

# Study Centre

Part 2: Principles of Islamic Contract Law  
By Tarek El Diwany

## Overview of this course

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- Part 1: The Monetary System
- Part 2: Principles of Islamic Contract Law
- Part 3: Instruments of Islamic Banking and Finance

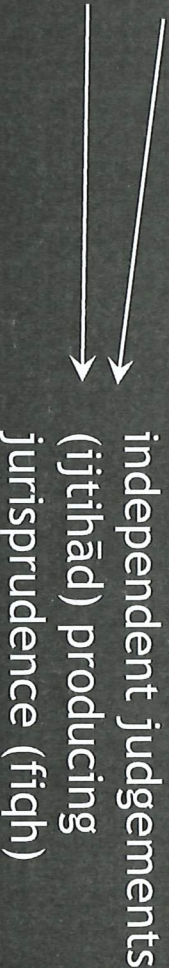
## Commodity money

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- In favour of gold and silver only
  - Ibn 'Asākir in Tārīkh Dimashq: Adam the first man to mint dinar and dirham.
  - Ibn Khaldūn: gold and silver created by Allāh to function as money:
- Not restricted to gold and silver only
  - The ibāḥah principle (there is no clear prohibition on using other commodities in the texts).
  - The sunnah of using gold and silver cannot be used as a basis for prohibiting the use of other items.
  - Caliph 'Umar suggested that camel skins should be used as money, and the idea was rejected on the grounds that such usage might lead to a shortage of camels rather than on the basis that the use of camel skins as money is prohibited in Islam.



## Sources

- Qur'ān
    - “recitation” (word of God revealed to Muhammad)
  - Sunnah
    - recorded example of the Prophet Muhammad pbuh (ahādīth) each with a chain of narration (isnād)
  - Ijmā' (Consensus)
  - Qiyās (Analogy)
  - 'Urf (Custom)
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- independent judgements  
(ijtihād) producing  
jurisprudence (fiqh)

## The structure of Islamic law

- Fiqh (jurisprudence).
- Uṣūl al-fiqh (principles of deriving laws from sources).
- al-Qawā'id al-fiqhiyyah (legal maxims assist judges in making decisions in cases where rules seem to conflict).
- 'Aqīdah
  - articles of faith (tawhīd, angels, scriptures, prophets, last day, destiny)
- Akhlāq
  - morality and ethics - personal behaviour
- Sharī'ah
  - 'Ibādāt (acts of worship)
  - Mu'amalāt (the law of transactions)

## The legal rule in fiqh

- Fiqh literally “comprehension” used generally as “jurisprudence”.
- Aims to accord with objectives of sharī‘ah.
- Embodies the set of rules by which actions are judged.
- Legal rules provide specific guidance on the application of principles:
  - ḥukm (the legal rule): e.g. a traveller can shorten and combine daily prayers
  - ḥikmah (wisdom of the law): e.g. praying while travelling is eased
  - ‘illah (ratio decidendi): e.g. for the purpose of the ḥukm , travelling is defined as being more than 3 days journey by camel (schools may differ on the ‘illah)
  - Conditions and impediments (e.g. setting sun is the cause for evening prayer, condition is adulthood, impediment is insanity)
- Commands
  - Positive: fard (obligatory), wājib (necessary, Hanafīs), mustahabb (preferred) e.g two prostrations on entering mosque
  - Negative commands: ḥarām, makrūh (detested) e.g. praying while sun sets/rises
  - Neutral: mubāh (indifferent) no evidence for or against in sources

# Schools of thought

- Four main Sunni schools:
  - Imām Abū Ḥanīfah (al-Nu‘mān ibn Thābit, died 150 AH)
  - Mālīk ibn Anas (died 179 AH)
  - Muḥammad ibn Idrīs al-Shāfi‘ī (died 204 AH)
  - Imām Aḥmad ibn Ḥanbal (died 241 AH)
- Two main Shī‘ī schools:
  - In Shī‘ī theology, God inspires the successor on earth (known as the Imām), hence the Imām is infallible.
  - Ithnā ‘Asharīs (the Twelvers) believe in twelve Divinely-inspired Imāms from the lineage of ‘Alī through Fātimah.
  - Ismā‘īlīs differ from the Ithnā ‘Asharīs with regard to the lineage of the imams. Ismā‘īlīs have two main sub-sects, the Nizārīs (followers of the Aga Khan) and the Bohras.



# Objectives of sharī'ah

- Purpose
  - worship, submission, test of life, accounting on Day of Judgement, regulation by values and rules, success measured by piety and good deeds.
- Two ways of identifying aims and objectives
  - intention and goal behind an action or ruling revealed in a text
  - inductions made from texts (must be in harmony with those from texts).
- Al-Ghazālī's Five Necessities
  - Preservation and maintenance of religion
  - Preservation of life and its sanctification
  - Safeguarding the intellect
  - Protection of lineage
  - Safeguarding wealth
- Ibn Taymiyyah
  - passing the test of life as the main aim of Islam; worldly benefits not main aim.

# Uṣūl al-fiqh

- **Presumption of Continuity (Istiṣḥāb)**
  - A ruling that “maintains the status quo” e.g. “innocent until proven guilty”.
- **Juristic Approbation (istiḥsān)**
  - Hanafī and Mālikī principle of fiqh. Where the application of other fiqh rules would lead to an undesirable outcome, jurists may approve a more equitable ruling for the sake of achieving a just outcome. Sometimes termed “juristic preference” (tarjīḥ). For example, hiring the services of a worker means paying for an object of sale that does not yet exist (the labourer’s work) hence strict qiyās prohibits the contract. Istiḥsān similar to English law concept of “equity”.
- **Consideration of Public Interest (istiṣlāḥ)**
  - Maṣlahah literally “benefit”. Describes an interest that the sharī‘ah seeks to protect. Core and subsidiary maṣlahah. What constitutes a core maṣlahah? Al-Ghazālī’s ‘five’.
- **Precautionary Legal Prohibition (sadd al-dharā’i’)**
  - Al-Qurṭubī “matter not forbidden in itself but might lead to something forbidden”

## al-Qawā'id al-fiqhiyyah

- Five prominent legal maxims (al-qawā'id al-kulliyah al-khams):
  - Matters are to be judged by their objectives (e.g. selling weapons is allowed, but not if weapons are to be used by the enemy; sale is allowed, but not if carried out in such a way as to bypass the ribā prohibition).
  - Certainty cannot be removed merely by doubt (e.g. a buyer of grapes should not be doubted unless strong evidence exists that these will be used in an impermissible way).
  - Hardship merits alleviation. Where a situation of difficulty exists, legal principles should be applied in a way that relieves difficulty where possible.
  - Harm shall be removed. A contract may not result in harm to the parties or to others (e.g. cannot be required to perform work that is known to cause harm).
  - Customary practice shall have the force of law (e.g. if it customary for a gift to be given at the end of an interest-free loan period, the gift is seen as usurious).

# A property methodology

Methodology	Some Legal Implications
Moveable or immovable	The re-sale of a car is prohibited until after receipt, but land can be sold by constructive possession.
Valued or non-valued	Bread can be sold, pigs and wine cannot be sold.
Fungible or non-fungible	Fungible (mithlī or dayn) or non-fungible (qīmīmī or ‘ayn). Fungible item can be substituted by others of its kind (e.g. one ounce of gold for another); non-fungible item cannot be substituted by another of its kind. Rules of sale differ according to whether the object of sale is fungible or non-fungible.
Durable versus consumable	Durable items (such as buildings) can be leased. Non-durable items such as food cannot be leased.
Owned versus un-owned	Public property cannot be owned (e.g. sea, rivers, sunlight) hence exploitation of certain resources for private gain (as opposed to public gain) is prohibited in Islam.

## Contract cornerstones and conditions

- Cornerstones (rukṅ, plural arkān) are the basis of the contract (e.g. buyer and seller in a contract of exchange).
  - In the absence of its cornerstones, a contract cannot legally exist.
  - If cornerstones are present then a contract can be concluded.
- Conditions (shart, plural shurūṭ) are overlaid on cornerstones.
  - If a legally concluded contract contains one or more prohibited conditions, it will be judged fāsīd (defective) among Ḥanafīs and bāṭil (void) among other schools.
  - Ḥanafīs view a defective contract as being capable of remedy. Others say that the contract is void, in other words that no contract is in force between the parties.

## Genus, type & quality

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- “Genus” (synonymous with the word “species” in some texts) denote an item within a particular category (for example, dates are a genus within the edible goods category).
- “Type” denotes the variety of the genus (for example, ‘ajwah are a type of dates)
- “Quality” denotes the characteristics of a given type (for example, top quality ‘ajwah dates).

## Conditions for invalidity

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- General invalidating conditions
  - ignorance (as to countervalues, price, timing, etc.)
  - uncertainty (over performance, deliverability)
  - coercion
  - contract results in harm
  - corrupting stipulations (e.g time expiry on a sale)
- Specific invalidating conditions for each contract type
  - e.g. deferred transfers prohibited in money exchanges

## Concluded, valid, executed & binding ...

- To be seen as 'aqd al-ṣaḥīḥ (a legitimate contract) in shari'ah, contract must be
  - Concluded
  - Valid
  - Executed
  - Binding
- If the contract is not properly concluded, then it is void.
- If the contract is not executed (for example, the seller has not come into possession of the object of a previously concluded bay' al-salam contract) then the contract is regarded as being suspended until such time as it is executed.
- If a contract is not binding (in other words, if options have been specified) then the contract may be voided or made binding at the choice of the option holder.



## Ribā

- A ribā transaction occurs where unequal countervalues are exchanged in a commutative transaction.
- Ribā features one or both of:
  - a surplus (al-faḍl) of one countervalue over another.
  - a delay (al-nasā or al-nasī'ah) in settling one or both countervalues.
- Chapra derivation of “ribā” from “rayb” (meaning “doubt”) e.g. over the rightfulness of income. Ribā “covers all income derived from injustice to, or exploitation of, others”. Hence Chapra explains hadīth that “deceiving a unknowing entrant into the market is ribā”.
- Ibn Arabi: ribā is “all excess over that justified by consideration”.
- Rashīd Ridā distinguishes ribā al-Qur’ān and ribā al-Sunnah, accepts simple interest, rejects compound interest (Qur’ān prohibits ribā “doubled and redoubled”).

# Contract types

Contract Type	Some Examples
Exchange	Sale (bay')
	Rental ('ijārah)
	Partnership (mushārakah)
Investment	Silent partnership (mudārabah)
	Gift (hiba)
	Donation (tabarru')
Charity	Loan (qard)
	Mortgage (rahn)
	Guarantee (kafālah)
Security	Agency (wakālah)
	Trust (amānah)
	Bill of exchange (hawālah)
Other Forms of Contract	

## Double deferment of countervalues

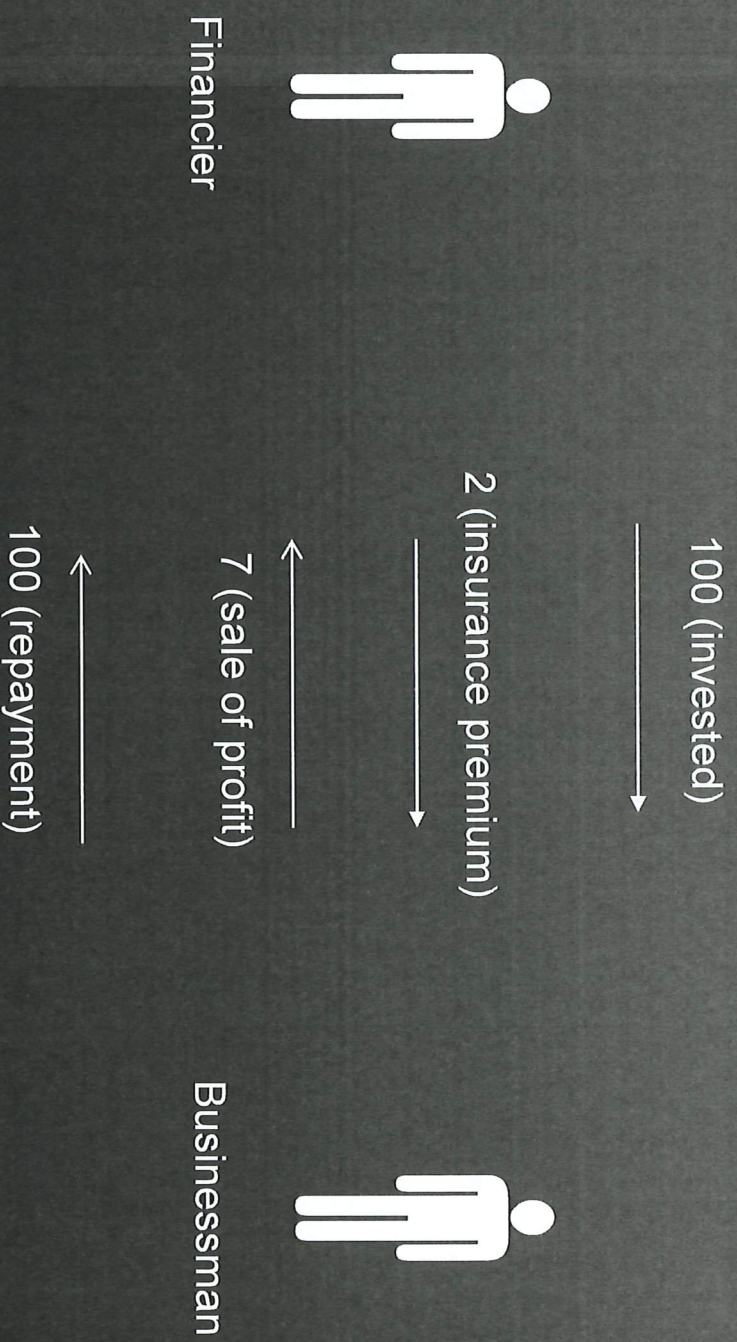
- Each transaction between two individuals is an exchange, either of corporeal property for corporeal property, or of corporeal property for a corresponding liability, or of a liability for another liability ... Each one of these three again is either immediate for both parties, or delayed for both, or is immediate for one party and delayed for the other. The kinds of sales (that emerge) are thus nine in number. Delay from both sides is not permitted by consensus either in corporeal property or in liabilities as it amounts to a proscribed exchange of a debt for a debt ... when two commodities are exchanged, one may serve as a currency and the other as a priced commodity, or both may be currencies. When a currency is exchanged for a currency the sale is called 'şarf', and when a currency is exchanged for a priced commodity, the transaction is sale proper (bay'). Similar is the sale of a priced commodity for another priced commodity (barter) ...

Ibn Rushd, *Bidāyat al-Mujtahid*, 1996, p. 154.

## Exchanging ribāwī items

- The Ḥadīth of Abū Sa‘īd al-Khudrī :
  - Abū Sa‘īd al-Khudrī reported that the Holy Prophet (pbuh) said: ‘Gold is to be paid for by gold, silver by silver, wheat by wheat, barley by barley, dates by dates, and salt by salt - like for like, equal for equal, payment being made on the spot. If the species differ, sell as you wish provided that payment is made on the spot’. Ḥadīth: Muslim, No. 4064.
- This Ḥadīth is the basis of the prohibition of:
  - excess in exchanges of the same species (e.g. dates for dates)
  - deferment in exchanges between monetary items, and in exchanges between non-monetary commodities
- Deferment on one side of an exchange between monetary and non-monetary commodities is permitted (e.g. gold for dates)
- Most jurists extend the ribāwī items to include:
  - all objects that have the nature of money (thamaniyya) through analogy with gold and silver
  - many edible/storable commodities, through analogy with the non-monetary commodities (hence one ounce of copper cannot be exchanged for two ounces).

# The triple contract



## Gharar

- Gharar has the meaning of fraud, deception, delusiveness, peril, uncertainty and fallaciousness (e.g. “deceptive uncertainty”). )
- Ibn Taymiyah: gharar exists in a contract “when there is risk-taking which results in one party unlawfully devouring the property of the other party”.
- Gharar applies in principle to ‘uqūd mu‘āwadah (contracts of consideration) not to ‘uqūd tabarru’ (charitable contracts) and arises as:
  - uncertainty in the terms of a contract e.g. A agrees to sell car to B for a price of £10,000 “if it rains tomorrow” due to the (uncertainty in contract execution).
  - uncertainty over object of sale (e.g. sale of the unborn foetus in a camel, sale of runaway camel, sale of “whatever fish will be caught in a specified net”).
- Major gharar invalidates a contract, minor gharar is tolerated.
- Imām Ahmad, Ibn Taymiyah, Ibn al-Qayyim, do not tend to see existence, ownership, availability or possession (qabd) of a commodity as pre-requisites to validity, rather seller’s ability to deliver at the point of contracting.

## Limited liability

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- Usmani:
  - waqf
  - bayt al-māl
  - zakāh applicable to partnership assets (Imam Shāfi‘ī)
  - inheritance under debt
  - limited liability of the master of a trading slave
- Nyazee:
  - What is the legal nature of shares (title deeds, receipts, promissory notes)? Can company mortgage assets and shareholder mortgage shares? If shareholders own assets of the corporation, how can the corporation sell its assets without consulting them? Are executives agents of the shareholders when doing so?
- Al-Nabhānī:
  - Limited liability company prohibited under Islamic law because shareholders may not know one another, and also because offer and acceptance is not properly conducted (one shareholder does not offer to join with another, but rather lawyers draw up a share subscription document to which anyone can subscribe).

