor 2, 2000, hlm. 172

³⁸ Frank E Vogel dan Samuel L Hayes III, *Hukum Keuangan Islam, Konsep, Teori dan Praktek*, Terj. M. Sobirin Ashnawi dkk (Yogyakarta: Nusamedia, 2007), hlm. 110-111. Bandingkan juga dengan Syamsul Anwar, *Hukum Perjanjian Syariah* ..., hlm. 192

³⁹ Frank E. Vogel dan Samuel L Hayes III, *Hukum Keuangan Islam* ..., hlm. 111- 112. Bentuk-bentuk jual *gharar* masa jahiliyyah ini adalah (1) Jual beli al-hasah. Ini adalah cara jual beli yang dilakukan oleh orang jahiliyyah. Cara jual beli ini dilakukan pada saat jual beli tanah yang tidak jelas luasnya. Mereka melemparkan hasah (batu kecil). Pada tempat di mana batu kecil itu jatuh, maka tanah itulah yang dijual. Dengan kata lain, barang yang terkena lemparan batu, barang itulah yang dijual. (2) Jual beli *darbatul gawwas* (tebak selam), yakni jual beli yang dilakukan dengan cara menyelam. Barang aynng ditemukan di laut waktu menyelam itulah yang dijualbelikan. Si pembeli menyerahkan harga/bayaran sekalipun tidak mendapatkan apa-apa. Terkadang si penjual menyerahkan barang yang ditemukan sekalipun jumlah barang tersebut mencapai berapa kali lipat dari harga yang harus diterima. (3) Jual beli nitaj. Yaitu jual beli hasil binatang ternak sebelum memberikan hasil, di antaranya jual beli susu yang masih berada dalam kantung susu binatang. (4) Jual beli mulamasah, yaitu jual beli dengan cara si penjual dan si pembeli melamas (menyentuh) baju salah seorang dari mereka (saling menyentuh) atau barangnya. Setelah itu, jual beli harus dilaksanakan tanpa diketahui keadaannya atau saling rida. (5) Jual beli munazabah, yaitu jual beli di mana kedua belah pihak saling mencela barang yang ada pada mereka dan ini dijadikan dasar jual beli, yang tidak saling rida. (6) Jual beli muhaqalah, jual beli tanaman dengan takaran makanan yang dikenal dalam masyarakat. (7) Jual beli muzabanah, jual beli kurma yang masih di pohonnya. (8) Jual beli mukhadarah, yakni jual beli kurma hijau yang belum tampak mutunya. (9) Jual beli domba di tubuh domba hidup sebelum dipotong. (10) Jual beli habalul-habalah, jual beli anak unta yang masih di dalam perut induknya. Lihat juga Muhammad, *Dasar-dasar Keuangan Islam* ..., hlm. 110-111

yang jatuh ke tanah. Transaksi yang juga masuk ke dalam kategori ini adalah transaksi samara pra Islam yang lain yang juga dilarang oleh Sunnah, yakni transaksi yang paling tidak berdasarkan pola penafsiran, tampak belum sempurna, bentuk-bentuk perjudian yang menyenangkan yang digemari oleh pedagang, misalnya menjual barang dengan cara disentuh oleh pembeli (*mulamasah*) dengan harga tertentu (tanpa diperiksa).

2. Hasil yang belum pasti. Hadis kedua menjabarkan kontrak yang nilai pertukarannya tidak hanya harga yang belum pasti, akan tetapi sama sekali belum terwujud. Misalnya membeli ikan yang ada di dalam air. Agaknya jual beli barang-barang yang belum menjadi milik seseorang masuk ke dalam kategori ini. Resiko dalam jual beli ini dapat dengan mudah dihindari dengan menjadikan jual belinya bergantung pada resiko yang diperkecil, misalnya ikan-ikannya ditangkap dan barang-barangnya dimiliki.
3. Keuntungan masa datang yang belum diketahui. Hadis-hadis yang lain menggambarkan transaksi dengan sedikit resiko pada awalnya, karena memberikan manfaat berharga yang diketahui dan ditentukan secara tepat, akan tetapi manfaatnya pada masa mendatang bagi pembeli belum diketahui. Seperti “upah perkawinan binatang jantan” dan hasil “menyelam”. Transaksi semacam ini termasuk sifat-sifat judi, terutama jika pembelinya sangat berharap atau membayar terlalu banyak. Pada kondisi yang lain, mungkin ketika kontraknya telah menjadi lazim dan berlangsung di antara pihak-pihak yang sudah dikenal baik, kontrak-kontrak tersebut sepenuhnya tidak berakibat buruk dan bahkan bisa sangat diperlukan.
4. Ketidaktepatan. Kelompok hadis terakhir menunjukkan elemen perjudian atau resiko yang paling sedikit. Hadis ini tampaknya hanya berkaitan dengan ketidaktepatan, seperti pada jual beli barang-barang yang sebelum ditimbang. Jual beli seperti ini mencakup jual beli orang yang dengan sengaja menutup mata dari resiko atau sebaliknya merupakan jual beli sepenuhnya biasa dan praktis seperti jual beli timbunan barang-barang yang dilihat oleh kedua belah pihak akan tetapi tidak ditimbang.

Dari penjelasan di atas, terlihat bahwa pemaknaan *gharar* sangat dekat dengan ketidakpastian karena tidak tersedianya data yang cukup untuk melakukan transaksi. Inilah sifat utama yang melekat pada *gharar*. Dan ini juga yang menentukan apakah transaksinya termasuk pada kategori perjudian atau murni resiko. Pemaknaan objek akad harus ada pada waktu akad, tidak harus diartikan secara kaku. Akan tetapi, yang lebih penting dari itu adalah unsur pasti atau tidaknya barang tersebut dapat diserahkan pada waktu penutupan akad. Ketika unsur kepastiannya tidak bisa ditegaskan (bersifat tidak pasti), maka sifat *gharar* sudah melekat padanya. Atau dengan bahasa yang lain, kalau transaksi itu dapat dipastikan akan dapat diserahkan objek akadnya, maka inilah yang dimaksudkan dengan resiko. Akan tetapi ketika tidak dapat dipastikan apakah objek akadnya tidak dapat diserahkan atau tidak, maka inilah yang dinamakan *gharar*, dan ini dilarang. Tidak semua resiko adalah *gharar*, akan tetapi semua *gharar* adalah resiko. Resiko atau *gharar* sangat ditentukan oleh tersedianya data untuk melakukan transaksi. Memutuskan untuk melakukan transaksi yang dilengkapi dengan data, maka ini termasuk ke dalam kategori resiko. Sebaliknya, tanpa adanya data yang mendukung, maka inilah yang termasuk ke dalam *gharar*.

Sehubungan dengan pembagian bentuk hasil ketidakpastian di atas, al-Suwailem membedakan resiko menjadi dua tipe. Pertama, resiko pasif, yaitu *game of chance*, yang hanya mengandalkan faktor keberuntungan, dan inilah yang dimaksud dengan tidak tersedianya data dalam melakukan transaksi. Kedua, resiko *responsive* yang memungkinkan adanya distribusi probabilitas hasil keluaran dengan hubungan kausalitas yang logis. Hal ini bisa diasosiasikan dengan *game of skill*. Hubungan antara *game of chance* dengan *game of skill* menunjukkan hubungan suatu transaksi investasi itu halal atau haram (dibolehkan atau dilarang).⁴⁰ Ketidakpastian secara intrinsik terkandung dalam setiap aktivitas ekonomi, akan tetapi ketidakpastian kejadian tersebut akan selalu mengikuti asas kausalitas yang logis yang dapat mempengaruhi probabilitasnya. Hal ini berarti, mencari keuntungan dengan hanya mengandalkan keberuntungan (*chance*) saja, seperti membeli lotre akan menimbulkan dilusi atau pengharapan yang salah, sehingga telah pasti merupakan transaksi yang *gharar* dan dilarang.

Dari penjelasan tersebut, dengan mengacu pada hadis Nabi, transaksi *gharar* dapat timbul karena tiga sebab utama: Pertama, kurangnya informasi atau pengetahuan (*jahala, ignorance*) pada pihak yang melakukan kontrak. Kedua, karena tidak adanya objek yang diperjualbelikan (sebagaimana yang telah

⁴⁰ Ibid., hlm. 107

dijelaskan sebelumnya). Ketiga, barangnya berada di luar kendali pihak-pihak yang bertransaksi. Untuk mengidentifikasi transaksi-transaksi yang tercampuri dengan jenis resiko yang ditengarai sebagai *gharar*, maka dapat digunakan tiga karakteristik ini.⁴¹

Berdasarkan jenis jual beli yang mengandung unsur *gharar* tersebut, jika dianalogikan ke dalam aktivitas keuangan, maka dapat dinyatakan bahwasanya aktivitas *gharar* dapat diminimalisir jika antara penjual dan pembeli masing-masing memberi dan menerima informasi mengenai barang yang diperjualbelikan. Inilah makna dari skill/keahlian/data dalam melakukan transaksi. Dalam bahasa literatur keuangan adalah perlunya informasi yang seimbang dari penjual kepada pembeli mengenai barang yang diperjualbelikan. Jika terjadi informasi yang simetris dari penjual kepada pembeli maka dapat digunakan sebagai alat untuk memperkecil resiko yang mungkin terjadi atas transaksi tersebut. Dengan demikian dapat disimpulkan bahwa kesediaan menanggung resiko dalam bisnis adalah resiko yang melibatkan pengetahuan (*game of skill*), bukannya *game of chance*. Jika *game of skill* dibenarkan maka konsekwensi logisnya adalah keharusan penguasaan manajemen resiko.

Terkait dengan penjelasan di atas, maka muncul pertanyaan mengenai spekulasi. Dapat dijelaskan bahwa kegiatan spekulasi tidak berbeda dengan kegiatan mengambil risiko (*risk taking action*) yang biasa dilakukan oleh pelaku bisnis atau investor. Ada yang membedakan spekulasi dengan pelaku bisnis (investor) dari derajat ketidakpastian yang dihadapinya. Spekulasi berani menghadapi sesuatu yang derajat ketidakpastiannya tinggi tanpa perhitungan, sedangkan pelaku bisnis (investor) senantiasa menghitung-hitung risiko dengan *return* yang diterimanya. Spekulasi adalah *game of chance* dan meninggalkan prinsip *responsibility* di dalamnya sebagaimana yang telah dijelaskan sebelumnya, sedangkan bisnis adalah *game of skill*, yang sangat memperhatikan unsur tanggung jawab dan ketersediaan data di dalamnya. Seorang dianggap spekulatif apabila ia ditengarai memiliki motif memanfaatkan ketidakpastian tersebut untuk keuntungan jangka pendek. Pertanyaannya sekarang adalah bagaimana meredam spekulasi? Spekulasi dilarang bukan karena ketidakpastian yang ada di hadapannya, melainkan cara orang mempergunakan ketidakpastian tersebut. Manakala ia meninggalkan *sense of responsibility* dan *rule of law* nya untuk memperoleh keuntungan semata dari adanya ketidakpastian, itulah yang dilarang dalam konsep *gharar* dan *maysir* dalam Islam.

c. Instrumen yang Dipergunakan dalam Menghadapi Ketidakpastian

Di atas sudah dijelaskan bahwa dalam perekonomian konvensional, asumsi kerugian dalam hitung-hitungan perekonomian adalah hal yang tidak diperbolehkan. Mereka tidak mau rugi dalam sebuah kegiatan investasi. Oleh karena itu, untuk mengganti nilai kerugian yang diprediksikan, maka diterapkan lah instrument bunga. Lalu bagaimana dalam teori keuangan Islam dalam menghadapi sistem ketidakpastian ini? Untuk menjawab hal ini, maka akan dimulai dengan membahas bagaimana pandangan Islam tentang nilai waktu dari uang.

Dalam perekonomian (konvensional) sebagaimana yang telah diilustrasikan di depan, terdapat pemikiran nilai uang menurut waktu. Dalam hal ini harus ditegaskan bahwa uang bukanlah suatu yang hidup dan tumbuh serta berkembang dengan sendirinya. Dalam ilmu ekonomi, ada suatu yang mengecil dan ada yang membesar yang disebabkan oleh usaha yang dilakukan yang tersimpul dalam konsep *risk return profile*. Berkurang dan bertambahnya jumlah uang jika diperoleh melalui sebuah usaha yang wajar adalah sesuatu yang dibolehkan. Satu hal yang harus diingat adalah bahwa sistem perekonomian adalah dinamis. Situasi keseimbangan yang baru akan diganggu dan dipengaruhi oleh faktor-faktor ekonomi lainnya, seperti selera, jumlah penduduk, pola-pola tabungan investasi dan perubahan dalam nilai dan standar kehidupan. Dalam perekonomian, variable-variabel ini mempunyai kecenderungan beroperasi dengan cara kumulatif dan melingkar, bereaksi dan beraksi satu sama lain dalam pola yang rumit. Mengabaikan mobilitas variable ini sama halnya dengan tidak memperdulikan kenyataan pokok mengenai perubahan dalam sistem perekonomian.⁴²

Berdasarkan surat *al-Asr*, dapat dikatakan bahwa nilai waktu dari semua adalah sama kuantitasnya, namun nilai waktu tersebut antara satu orang dengan lainnya adalah berbeda. Perbedaan dari waktu tersebut adalah tergantung pada bagaimana seseorang memanfaatkan waktu. Semakin efektif dan efisien akan semakin tinggi nilai waktunya. Efektif dan efisien akan mendatangkan keuntungan di

⁴¹ Ibid., hlm. 109. Bandingkan dengan Frank E. Vogel dan Samuel L Hayes III, Hukum Keuangan Islam, hlm. 112

⁴² M. Abdul Manan, Teori dan Praktek Ekonomi Islam, Terj. M. Nastangin (Yogyakarta: Dana Bakti Wakaf UII, tt), hlm. 122

dunia bagi siapa yang melaksanakannya. Implikasinya dalam dunia bisnis, bahwa bisnis akan selalu berhadapan dengan sejumlah resiko yakni untung dan rugi. Keuntungan dan kerugian tidak dapat dipastikan untuk masa yang akan datang. Bisnis pada dasarnya hubungan antara *return* dan *risk*. Bisnis bukanlah aktivitas yang mendatangkan keuntungan tanpa ada resiko. Artinya, dalam sebuah usaha faktor kerugian dan keuntungan dalam menjalankan sebuah usaha adalah sesuatu yang tidak bisa dipastikan di depan. Ketidakpastian adalah sesuatu yang inheren dalam sebuah usaha. Oleh karena itu, adalah tidak adil kalau situasi yang tidak pasti diubah menjadi pasti.⁴³

Sementara itu, dalam perekonomian (konvensional), ada dua alasan yang dimunculkan untuk mengusung konsep *time value of money*, sebagai usaha untuk menghadapi sejumlah ketidakpastian. Salah satunya adalah *presence of inflation*, atau penurunan daya beli uang atau *decreasing purchasing power of money*. Berdasarkan teori ini, adalah hal yang logis jika suku bunga ditetapkan sebagai kompensasi daya beli uang selama dipinjamkan.⁴⁴ Dalam hal ini, Islam jelas-jelas menolak, karena tidak lengkap kondisinya. Dalam setiap perekonomian, selalu ada keadaan inflasi dan keadaan deflasi. Bila keberadaan inflasi menjadi alasan keberadaan *time value of money*, maka seharusnya keadaan deflasi seharusnya juga menjadi alasan adanya *negative time value of money*.⁴⁵ Dengan demikian, selama ini hanya satu kondisi saja yang diakomodasi oleh teori *time value of money* yakni inflasi, sedangkan deflasi diabaikan.

Alasan mengenai ketidakpastian *return* dalam usaha, dikonversi menjadi suatu kepastian melalui *premium for uncertainty*. Padahal, dalam setiap investasi selalu ada probabilitas untuk mendapat *positive return*, *negative return* dan *no return*. Adanya probabilitas inilah yang memunculkan ketidakpastian. Probabilitas untuk mendapatkan *negative return* dan *no return* yang dipertukarkan dengan sesuatu yang pasti, disebut dengan *premium for uncertainty*.⁴⁶

Landasan berpikir seperti inilah yang ditolak oleh ekonomi syariah, karena mendapatkan hasil tanpa memperhatikan suatu resiko dan memperoleh tanpa mengeluarkan suatu biaya apapun, dan ini sangat bertentangan dengan konsep *uncertainty*. Teori inipun sebenarnya juga ditolak oleh teori keuangan karena dalam suatu usaha terdapat hubungan antara *risk and return*, bukan *return goes along with risk*. Di atas sudah disebutkan bahwa investasi adalah termasuk ke dalam kategori resiko yang dapat dikontrol dan dikendalikan. Oleh karenanya, upaya dan usaha harus dilakukan untuk menentukan hasil yang diinginkan. Jika ditarik dalam kontek ekonomi, maka keuntungan adalah diperoleh setelah menjalankan aktivitas bisnis. Bagi yang melakukan bisnis secara efektif dan efisien, maka ia akan mendapatkan keuntungan.

Jika instrumen *interest rate* dilarang dalam Islam, maka apa ukuran yang digunakan untuk menetapkan besarnya keuntungan yang diramalkan? Dalam ekonomi syariah penggunaan sejenis *discount rate* dalam penentuan harga membayar tangguh (*bai' almu' ajjal*) dapat digunakan dengan alasan:⁴⁷

1. Jual beli dan sewa menyewa adalah sector riil yang menimbulkan nilai tambah ekonomis (*economic value added*)
2. Tertahannya hak si penjual (uang pembayaran) yang telah melaksanakan kewajibannya (menyerahkan barang atau jasa), sehingga ia tidak dapat melaksanakan kewajibannya kepada pihak lain.

Demikian pula penggunaan *discount rate* dapat juga digunakan dalam penentuan nisbah bagi hasil. Nisbah akan dikalikan dengan pendapatan aktual (*actual return*) bukan dengan pendapatan yang diharapkan (*expected return*). Transaksi bagi hasil beda dengan transaksi jual beli atau transaksi sewa menyewa, karena dalam transaksi bagi hasil hubungannya bukan antara penjual dengan pembeli atau antara penyewa dengan yang menyewakan. Dalam transaksi bagi hasil, yang ada adalah hubungan antara pemodal dengan yang memproduksi modal tersebut. Jadi, tidak ada pihak yang telah melaksanakan kewajibannya namun masih tertahan haknya. *Sohibul mal* telah melaksanakan kewajibannya, yaitu memberikan sejumlah modal, yang memproduksi modal (*mudorib*) juga telah melaksanakan kewajibannya yaitu memproduksi modal tersebut. Hak bagi *sohibul mal* dan

⁴³ Muhammad, Manajemen Bank Syariah ..., hlm. 48-49

⁴⁴ Muhammad Syafi'i Antonio, Bank Syariah..., hlm. 75-76

⁴⁵ Adiwirman S Karim, Bank Islam, Analisis Fiqih dan Keuangan (Jakarta: Rajawali Press, 2007), hlm. 376-377

⁴⁶ Muhammad, Manajemen Bank Syariah..., hlm. 68

⁴⁷ Ibid., hlm. 69

mudarib adalah berbagi hasil atas pendapatan atau keuntungan tersebut sesuai dengan kesepakatan awal apakah bagi hasil itu akan dilakukan atas pendapatan atau keuntungan.

Islam sangat mendorong kegiatan investasi. Dalam melakukan investasi, Islam tidak menuntut secara pasti hasil yang akan datang. Hasil investasi di masa datang sangat dipengaruhi oleh banyak faktor, yaitu faktor yang dapat diprediksikan atau tidak. Faktor-faktor yang dapat diprediksikan atau dihitung sebelumnya adalah berapa banyaknya modal, berapa nisbah yang disepakati, berapa kali modal yang dapat diputar. Sementara efeknya yang tidak dapat dihitung secara pasti atau sesuai dengan kejadian adalah perolehan usaha (*return*).

Berdasarkan hal di atas, maka mekanisme investasi menurut Islam, perolehan nilai waktu yang diformulasikan dalam bentuk bunga adalah tidak dapat diterima. Islam memberikan alternatif terhadap sistem ini sebagai berikut:⁴⁸

$$Y = (QR) vW$$

Di mana:

Y = Pendapatan

Q = Nisbah Bagi Hasil

R = Return usaha

V = Tingkat pemanfaatan harta

W = Harta yang ditabung

Ekonomi syariah adalah ekonomi yang berbasis bagi hasil. Dalam ekonomi bagi hasil, maka yang digunakan untuk mekanisme ekonominya adalah nisbah bagi hasil dan return usaha yang terjadi secara riil. Inilah maknanya *economic value of time*, yakni waktulah yang memiliki nilai, bukan uang yang memiliki nilai waktu. Berikut ini akan dipetakan perbedaan antara *interest rate* dengan *discount rate* dalam pandangan ekonomi konvensional dengan ekonomi syariah.⁴⁹

Certainty Return		Uncertainty Return	
Ekonomi Konvensional	Ekonomi Syariah	Ekonomi Konvensional	Ekonomi Syariah
<p><i>Interest rate</i> ditentukan oleh:</p> <ol style="list-style-type: none"> 1. <i>Preferency current</i> 2. <i>Expected Inflation</i> 	<p>Keuntungan dalam jual beli/sewa menyewa secara bayar tangguh ditentukan oleh :</p> <ol style="list-style-type: none"> 1. Tingkat keuntungan setiap kali transaksi. 2. Frekuensi transaksi dalam satu periode 	<p><i>Discount rate</i> ditentukan oleh:</p> <ol style="list-style-type: none"> 1. <i>Preferency current consumption</i> 2. <i>Premium for uncertainty</i>, dengan kata lain <i>actual return</i> dilaksanakan harus sama dengan <i>expected return</i> 	<p><i>Discount rate</i> ditentukan atas dasar harapan keuntungan (<i>expected return</i>) dan digunakan untuk menentukan nisbah bagi hasil. Bagi hasil yang harus dibayar adalah nisbah bagi hasil dikalikan dengan pendapatan aktualnya. (<i>actual return</i>). Dengan kata lain, pendapatan actual (<i>actual return</i>) tidak harus sama dengan pendapatan yang diharapkan (<i>expected return</i>)</p>

⁴⁸ Ibid., hlm. 71

⁴⁹ Ibid., hlm. 70

d. Implikasi Konsep *Uncertainty* dalam Kontrak/Akad

Menurut Adiwarmanto S. Karim, berdasarkan tingkat kepastian hasil yang diperolehnya, akad *tijarah/* bisnis⁵⁰ dibagi menjadi dua kelompok besar, yaitu:⁵¹

1. *Natural Certainty Contract*, di mana *cash flow* dan *timing* nya bisa diprediksi dengan relatif pasti karena sudah disepakati oleh kedua belah pihak yang bertransaksi di awal akad (*fixed and predetermined*). Kedua belah pihak saling mempertukarkan aset yang dimilikinya, karena objek pertukarannya (baik barang atau jasa) pun harus ditetapkan di awal akad dengan pasti, baik jumlahnya (*quantity*) mutunya (*quality*) maupun harganya (*price*) dan waktu penyerahannya (*time of delivery*). Kontrak-kontrak ini secara “*by their nature*”/sunnatullah, menawarkan *return* yang tetap dan pasti. Termasuk ke dalam akad ini adalah akad jual beli (*al-bai`*, *salam*, dan *istisna`*) dan akad sewa menyewa (*ijarah* dan *ijarah muntahiyah bi attamlik/* IMBT). Dalam akad-akad ini, pihak yang bertransaksi saling mempertukarkan asetnya (baik *real asset* ataupun *financial asset*). Masing-masing pihak tetap berdiri sendiri, tidak saling bercampur untuk membentuk usaha baru sehingga tidak ada pertanggungjawaban resiko bersama, juga tidak ada percampuran aset.
2. *Natural Uncertainty Contract*, di mana *cash flow* dan *timing* nya tidak pasti karena sangat bergantung pada hasil investasi. Tingkat *return* investasinya bisa positif, negatif atau nol (*not fixed and not predetermined*). Pihak-pihak yang bertransaksi saling mencampurkan asetnya (baik *real* maupun *financial asset*) menjadi satu kesatuan dan kemudian menanggung resiko bersama untuk mendapatkan keuntungan. Keuntungan dan kerugian ditanggung bersama. Karena itu, kontrak ini tidak memberikan kepastian pendapatan (*return*) baik dari segi jumlah (*amount*) maupun waktu (*timing*) nya. Yang termasuk ke dalam kontrak ini adalah kontrak-kontrak investasi. Kontrak investasi ini secara *sunnatullah* tidak menawarkan *return* yang tetap dan pasti. Jadi sifatnya tidak *fixed and predetermined*. Termasuk ke dalam bentuk akad ini adalah *musyarakah* (*wujuh*, *inan*, *abdan*, *mufawadah* dan *mudarabah*), *muzara`ah*, *musaqah*, dan *mukhabarah*. Bentuk akad seperti inilah yang dibicarakan dalam bagian ini.

Perbedaan antara *natural certainty contract* dengan *natural uncertainty contract* sangatlah penting karena keduanya mempunyai karakteristik yang khas yang tidak boleh dicampuradukkan. Bila *natural certainty contract* diubah menjadi *uncertainty contract*, maka akan terjadi *gharar* (ketidakpastian, *unknown to both parties*). Dengan kata lain, mengubah hal yang sudah pasti menjadi tidak pasti, ini adalah dilarang.

Demikian pula sebaliknya, bila *natural uncertainty* diubah menjadi *natural certainty contract*, maka terjadilah *riba nasi`ah*. Artinya, merubah hal-hal yang seharusnya tidak pasti menjadi pasti. Hal ini juga melanggar *sunnatullah*, karena itu dilarang. Akan tetapi, justru itulah yang dilakukan oleh perekonomian konvensional, mengantisipasi ketidakpastian dengan menerapkan instrumen suku bunga. Perilaku produktif dan kreatif yang merupakan karakter dasar dari bentuk transaksi ini menjadi tereliminir.

Berkaitan dengan pembagian transaksi ini, ada satu kritik yang dialamatkan pada ekonomi Islam. Sungguhpun sudah jelas perbedaan karakter kedua bentuk transaksi ini, akan tetapi yang terjadi selama ini adalah bahwa ternyata praktek perekonomian Islam juga mempunyai kecenderungan untuk lebih suka bergerak dalam bidang transaksi yang pasti dan menghindarkan diri dari bentuk transaksi *uncertainty*. Perbankan syariah misalnya, lebih suka memberikan produk *murabahah* ketimbang *mudhrabah*. Padahal, sebagaimana yang telah dipaparkan sebelumnya, ketidakpastian akan dapat menjadi motivasi untuk menciptakan karya dan usaha-usaha yang produktif, dan memang inilah yang sangat dianjurkan dalam Islam. Sifat ketidakpastian dari suatu kontrak inilah yang sebenarnya menggerakkan sektor riil. Bank Islam adalah lembaga keuangan yang diidealkan dan berfungsi untuk memperlancar mekanisme ekonomi di sektor riil melalui aktivitas investasi.⁵² Yang terjadi sekarang adalah perbankan Islam lebih suka pada transaksi yang pasti, maka akibatnya adalah pengembangan

⁵⁰ Akad dari segi ada atau tidak adanya kompensasi, dibagi menjadi dua. Pertama, akad tabarru' (gratuitous contract) adalah segala macam perjanjian yang menyangkut non-profit transaction (nir laba). Transaksi ini pada hakekatnya bukan transaksi bisnis untuk mencari keuntungan komersial akan tetapi bertujuan untuk tolong menolong dalam rangka kebaikan. Para pihak yang berbuat kebaikan tidak berhak mensyaratkan imbalan apapun kepada pihak lainnya. Meskipun demikian, ia boleh untuk meminta sedikit biaya kepada counter part nya untuk sekedar menutupi biaya untuk melakukan transaksi tabarru' tersebut. Kedua, akad tijarah, atau disebut juga dengan akad mu'awadah (compensational contract), yakni segala macam perjanjian yang menyangkut for profit transaction. Akad-akad ini dilakukan bertujuan untuk mencari keuntungan, karena itu bersifat komersial. Lihat Adiwarmanto S. Karim, Bank Islam..., hlm. 66 dan 70

⁵¹ Ibid., hlm. 70-79

⁵² Ascarya, Akad dan Produk Bank Syariah (Jakarta: Rajawali Pres, 2007), hlm. 30

sektor riil tetap sulit untuk diwujudkan. Dapat dikatakan bahwa berbagi resiko sebagai icon perekonomian Islam dan ini merupakan bentuk antisipasi ketidakpastian dalam ekonomi Islam patut dipertanyakan kembali. Penghindaran suku bunga dalam perekonomian Islam patut dipertanyakan kembali dengan kenyataan bahwa ekonomi Islam lebih suka bergerak dalam kontrak *certainty*.

Penutup

Ketidakpastian atau resiko bukanlah suatu hal yang terlarang dalam Islam. Justru, keunggulan ekonomi Islam itu terletak pada pengakuan terhadap ketidakpastian ini. Ia sangat bermanfaat sebagai stimulan dan motivasi untuk melakukan “rekayasa” dalam investasi untuk mendatangkan sebuah return. Hanya ketidakpastian yang dapat merangsang dan menstimulasi usaha-usaha produktif saja yang diperbolehkan untuk dilakukan dalam Islam. Sebaliknya, ketidakpastian yang tidak dapat diprediksikan akan resikonya, inilah yang dilarang. Dengan demikian, melibatkan diri dalam kegiatan investasi yang memang di dalamnya terdapat unsur ketidakpastian, adalah dibolehkan dengan syarat tersedianya data yang cukup tentang kegiatan tersebut. Inilah yang dinamakan dengan bisnis atau usaha. Dan ini sangat berbeda dengan kegiatan spekulasi yang hanya sematamata mengandalkan chance dan meninggalkan unsur *sence responsibility*, unsur yang harus ada dalam kegiatan usaha atau bisnis. Di samping itu, sifat ketidakpastian tersebut jangan sampai pula dirubah menjadi sesuatu yang bersifat pasti dengan menetapkan dan memperjanjikan kompensasi di depan transaksi, sehingga menghilangkan karakter utama dari ketidakpastian tersebut, yakni usaha dan rekayasa.[]

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