AN APPRAISAL OF COMPARATIVE ANALYSIS OF (GHARAR UNCERTAINTY, RISK, DECEIT, AND SPECULATIVE) IN TRANSACTION UNDER ISLAMIC LAW AND COMMON LAW

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Abstract
This paper presents a comparative analysis of the concepts of Gharar (uncertainty, risk, deceit, and speculation) in Islamic Law and Common Law. Gharar, a fundamental concept in Islamic finance, is examined in its various dimensions to understand how it is translated and interpreted within the frameworks of both legal systems. The study explores the origins and definitions of Gharar in Islamic jurisprudence, focusing on its implications for financial transactions and contracts. It also delves into the principles of risk and uncertainty in Common Law, highlighting the differences and similarities in their treatment and regulation. The analysis reveals that while both legal systems aim to ensure fairness and transparency in economic activities, their approaches to managing uncertainty and risk differ significantly. Islamic Law emphasizes the prohibition of excessive uncertainty and deceit to promote ethical financial practices, whereas Common Law tends to accept a certain level of risk and speculation as inherent to market operations. The study also addresses how these differences impact the enforceability and interpretation of contracts, with Islamic Law prioritizing the prevention of unjust enrichment and exploitation, and Common Law focusing on balancing interests and economic efficiency. By comparing Gharar with the principles of risk and deceit in Common Law, this paper sheds light on the underlying philosophical and practical distinctions between the two legal systems. The findings underscore the importance of contextual and cultural factors in shaping legal norms and highlight the potential for cross-jurisdictional learning and adaptation. This comparative analysis not only enhances the understanding of Gharar but also contributes to broader discussions on legal pluralism and the harmonization of international financial regulations.

Keywords: *Gharar, Uncertainty, Risk, Deceit, Speculative, Transaction, Islam, frameworks, jurisprudence and Law.*

1.1 Introduction.

Islamic law scholars disagree on whether the insurance contract is prohibited or not under Islamic law. The argument is based mainly on whether it pertains to the kind of contracts involving riba. Generally, this view is interpreted differently leading into the emergence of three schools of thought, which are: those who view it as prohibited: those who view it as permitted: and those who view that some types of the contract are permitted while some are prohibited. The first group mainly consist of the traditional scholars of Islamic laws through some distinguished contemporary scholars like Zuhayhi;[1] and Musleh-Ud-Din[2] also hold the same view. The second view exist as

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[1] Zukayli, Walibah, "Aqd al-Tamin:al- Dawabit al-siyar'iyyah li suwar wa I'ada. al-Ta'mi, (Damascus: Dar al-Maktah, 1995) 7-9

[2] Musleh-ud-din, Muhammad Insurance and Islamic Law (Lahore: Islamic Publications 1982)

early as the late 9th and early 20th centuries.[3] Among them are Siddiqi who argues that the contemporary insurance business is based on a syriah-vaild concept and is distinct from maysir and gharar. And the involvement of interest in it also is not inherent to its concept.[4] The last view contends that all insurance contract can be said to be prohibited. Some of these contracts are permitted especially those which are beneficial to the public at large. For instance, Muhammad ‘Abduh, Muhammad Abu, Zarah and Muhammad Yusuf Musa are adherent of this school.[5]

1.2 Gharar in Conventional Insurance

Insurance in its legal form may be defined as a contract whereby one party, called the insurer undertakes, in return for the agreed consideration, called the premium, to pay to another person, called the assured or insured, a sum of money or its equivalent (the compensation), on the happening of a specified event.[6] It is a contract whereby the insured assumes the risk of an uncertain event, even (insured event or the peril insured against), promising to pay to the assured, money or money’s worth on the occurrence of such an event.[7] They are two types of insurance. Firstly, contract of insurance that merely secure the payment of money on the happening of the specified event. In this class of insurance, the amount recoverable is not measured by the extent of the insured loss, but is payable whenever the specified event happens, irrespective of whether the assured, in fact, sustains a pecuniary loss or not. Life insurance, personal accident insurance and sickness insurance are of this type. Whereas in the other class of insurance, the amount recoverable is measured by the extent of the insured’s pecuniary loss. These are contracts of indemnity and normally are known as general insurance policies.[8] The subject matter of the contract of insurance is money or financial interest protected against the loss to the thing insured. The protection given by the contract of insurance is not a protection against accident in that the contract can prevent an accident from happening. It merely secures for the assured, when the accident happened, the payment of the sum money. Whereas the subject of insurance in the sense that it exists independently of the contract. It is the thing that the insured fears a risk. For example, in a motor policy, the motor car is the subject matter, while in life policy, the life of the insured, which is at

[3] Kling Mmuller, E “The Concept and Development of Insurance and Islamic Countries” (1969) *Islamic Culture* 33-34.
[4] Siddiqi, Insurance in an Islamic Economy (Leicestor: Islamic Foundation 1985) 40-41.
[5] Ahmad Hidayat, (2000).
[6] Vany, E.R. Hardy, General Principles of Insurance Law (1993 London: Butterworth) 3; Marks Dorfman Introduction to Insurance (New Jersey: Prentice Hall, 1902) 5.
[7] The Insurer is the party who agrees to pay compensation for the losses and the insured is the party who will receive the compensation. The payment that the insurer receives is called a premium and insurance contract is called policy
[8] Vany (n 6) 7-10

risk of injury or death is the subject matter. This is also termed as the insurable interest or insurable risk. It is the material interest protected against the unexpected loss or damage.[9] A contract of insurance also must be entered into for a specific but uncertain occurrence of an event. It is not enforceable should either party be found to be in breach of the principles of uberimae fidei (utmost good faith), benefits from a policy cannot be obtained unless the beneficiary has an insurable interest in the subject matter of the policy.[10]

Uncertain occurrence relates to the insured events occurrence whether it will or will not happen as well as the time of its occurrence. In life insurance where death is a certainty, the uncertainty relates to the time when it will happen. Insurance on the matter does not decrease the uncertainty for the individual as to whether or not the event will occur, nor does it alter the probability of occurrences, but it does reduce the probability of financial loss connected to the event.[11] "The main function of insurance is to reduce risk for the insurer, by combining many individual loss exposures, thus reducing it through spreading the cost of the unexpected losses between the participants. The key to this function is the law of large numbers, which implies that increasing the numbers of loss exposures decreases the risk by transferring the risk to the insurer who promise to reimburse him when a loss occurs. Though there are many types of risk prevalence in the society an insurance contract only deals with pure risk, which refer to the situation that can result in gain, loss, or no change.[12] However, for practical purposes, not all pure risks can be privately insured. There are ideally certain requirements of an insurable risk like a sufficiently large number of homogenous exposure units to make the losses reasonably predictable. Where the loss produced by the risk must be definite or determinable, also must be fortuitous or accidental and unintentional and should not be catastrophic.[13]

1.3 Scholars Debates and view on Gharar Conventional Insurance

Gharar emerges from two source. Generally, the doubt or indeterminacy about the contract arises when one or both parties enter the contract without knowing exactly what the outcome will be. Neither the insurer nor the insured know the precise nature and extent of their rights and obligations

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[9] Ivany (n 3), pp. 11-18; Radja, George. E. Principles of Risk Management and Insurance (US: Addisu Wesley Longman, 2001) 72.

[10] Omar, Maizon (1905) "Principles and practice of insurance" in seminar towards a consumer-oriented insurance industry, October 14th 1956, Pataly Jaya.

[11] Vaughan, Emmet J (1986), Fundamentals of Risk and Insurance, Toronto: John Wiley & Sons. P.p. 35

[12] Dorfman (n 6) 9

[13] Vaughan (n 11) 26-27

until after the occurrence of the insured event. The second type of gharar is also said to occur in insurance as in most cases the insured when entering into such contract are unsure, if not totally ignorant of the terms. Most do not read the policy while among those who read it, many do not understand its contents.[14] Normally the discussion on gharar insurance in conventional state is focused on the gharar due to doubts only. This may be so because the elements of frauds in insurance are controlled by relevant legal acts such as Malaysian Insurance Act, 1963.

Gharar insurance arising from doubts is said to take place in four ways namely in the contract outcome: in the length of the contract period and in the amount of compensation and premium.[15] Uncertainty in the existence of the contract especially ambiguity concerning the existence of compensation. According to the traditional jurists, the subject matter of sale contract must be of rescannable knowledge (Ma'lum) in its specification (ta'yin) character (s.fah) and quantum (qadr). It should also be able to be delivered or received.[16] The above gharar is associated with the deliverability of the subject matter which may arise when the seller has no physical control or inability to deliver or person the object of the contract. This type of gharar happens in contract of medium, during the inception of the contract when its existence is not known (Majhul) and there is a possibility of non-existence in the future.[17] Insurance is said to countian gharar that is, it is uncertainty in its existence since one of its subject matter (ma'qud' alaugh) namely the compensation has the possibility of non-existence in the future. The compensation is uncertain because it depends on the occurrence of the insurable risk which may not happen. Take for example a case of motor insurance. The coverage normally is annually. During the inception of the contract, there is always uncertainty or ambiguity about the possibility of the occurrence of the insurable risk among which is an accident to the car or the car is stolen during the period the property is insured, then it relies upon the occurrence of the event. That is, the compensation will only be given when the car is involved in an accident or is stolen. Since the insured event carries the possibility of "not happening" during the time of the contract, then the compensation also carries the possibility of non-existence. And with the possibility of non-existence of the compensation which is one of the ma'qud'alayh (subject matter), then the arise uncertainty in the existence of

[14] Mahmood, NIK Ramlah (1991), "Takaful: The Islamic system of mutual insurance. The Malaysia Experience" Arab Law Quarterly, P.P. 283-4.
[15] Ismail, A. (1997), the lum. Insurance. Com. My/zone-consumers/interactive-guide/takaful; Muslehud-din,m (n2) 143-165; mahmud, Abd-al-latif Mahmud Ali (1994) 3012-302: shart al-din (1981) 142-168
[16] Shabini, al-khatib (n.d) vol.2 pp. 26, saloh
[17] Abd Alsami (1947), pp. 177

the contract itself. Not all type of insurance carry this type of gharar. For example, in a permanent or whole life insurance policy where the policy remains in force during entire lifetime.[18] The insurable risk is a certain matter which is death. And with the certainty of death, the indemnity is also a sure thing.[19]

Uncertainty in the outcome or result of the contract especially ambiguity concerning the payment of compensation. This uncertainty in the outcome or result of the uncertainty in the existence of the contract or specifically the compensation. It happens because there is a possibility of non-occurrence of the insured event during the contract period. With this possibility comes the possibility of non-existence or non-delivery of the insured event during the contract period. With this possibility comes the possibility of non-existence or non-delivery of the compensation. Thus there is no certainty in the payment of the compensation at the initiative of the compensation at the contract. For example fire insurance for home. Because the insurable risk that is fire has the possibility of non-occurrence. Since compensation is one of the subject matter, it is required by the Islamic law of contract that it also should be able to be delivered. The possibility of non-delivery as men implies that there is gharar in the contract. Due to this interrelatedness with the uncertainty of contracts existence or payment of the compensation is a certainty since death is a sure thing and will definitely happen. Uncertainty in the exact amount of the compensation that shall be received by the insured or the amount of premium by the insurer.

As mentioned above, one of the conditions that must be observed by the subject matter is reasonable knowledge in its quantum (qadr).[20] This condition is applicable to both, the premiums and the compensation. The uncertainty besides the premium for all causes of insurance except some general ones that need to be paid lump sum at the start of the contract, for instance., motor insurance. The uncertainty about the amount of the premium exists because the total amount of the premium has to be paid by the insured depends on the occurrence of the risk. If we say that the premiums for all types of insurance are already quoted and listed before and according to relevant criteria and the insured already knows the amount he needs to pay monthly in the course of the

[18] www. Lifeinsurance.net/about-whole-life-insurance.tm(08/02/2002)

[19] Sharf al-Din (1981). Ibid.

[20] Want of knowledge in quantum could happen in a contract if the quantity of subject matter is not fully specified by either party or both. It is mostly applicable to ribbawi goods in order to avoid the implication of riba. Since insurance is a financial contract that involves the exchange of money then the condition is also applicable to it. See Hidayat (n5) 121-2.

contract, we might argue that he is in fact not sure how many quoted premiums would he pay in the future. This is again due to his insurance of the time when the insurable risk will happen.

As to uncertainty concerning the compensation, we should view it from several angles. Firstly, uncertainty in the amount of the compensation paid by the insurer and received by the insured. Admittedly there are cases of insurance where the amount of compensation shall be received in the event of the insurable risk.[21] But setting fixed compensation for example for specific injury still carry uncertainty since the injury's existence as well as its extent is not known at the start of the contract.

Another issue is when the compensation is not definite or set in certain ranges at all but is paid based on the insurer's observation about the extent of injury or peril itself like the compensation for burnt house or damaged ear. Thus again, the compensation is ambiguous since it depends on the extent of the injury that is not known at the start of the contract. The uncertainty here not only concerns the exact amount shall be received in the event of the risk but also the formula or "how the insurance set the amount of compensation. This uncertainty regarding the formula used also pervades the fixed compensation since the insureds are not expect that the insurer will somehow pay them the compensation and normally the amount of the compensation is left to be decided solely by the insurers.

Uncertainty in the contract period since it is based on a time frame which is not known and cannot be known. This type of uncertainty exists in all type of insurance contract due to the fact that the knowledge of the happening or the occurrence of the insurable risk is beyond anyone's comprehension. Although, contracts like motor insurance has its own time frame which normally are annually, the uncertainty is still there. If we refer to the uncertainties raised in the insurance contract above, we may notice that all the uncertainties develop, because of the element of uncertainty concerning the happening of the event that is pure risk. The compensation, depends on pure risk and on the insurers decision that is on the exact amount of compensation paid to the beneficiaries. All of the argument about the existence of gharar in major or minor insurance contract, basically concerns this root of uncertainties, which is known in conventional insurance as pure risk. Basically, most Islamic scholars admits that uncertainties exists in the contract in the forms as mentioned but they differ about the extent of these uncertainties. The proponent of major

[21] Islamic law of contract provides that since this is an exchange of money for money (i.e ribani transaction) then the exact amount of compensation need to be stated at the commencement of the contract.

gharar in insurance see the contract as overwhelmed with gharar, based on the fact that gharar pervades the subject matter though doubts in both price (premium) and main fact (compensation), could make the contract void.[22] Whereas the proponents of minor or non-gharar in insurance view it from a wider perspective where they notice that the gharar depends on something beyond human control which is pure risks that cannot be eliminated.[23]

1.4 Observations

1. Understanding Gharar in Islamic Law:

Gharar refers to excessive uncertainty or ambiguity in the terms of a contract or transaction under Islamic law. It is considered impermissible because it can lead to unfair exploitation, deceit, and harm to one of the parties involved. Gharar encompasses not only uncertainty but also deceit and speculation that may result in unjust outcomes.

Islamic law emphasizes the principles of fairness, transparency, and the protection of all parties in a transaction. Therefore, contracts containing elements of Gharar are often deemed invalid or voidable.

2. Risk and Speculation in Common Law:

In contrast, risk and speculation are generally accepted elements in transactions under the Common Law. Risk, understood as the potential for loss or gain, is inherent in most business dealings and is often considered a necessary part of entrepreneurship and investment. Speculation involves taking on risk with the hope of substantial gain but is distinguished from deceit as it is based on informed decision-making. Common law generally permits speculative transactions as long as there is no fraudulent intent or misrepresentation.

3. Comparative Analysis of Gharar and Risk:

The primary difference between Gharar in Islamic law and the concept of risk in Common Law lies in the degree of uncertainty and the ethical considerations associated with it. While Common Law permits a certain level of risk and speculation, Islamic law prohibits transactions where uncertainty reaches a level that could result in unfairness or harm. The concept of Gharar in Islamic law also incorporates moral and ethical dimensions that are less emphasized in Common Law. Islamic law not only seeks to minimize harm but also promotes mutual benefit and fairness,

[22] See Sharf al-Din (1981) 142-168, Mahmud (1994) 301-302

[23] Zarga (1994), pp, 51-52 Ma'sum (2001), pp. 105-106; Saiful Azhar, Islam and Life Insurance" The Sun (March 22nd 1996)

which are not always the focus in Common Law, where the autonomy of the contracting parties is paramount.

4. Deceit and Misrepresentation:

Both Islamic law and Common Law strongly condemn deceit and misrepresentation in transactions. However, the threshold for what constitutes deceit differs, with Islamic law taking a stricter approach due to its emphasis on ethical conduct. At Common Law, deceit typically requires proof of intentional misrepresentation, while Islamic law may consider broader forms of deception, including the omission of material facts that could lead to Gharar.

5. Application and Enforcement:

The application of Gharar in Islamic jurisdictions can lead to the annulment of contracts or transactions that would be permissible under Common Law, particularly those involving high levels of speculation or uncertainty. Common Law systems, on the other hand, often enforce contracts even where significant risk or speculation is involved, provided there is no fraud or misrepresentation.

1.5 Recommendations

1. Enhanced Understanding and Integration:

Legal practitioners working in jurisdictions with both Islamic and Common Law influences should be trained in the nuances of Gharar and its implications for contracts and transactions. This training should include comparative studies that highlight the differences and potential conflicts between the two legal systems. In jurisdictions where both legal systems coexist, there should be efforts to harmonize the rules regarding uncertainty, risk, and deceit in transactions. This could involve creating hybrid legal frameworks that respect the ethical principles of Islamic law while accommodating the practicalities of Common Law.

2. Clear Guidelines and Contract Drafting:

Clear guidelines should be developed to help parties draft contracts that avoid Gharar while still allowing for necessary business risks. These guidelines should outline what constitute acceptable risk under both Islamic and Common Law and how to structure transactions to minimize uncertainty and speculation. Contractual clauses that address potential uncertainties and outline the responsibilities of each party in managing risk can help bridge the gap between Islamic and Common Law approaches.

3. Ethical Considerations in Business Transactions:

Businesses operating in Islamic jurisdictions should be encouraged to adopt ethical practices that go beyond legal compliance. This includes transparency in disclosing potential risks and uncertainties to all parties involved, thereby reducing the likelihood of Gharar and promoting fair dealing. Common Law jurisdictions could also benefit from incorporating some of the ethical principles found in Islamic law, particularly in areas where consumer protection and fairness are concerned. This could involve stricter regulations on speculative transactions that might harm vulnerable parties.

4. Judicial and Arbitration Training:

Judges and arbitrators in mixed jurisdictions should receive specialized training on Gharar and its implications for contract enforcement. This training should focus on understanding when a contract might be considered voidable under Islamic principles and how to apply these principles alongside Common Law doctrines. Arbitration clauses that specify the application of Islamic principles in resolving disputes could help parties ensure that their transactions are compliant with both legal systems.

5. Research and Academic Collaboration:

Further, comparative research should be conducted to explore how Gharar and similar concepts in Common Law can be aligned or reconciled. Academic institutions should collaborate on studies that examine successful integration models in countries where both legal systems are in practice. Publications and case studies highlighting the practical application of Gharar in modern commercial transactions could provide valuable insights for legal practitioners and scholars. These observations and recommendations aim to enhance the understanding and application of Gharar in the context of Islamic law and its comparison with the concepts of risk, deceit, and speculation under Common Law, promoting fairer and more ethical business practices across different legal systems.

1.6. Conclusion

The comparative analysis of Gharar (uncertainty, risk, deceit, and speculation) in translation under Islamic law and common law has revealed fundamental differences and nuanced similarities between these two legal frameworks. This exploration provides insights into how each system addresses elements of uncertainty and risk in contractual agreements and transactions, reflecting their underlying principles and societal values. Gharar, rooted in Islamic jurisprudence, refers to excessive uncertainty and ambiguity in contracts. Islamic law seeks to minimize Gharar to ensure fairness, transparency, and mutual consent in commercial transactions. The prohibition of Gharar is aimed at preventing unjust enrichment and exploitation, promoting ethical conduct, and maintaining social justice. Contracts involving excessive uncertainty, such as those with unclear terms or speculative elements, are considered void under Islamic law. Risk and Uncertainty in Common Law: Common law, primarily practiced in Western legal systems, distinguishes between acceptable levels of risk and those considered excessively speculative or deceitful. While common law allows for some degree of risk and uncertainty, it emphasizes informed consent and the ability of parties to assess and manage potential risks.

- Legal principles such as caveat emptor ("let the buyer beware") and doctrines addressing fraud and misrepresentation play key roles in regulating uncertainty and deceit in contracts. Common law focuses on the freedom of contract, where parties are generally free to negotiate terms, provided there is no fraud, undue influence, or significant imbalance of power. Both Islamic law and common law recognize the importance of reducing uncertainty and deceit in contractual agreements, albeit through different mechanisms and philosophical foundations. Islamic law's strict prohibition of Gharar reflects its broader ethical and social objectives, whereas common law's approach balances individual autonomy with protections against unfair practices. Islamic law tends to take a more conservative stance, prohibiting transactions with significant uncertainty, such as speculative investments, gambling, and certain derivative contracts. Common law, however, permits such transactions provided they are entered into freely and with full disclosure of the associated risks. Understanding the treatment of Gharar in Islamic law and risk and uncertainty in common law is crucial for practitioners and scholars engaged in cross-jurisdictional legal matters. This knowledge helps in drafting contracts that are compliant with the legal and ethical standards of both systems. - Businesses operating in Islamic finance or international trade must navigate these differences to ensure their transactions are legally sound and culturally sensitive. This requires a nuanced approach to contract formulation, risk management, and dispute resolution.

Finally, the comparative analysis of Gharar under Islamic law and the treatment of uncertainty and risk under common law highlights the distinctive ways in which these legal systems address contractual fairness and ethical conduct. While both aim to protect parties from undue harm and deceit, they do so through different doctrinal lenses and practical applications. A deep appreciation of these differences and similarities enhances the ability of legal practitioners and scholars to bridge gaps between the two systems, fostering more equitable and effective legal and commercial practices in an increasingly interconnected world.

A possible argument for the view is that the prohibited gharar phenomenon only happens in speculative actions that carry not only the possibility of profit or loss but also choice. In this type of action we also see that elements of Zulm will prevail when gharar is exploited or used by the contracting parties. But then, both parties are free to avoid the uncertainty or make it disappear altogether. Take the sale of fish in a pond as an example. When the contract is initiated as it is. It carries the possibility of getting the fish (i.e making profit) and not getting it (i.e making loss). The seller has the choice to avoid the gharar by catching the fish first before selling it, thus making the contract legal. Here we see a type of Zulm emerging from this uncertainty where the seller took the advantage of exploiting the greater gharar over a minor gharar when he sell the fish he already caught.

From the above observations, we conclude that conventional insurance does carry excessive gharar. Firstly, because the subject matter exchange in the contract are between money and money which is a kind of a buying and selling contract, thus making the contract exposed to conditions or requirements of reasonable knowledge in the subject matters quantum as well as the ability to deliver them. Secondly, the uncertainty arising due to uncertainty of the happening of the insured event as well as the time of happening. Although the event or the time is beyond man's control, any contract attached with these conditions is not allowed due to want of knowledge. Want of knowledge itself shall result in the contract.