

## Reanalysis of Futures Contracts in Business from the Perspectives of Juridical Issues

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**Abstract:** The merely sector of futures that is considered here is futures trading in commodities such food grains, oils and pulses, which are essential foodstuffs and which present a pressing case for reconsideration and review. Since there is no decisive proof on the prohibition of futures, then it's permissibility in shari [ah] is established. So commodity futures fall under the basic principle of permissibility. Nowadays, the most influential competitive weapons in the international affairs are the invention of innovative methods of exchange and covering the risks for more and better success. Futures contracts are one of these methods. The purpose of futures is to provide risk-control tools for investors and to help them to reach to their beneficial commercial purpose. In the current paper I'm going to not merely review the related literature in futures markets in products but also to investigate their lawfulness or illegalness in the constitution law relying on the opinions of Islamic jurists. Logical hypothesis here is considered as the correspondence between futures contracts as undetermined contracts and Islamic contract.

**Key words:** Futures contract • Juridical issues • Futures trading • Islamic law • Tacking possession

### INTRODUCTION

**Opening Remarks:** Since the inauguration of organized futures markets in the early 1970s, new crop and trading formulas in different sectors of the derivatives markets have increased and futures contracts are at present available in a large number of merchandise. In terms of volume, futures' trading has far beat trading levels in predictable stocks and it is now the single most voluminous mode of commerce on the global scale.

What essentially prompted the development of futures market was the fear of the purchasers and venders of commodities over the unnecessary movement of prices [1]. The venders of commodities feared drastic lessening in the prices of their goods whereas the purchasers or possible purchasers were wary of cost hikes at the time they might have needed to get. The usual remedy available to them was for the purchaser to buy the commodity at the preferred price and then keep it until the occasion he needed to use it. The purchaser would in that case deserve costs of carrying and storage etc. and would also have to pay for what he bought in full. If the vender wished to keep his supplies until a future date, he too would incur costs of carriage. In both cases, the costs of cart would add to the prices that would most likely be

passed on to the consumer. The futures market provided a instrument that sought to overcome these difficulties by making it possible for purchasers and venders to go into the market when they needed to at considerably lower costs. These costs according to one estimate could be as low as one-tenth to one-twentieth of the cost of carriage of cash market transactions [2].

Farmers, product merchants and factory owners were consequently enabled to shut in a complimentary position for the goods they needed in the months ahead or vend their goods well ahead of time at favorable prices. The futures market opened new potential for management of risk over production, marketing and investment planning. These benefits are also not confined to individual traders. Developing countries that need sizeable investment capital can considerably improve their prospects of obtaining it from the international market if they provide the investors with effective risk management facilities. Futures and options can thus contribute to the prospects of attracting investment and enhancing the financing capabilities of developing countries [3].

**Statement of Problem:** The juristic deliberate over futures revolves about the following five points. The first is that both counteract values in such sales are fictional at the

time of contract, for no goods are delivered at that time and no cost is paid. The futures contract is, therefore, merely a paper deal and not a genuine sale. It is also said that futures sales consist merely of an exchange of promises made for the sole purpose of speculative yield making. The *shari'ah* considers a sale valid merely if at least one of the counter values is at hand at the time of contract. Either the price or delivery of the sold item may be postponed to a future date - but not both. Second, futures trading is said to be invalid because it consists of short selling, in which the vender does not own nor possess the item he vend s. The reason given is that the essence and purpose of sale is to move possession of the sold item to the purchaser. Nevertheless, if the vender does not own the item, its ownership cannot be transferred. Third, it is said that futures sales fall short of meeting the necessities of *qabd*, or taking possession of the item prior to resale. almost all sales and purchases in the futures market take place without physical delivery. This is also the case in off-set business that are accomplished so as to close out an open position in the market. Fourth, the critics have argued that postponement of both oppose values to a future date turns futures sales into the sale of one debt for another (*bay' al-kali bi al-kali*), which is said to be prohibited. And, fifth, that futures trading involves speculation that limits on betting and *gharar* (uncertainty and risk taking). The gambling element is also said to cause unpredictability of commodity prices in the cash market.

There is fundamentally no subject over *riba* in commodity futures. Excepting the sectors which proceed over interest, explicitly interest rate futures, foreign currency futures and stock index futures, futures trading in commodities do not partake in *riba* as there is no giving or taking of interest complicated in them. Nor do they proceed over replace merely of money for money, but consist of sales and purchases of goods that occupy transfer of ownership of the goods concerned and their prices between the traders [4].

**Futures Contracts:** A trader who enters a futures contract may be either a real hedger who buys or vends a futures contract to keep himself from drastic price fluctuations, or an speculator hopeful to earnings from those price movements. Upon closer test, nevertheless, one finds that such a distinction is rather theoretical than real, for it is difficult to differentiate between the two in categorical terms - hedgers are also speculators who take a certain risk and think over likely price movements. Even if traders enter the market in order to hedge a location, later when

the price moves in their favor, they may well decide to vend and then buy again when the prices drop, in which case the traders, for all intents and purposes, have become speculators. Since futures take place on the basis of a low margin deposit of merely about 10 percent of the real price, they remain wide open to economic speculation and extreme risk taking. This is frequently said to be similar to gambling. Yet speculation and hedging are essential to futures markets, which cannot function without the presence of hedgers and speculators.

The risk management function of futures is manifested in its use as a hedging tool. Hedging (*al-tahawwut*) as a risk organization tool acquires even larger implication in modern economies in which the movement of goods and capital takes place at a quick pace, in much larger quantities and at lower costs. There is also greater instability in the swap rates of currencies. These have under current conditions made "hedging mechanisms a necessity by which to limit exposure to risk, evade liquidation and intolerable consequences of price changes." [5]. The risks are so high that employing sufficient hedging strategies has now become a essential characteristic and theme of financial management. The need for hedging is also underscored by the fact that no reliable forecast and caution device is obtainable in the system, which leaves all market participants defenseless to the poor special effects of unexpected price changes [6].

The absence of a risk management mechanism is uniformly right of the Islamic law of dealings. Instability of prices and currencies is by and huge a modern incident, that is why the scholastic *fiqh* literature has not addressed the topic. All that one finds is the ease of use of certain contract varieties such as the proceed payment sale of *salam*, deferred payment sale (*bay' bi-thaman ajil*) and the manufacturing contract (*al-istisna'*) that can be used by purchasers and venders for their particular needs. But the use of these contracts as hedging devices is unavoidably limited by the cost factor: using them for hedging purposes would be expensive. These contracts can in any case merely provide a partial answer, as they were not designed for hedging purposes. And then furthermore contracts tend to study rather stable markets and prices and may not be that effectual in volatile market situation [7].

Because protection of possessions is one of the higher objectives (*maqasid*) of *shari'ah*, it may be argued that failure to protect one's property in the facade of risk and bankruptcy is synonymous to ignore of responsibility which is undesirable from the viewpoint of Islam. As one

observer stated “it is a requirement that purchasers and venders take protective measures against actual and potential harm (*darar*). Risk and *darar* may not be possible to reduce but one can reduce them by recourse to risk management strategies and hedging” [8].

The futures contract is defined as “a lawfully binding commitment to deliver at a future date, or take release of, a given quantity of a commodity, or a financial instrument at an agreed price.” [9]. It is a solid legal agreement between a purchaser/vender and an established commodity exchange in which the trader agrees to deliver or accept delivery, during a designated period, of a specified amount of a certain commodity. The commodity so traded must adhere to the quality and delivery conditions prescribed by the commodity exchange on which it is traded [10].

Futures markets make the economic functions of managing the price risk associated with investment the underlying commodity over a period of time. The futures market is “a risk transmit mechanism whereby those exposed to risk shift them to someone else; the other party may be someone with an opposite physical market risk or a speculator” [11]. Future and options are furthermore known as derivatives in the sense that they are derived from the original commodity or device [12].

The clearinghouse interposes itself between purchaser and vender and professionally becomes the other party to all contracts - purchaser to all contracts sold and vender to all contracts bought. The vender has an indenture with the clearinghouse to vend his/her commodity and to be paid, just as the purchaser has a contract with it to get delivery of the specified commodity at maturity. This agreement enables participants to buy and sell liberally in the market without having to worry about their counterparts' creditworthiness [13].

The clearinghouse has always carried out as promised, partially because it maintains no futures market position of its own, as its major fear is to equilibrium out transactions and guarantee performance. It eliminates risk over contract performance partly via its day by day settlement process and furthermore by guaranteeing that members afford sufficient security to cover potential liabilities. The clearinghouse monitors the size of each trading position every day to ensure that traders do not overstretch themselves by building up large positions that they will have difficulty serving [14].

There has been some dissimilarity as to the juristic recognition of futures within the *fiqh* format of appoint contracts. There were those who subsumed futures under the *salam* sale, albeit a variation thereof. It was said to be

a *salam* with a differed payment. Majd al-din azzam called it *shibh al-salam*, or *quasi-salam*, but added and correctly so, that the futures contract could not be subsumed under the *salam* only because in *salam*, the cost of the commodities is paid on mark basis [15]. Sami hamoud considered futures to consist of a promise to vend, or exchange of promises (*mu'awadah*), which is lawful in all sales except the sale of currencies (*al-sarf*). The malikis have considered such a promise necessary and the civil law of jordan has furthermore adopted the maliki view [16]. Mustafa al-zarqa thought that futures did not fit the explanation either of *salam* or of deferred sale (*bay' al-mu'ajjal*) just because one of the counteract values is present at the time of contract in both of these while in futures both of the counter values are deferred to a future date [17].

Up till now it is satirical that many of the exorbitant judgments on futures have subsumed futures under the rubric of *salam* and declared them forbidden only because they did not obey with the necessities of *salam*. It is then added that deferment of the price in *salam* to a future date renders it into *bay' al-kali bil-kali* [18]. The critics have consequently ignored the market mechanism of futures, its ready procedures, the clearinghouse guarantees and, the fact that unlike *salam* futures transactions are not obtainable in the open market. To ignore these and similar other aspects of futures and compare them with *salam* or *bay' al-mu'ajjal* and then assert them prohibited on that basis is equivalent to arbitrary *taqlid*. It might have been preferable instead to distinguish futures as a new contract.

**Review of Related Literature:** [Abd al Rahman al-Jaziri's considered the Egyptian futures contract in cotton as a void able sale (*bay' al-fasid*) in which a mutable object is resold previous to taking possession. “this also applies,” al-jaziri added, “to the well-known sale of (futures) contracts in our time [19]. obviously, the basic rationale behind taking possession prior to vending is to prevent *gharar* (indecisively over the vender's ability to deliver in the event of obliteration and loss). If *gharar* can be successfully removed, after that it follows that the prerequisite of taking the item into possession may be relaxed or absolutely omitted.

Muhammad Akram khan made a declaration that “futures trading is alien to Islamic law as it involves trading without actual transfer of the goods or stock to the purchaser, which is explicitly prohibited by the prophet” [20]. The *hadith* cited in bearing addressed a friend, hakim ibn hizam to “sell not what is not with you.”

Khan did not take this *hadith* to its rational ending and has not explored the juristic discourse of the *fuqaha'* and commentators on the subjects he has raised and up till now he stated firmly that "all the transactions in these sequence are unlawful;" and "the Islamic position on futures market is quite clear" [21]. Khan accepted the same negative judgment on forward contracts: futures contracts "have a strong part of speculation" and forward contracts which comprise from a swap of promises "are not lawfully enforceable" [22].

In his 1983 magazine on the Islamic law of obligations, subhi mahmassani affirmed in passing that "contracts relating to future things (*al ashya' al mustaqbalah*) are essentially invalid, for such things are non-existent at the time of contract - except for the truth that the majority of jurists have remarkably permitted convinced contracts such as *salam* (forward sale) and *istisna'* (contract of manufacture)" [23]. It is affirmed that proprietary contracts (*uqud al tamlik*), which look for delay the move of possession of the object particular in the contract is a form of gambling, which is why they are banned [24].

In his 1982 article entitled "ra'y al tashri' al islami fi masa'il al bursah" (the *shari'ah* perspective on bourse-related subjects, ahmad yusuf sulayman reviewed the *fiqhi* rules on such subjects as the sale of objects that the vender does not own, sale preceding to taking possession, delayed sale, an sale of the nonexistent. He applied the rules of conservative sale on these subjects directly to futures and passed high-priced judgments on almost every case. Sulayman furthermore relied on the earlier quoted *hadith* but has not looked into its meaning and rationale and stated that the *shari'ah* has authenticated *salam* (forward sale in which merely the price is paid at the time of contract, but delivery is postponed to a future date) and that this is the merely frame within which a deferred sale involving a future delivery can be genuinely concluded [25].

Badr al mutawalli [abd al basit, *shari'ah* advisor to the finance house of kuwait, furthermore based his views on futures completely on *salam*. Since futures do not complete all necessities of a *salam* sale, they are prohibited. In this view, the *shari'ah* is closed entirely to the viewpoint of validating futures.

This negative stance on futures is furthermore reflected in the views of muhammad taqi usmani, a member of the Islamic *fiqh* academy of jeddah, who wrote that "futures contracts are unlawful under the *shari'ah* they do not serve a good purpose such that would warrant their validation under the *shari'ah*. For what happens in

the futures market is not real trading, the reason is profit making through sales that are more similar to gambling ... we do not thus need to search for valid alternatives to futures ... should there arise any such need, it should be addressed within the structure of *salam*." [26].

This is an extremely negative position, which is furthermore unconcerned of the benefits of futures, especially in its part where usmani seeks to close the door to further research that may seek to discover possible Islamic alternatives to futures. There is universal agreement, furthermore, that *salam* is too restrictive to offer an alternative to futures merely because in *salam* the price of the *salam* product must be paid in full at the time of agreement.

The views of sulayman and [abd al basit have been challenged and refuted by two famous commentators: [ali [abd al qadir and majd al din [azzam. [abd al qadir's commentary, which refutes sulayman's contentions, was published in the identical volume of the *encyclopedia of Islamic banks* (in arabic) that carried sulayman's article. [azzam's reply to [abd al basit appeared in the same collection of lawful verdicts (*fatawa*) published by the finance house of kuwait. Both commentators criticized the fundamental approach used by sulayman and [abd al basit and emphasized, in turn, that futures trading was a new method of trading that called for a fresh answer formulated in light of the operative procedures of futures markets [27].

[abd al karim al khatib admitted that futures contracts did not complete all the necessities of a conservative contract, but added that they were cautiously regulated and satisfied the fundamental aim and underlying principle of those rules [28]. [azzam, al khatib and [abd al qadir share the view that the register and permission procedures, as well as the guarantee functions of the clearinghouse, are precise and that trading futures are conducted by trained professionals in a highly centralized and controlled market. The contract qualifications and its related procedures are such that the prospects of uncertainty and *gharar* were virtually eliminated. therefore, the conclusion is drawn that futures contracts are valid from the *shari'ah* perspective.

In its 1985 resolution on stocks and commodities markets, the makkah-based *fiqh* academy has taken a somewhat ambivalent view of futures. While it acknowledges the benefits of futures to farmers and product traders, it fails to imitate that evaluation in its final decision on the topic. Futures transactions are prohibited, as they engage the sale of things that the vender does not own nor possess and are concluded over things that do

not exist at the time of contract. The academy's resolution stated that most futures sales were not real sales, in that the parties were not interested in making or taking delivery but were seeking to make a profit from product price actions. The conclusion was drawn that buying and vending futures contracts was faster to betting rather than trading [29].

Abdel-hamid al-ghazali, an Islamic economist, stressed the genuine benefits of futures particularly their effects on supply, cost and business planning and suggested that these remuneration should be taken into consideration [30]. Mukhtar al-salami, the then mufti of tunis, stated that "there is a valid requirement for future markets" and called on muslim jurists to address juridical subjects on futures according to modern circumstances. The *fiqh* academy scholars, salami added, must not limit themselves by quoting what is recorded in *fiqh* books and avoid passing excessive judgments on that basis [31]. Munzir kahf, furthermore an Islamic economist, is critical of the *fiqh* academy position on futures and commented that the futures market is the merely market where large business in commodities is conducted. Kahf added that in spite of the negative stance of the *fiqh* academy, Islamic alternatives must be found in order to aid the real reimbursement of these markets particularly in the commodities division [32].

#### **"Sell not What is not With You", As stated by a Hadith:**

This title is a direct translation of the famous *hadith la tabi' ma laysa [indak*, which the commentators have interpreted to mean that the subject matter of sale must exist and be owned by the vender at the time of contract. Futures trading, which consists of short selling is, consequently, different to the necessities of this *hadith*.

Several subjects have been raised relating to this *hadith*, one of which is a certain incongruity in its chain of transmission. Neither al bukhari nor muslim recorded it in their collections, although others, among them abū dawūd and al tirmidhi, did. This inconsistency is as follows: abū dawūd, ahmad ibn hanbal and ibn hibban state that it was narrated by ja [far ibn abi wahshiyah, from yūsuf ibn mahak, from hakim ibn hizam, while a fourth name, that of [abd allah ibn [ismah, occurs in other *hadith* collections between yūsuf and hakim. In *al mizan*, al dhahabi states that this intermediate name is totally unknown (*la yu[araf*). Even the principle narrator of this *hadith*, hakim ibn hizam, is said to be "obscure" (*majhuūl al hal*). Merely ibn hibban includes him among reliable narrators (*al thiqqat*). While al nasa'i has recorded one *hadith* described by him, others have said that he is "obscure" [33].

The *hadith's* precise legal value is open to explanation. Does it convey a total ban (*tahrim*), abomination (*karahiyah*), or mere regulation and advice of no legal import? The phrase *la tabi'* (do not vend ) could maintain any of these interpretations. Specialists in *usuūl al fiqh* admit all of these meanings in the purview of a prohibition (*nahy*). Merely when a ban is espoused with a caution (*w[aid*) is its meaning reinforced so as to convey a total ban (*tahrim*) [34]. The full version of the *hadith* is as follows:

Ja[far ibn abi wahshiyah reported from yūsuf ibn mahak, from hakim ibn hizam (who said): "i asked the prophet: 'o messenger of god. A man comes to me and asks me to vend him what is not with me. I vend him (what he wants) and then buy the goods for him in the market (and deliver them).' the prophet replied: 'vend not what is not with you'" [35].

In an attempt to determine the precise meaning of this *hadith*, muslim jurists have advanced three dissimilar interpretations.

- "Sell not what is not with you" means not to vend what you do not own (*ya[ni ma laysa fi milkik*) at the time of sale. One of the crucial supplies of sale, as al-kasani has stated, is that the vender owns the object of trade when vending it, fault which the sale is not accomplished, even if the vender acquires ownership later. The bare omission is the *salam* sale, where ownership is not a prerequisite [36]. Al-san[ani has stated that this expression implies that it is not permissible to vend something before owning it. Ibn al humam and ibn qudamah have concluded similarly that a sale involving something that the vender does not own is not acceptable, even if one buys and delivers it later [37].

The hanafis have ruled that the vender's rights of the item in question is not a circumstance of validity (*shart al sihah*) but of effectiveness (*nifadh*) of the sale. Hence, they validate a *bona fide* sale by an unauthorized person (*fudūli*) who does not own the object but vends it though. In this case, the sale is valid but not effectual. It becomes effective merely upon obtaining the owner's permission [38].

- In general, jurists and *hadith* scholars hold that this *hadith* applies merely to the sale of specified objects (*a[yan*) and not to fungible goods, as these can be substituted and replaced with ease. Al baghawī and his reporter, mulla [ali qari, al khattabi and many others stated that this prohibition is confined to the

sale of objects in rem (*bayʿ al aʿyan*) and does not apply to the sale of goods by description (*bayʿ al siffah*). Thus, when *salam* is concluded over fungible goods that are readily available in the locality, it is valid even if the vender does not own the object at the time of contract [39]. Imam al shafiʿi has ruled that one may vend what one does not own provided that it is not a specific object, for deliverance of a specific item cannot be guaranteed if the vender does not own it [40]. Al khattabi stated that this *hadith* refers to the sale of specific objects, for the prophet allowed deferred sales of different kinds in which the vender did not have the object of sale at the time of contracting. In essence, this prohibition seeks to prevent *gharar* in sales that consists of uncertainty over delivery [41].

Ibn qayyim al jawziya, critic of sunan abū dawūd and al mubarakfūrī, commentator of *jamiʿ al tirmidhi*, agreed that this *hadith* contemplated the sale of specified objects and not the sale by description of goods that are readily available in the market [42]. This analysis would successfully take futures out of the purview of this *hadith*, for futures trading merely takes place in fungible commodities and cannot proceed over specific objects having unique qualities.

- A third position is that sale of “what is not with you” means the sale of what is not present and what the vender cannot deliver. This is ibn taymiyya’s view, who stated that the importance is on the vender’s incapability to deliver, which entails risk taking and uncertainty (*mukhatarah wa gharar*). If the *hadith* were taken at face value, it would proscribe *salam* and a variety of other sales. But this is obviously not intended. The prophet forbade hakim ibn hizam to vend exacting objects either because he did not own them or because of uncertainty over his ability to deliver. The latter motive is the more likely one for the proscription [43].

The maliki jurist al baji has recorded a similar view and stated that “what is not with you” means “a specific object that is not in one’s tenure and one’s power to deliver.” [44]. It seems that this *hadith* is about the imposing of product on yielding, in the case of nonappearance of this power the contract is *gharar* and invalid [45]. It is quite possible that the vender owns the object but is unable to deliver it, or that the vender possesses the object but does not own it. In either case,

the vender would fall within the purview of this *hadith*. For that reason, its stress is not on ownership or possession, but rather on the vender’s effective control and ability to deliver. And so the prohibition’s effective reason (*ʿillah*) is *gharar* on account of one’s incapability to deliver.

Yuṣuf mūsā, [ali [abd al qadir and yuṣuf al qaradawi have drawn attention to the fact that the marketplace of madina during the prophet’s time was so small that it could not guarantee regular supplies at any given time. Therefore, the *hadith* merely prohibited the sale of items that were not obtainable at the time of sale. This is indicated, perhaps, as mūsā added, by hakim ibn hizam’s declaration that people would ask him to vend to them items that he did not have. In other words, they wanted to protect goods that they could not find in the market due to doubt over supplies. In contrast, modern markets are normal and all-embracing, which means that the vender can find the goods at almost any time and make delivery whenever required. With reference to futures trading, mūsā observes that futures contracts normally maneuver on a deferred basis, which gives the vender a fair amount of time to buy what is required in order to make delivery, if crucial, within the contract period [46].

When we compare the madinan market to its modern counterparts, we are faced with a different reality. Given currently available means and facilities, the fear of not being able to find the goods and make delivery is now irrelevant [47]. Masoumi nia doesn’t deem this kind of futures contracts as the proof of this *hadith* [48]. Short selling of items that are not owned by the vender takes place in the futures market with the assurance that identical contracts over the item can be bought and sold on an almost instantaneous basis. Even if the short vender does not own the item when vending a futures contract, his/her ability to make delivery is nevertheless guaranteed beyond any uncertainty.

**Sale Earlier than Taking Possession (*qabd*):** One necessity of a valid sale in *fiqh* is that the purchaser may not vend the goods purchased until they are in his/her possession. In support of this ruling, muslim jurists have referred to the authority of the *hadith*. The main purpose of this inquiry is to ascertain whether futures trading can be validated within the given terms of the *hadith* and whether the concerns of the *[ulama’* in coincidence with the conservative contract of sale are uniformly relevant to futures contracts.

Literally, *qabd* means taking and holding something in one's hands. In its juristic sense, *qabd* implies legal custody and possession in a proprietary capacity, even if it does not involve the physical act of savings. The vender must deliver the goods sold and the purchaser must pay the price. The purchaser, Nevertheless, is not obliged to receive the goods or take possession, as it is his/her right/freedom, which he/she may or may not choose to exercise [49].

The following three *hadiths* need to be reviewed on the theme of *qabd*.

[abd allah ibn [umar reported that the prophet said: "he who buys foodstuff should not vend it pending he has received it (*man ibta[a ta[aman fa la yubi[uhu hatta yaqbidahu*)." [50].

According to another statement by [abd allah ibn [umar, the prophet said: "he who buys foodstuff should not vend it unless he is satisfied with the measure with which he has brought it" (*man ibta[a ta[aman fa la yabi[hu hatta yastawfi*h) [51].

Ibn [abbas has furthermore reported the following *hadith* from the prophet: "he who buys foodstuff should not vend it until he has taken possession of it." Ibn [abbas said: "i believe it applies to all other things as well" (*man ibta[a ta[aman fa la yubi[uhu hatta yaqbidahu wa azunnu kull shay'in mithlahu*) [52].

As for the *hadith's* basic rationale, the *hidayah* states that the prophet prohibited the sale of items, in exacting unpreserved ones, that the vender did not possess, because of uncertainty and doubt over their delivery. All leading *fuqaha'* have held, accordingly, that one cannot vend foodstuff before taking possession of it. According to imam shafi[i, one cannot vend anything, before taking possession. Imam abū hanifah and ahmad ibn hanbal held, Nevertheless, that possession is not a requirement in the sale of actual property, as there is frequently no fear of destruction and loss [53]. Possession is not required for the sale either of foodstuffs and actual possessions if ownership of the goods inside question had been obtained by way of gift or inheritance, for these engage no financial exchange and the vender is not committed to paying a price to someone else [54].

A new resolution of the *fiqh* academy of jeddah has confirmed "the effective reason (*illah*) of the prohibition of sale prior to taking possession is *gharar*, on account of the possible failure to deliver the commodities purchased. The purchaser takes the risk of not receiving the commodities, as the vender may delay the delivery or wish to withdraw the contract." The resolution added that

there was an extra element of *gharar* in the sale of food grains and agricultural crops - they may perish or be damaged due to climatic factors and disease [55]. Whereas the academy has held futures usually impermissible is due to their failure to meet the obligation of *qabd*, others have held different views. Dallah al-barakah, the *sharifah* committee of the Islamic bank of sudan and that of the kuwait finance house have held that the prohibition of sale prior to taking possession is confined to foodstuff [56]. Some imamiyah scientists know the *qabd* as the chief condition of contract effects and others consider the *qabd* as the condition of contract accurateness; Nevertheless, the other scientists regard the *qabd* as the essential condition of contract [57].

According to the hanafis, *qabd* is not an essential requirement (*ruk'n*) of sale but rather a subsidiary condition, namely, that of effectiveness (*shart al nifadh*). This ruling led al-kasani to point out that a valid sale can be concluded prior to the vender's taking possession but that it will stay in abeyance until *qabd* has taken place [58]. To this, al sarakhsi added that *qabd* signify the effect or result of the contract that merely materializes after its conclusion. *Qabd* is consequently, not a precondition of a valid contract and it is completely legal to postpone it to a later date. Merely in the case of sale of coins for currency (*sarf*) is *qabd* elevated to a prerequisite of a valid contract [59]. Imam malik restricted this *hadith's* application to food grains, which means that non-food grain items (e.g., cotton, palm oil) may be sold prior to taking ownership [60]. Ibn rushd established this and stated, "there is no dissimilarity in the maliki school that merely food grains (mainly wheat and barley) cannot be sold prior to *qabd*." Imam malik furthermore validated the sale of foodstuffs in lump sum (*juzafan*), that is, without weighing and measuring, preceding to taking possession [61]. For liability for loss and destruction (*daman*) in this case is transferred to the purchaser at the moment of contract and not upon taking possession. Ibn hazm has held that the ruling of these *hadiths* is confined merely to wheat, just because the word *ta[am* that occurs in them means merely wheat and nothing else [62].

Ibn taymiyah departed from the majority position by opening up the concept of *qabd* to considerations of current custom. Ibn taymiyah stated that neither the arabic language nor the *sharifah* has given a specific meaning to *qabd*. *Takhliya* varies from object to object and the way in which it occurs is not forever the same. The precise meaning of *qabd* is, consequently, is to be strong-minded by reference to prevailing custom [63]. Ibn

qudama stated that *qabd* in all things refers to an suitable manner of taking possession. The *shari'ah* stipulated *qabd*, but the way in which it is accomplished is strong-minded by custom [64]. Ibn qayyim held that sale prior to taking possession is legal [65].

With the exception maybe of the shafi'is, no other school requires *qabd* prior to resale in the case of immovable objects. In at least two varieties of sale, namely, *salam* and *istisna'*, the requirement of *qabd* has been waived by the express authority of *hadith*. *Salam* and *istisna'* were validated on the grounds of kindness and expediency for the people [66].

One can say, maybe readily, that *qabd* is not a requirement in futures trading in such non-foodstuff items as cotton, rubber and tin. In addition, measurement and weighing, the recommended form of *qabd* in foodstuff sales was planned to ensure propriety in weighing and to prevent fraud. This is not a subject in futures trading, for such food grain contracts are bought and sold in standardized quantities and packages that are weighed and measured once. After this, the packages are sealed, labeled therefore and do not need to be reweighed each time they are sold, as the relevant documents provide adequate proof of the total weight. therefore, prevailing money-making customs in futures trading have made personal supervision over weight and measurement needless and unfeasible. It would appear that *qabd* in such commodities takes place by obtaining the representative storehouse receipt, rather than by constant re-measuring and reweighing. so it is clear that normal practice has a role in determining the manner in which the legal necessities of *qabd* and delivery may be satisfied. Provided that the processes adopted are free of doubt, unwarranted *gharar* and potential for dispute, it would be satisfactory. It is quite imaginable that modern technology and computerization may bring further changes into the predictable methods of *qabd*, which may gain popularity and customary approval. This would be satisfactory from the *shari'ah* perspective if it fulfills the basic rationale of *qabd*, which is to prevent uncertainty and *gharar*. No case of failure of a futures transaction has in fact been well-known due to *gharar* over perishing or destruction of foodstuffs.

This analysis of *qabd* would apply naturally to futures transactions involving holding the contracts until maturity and physical delivery. As for the bulk of futures contracts, in which the contracting parties close out their positions by incoming a reverse transaction, this is a new subject that needs to be addressed alone. Since, in

principle, the *shari'ah* validates the sale of a physical object (*bay' al'ayn*) and the sale of debts (*bay' al dayn*), delivery and *qabd* in the latter case are no longer a matter of physical delivery or retention of an real benefit, but one of appointment (*ta'in*) and computation of a debt recognized on the person (*dhimma*) of the debtor.

#### **Subjects over the Sale of Debts (*bay' al dayn bil dayn*) and *gharar*:**

Futures trading may be said to go on over deferred and unpaid debts. A debt is usually formed by a trader who enters the market either as purchaser or vender without any corporeal exchange of values. The arrears so originated may then become the subject of an offset or an overturn transaction and a chain of sales and purchases may follow that amount basically of the sale of debts. The offsetting business in futures furthermore consist of sales involving a money owing that one get-together owes to another and settles it through the modality of sale and purchase. Many types of sales have been included under *bay' al duyūn* (lit., sale of debts, furthermore known as *bay' al kali bi al kali*) and it has been disputed as to whether some of them do in fact meet the criteria as "sale of debts." It will be noted that the *fiqh* concept of *bay' al-dayn* referred to transactions over debts in the open market without any guarantee. *Bay' al-dayn* essentially envisaged sale over an unpaid debt involving either two, or in some cases, three parties. The basic foundation of the ban of *bay' al-dayn* was over uncertainty in its repayment. *Bay' al-dayn* could proceed over a bad debt or one in which the debtor only wanted a further postponement due to his incapability to pay on time. Subsequent adverse price changes furthermore added to that uncertainty. The circumstances is very different in the futures market now where all transactions are concluded over guaranteed debts. The critics have not hesitated, Nevertheless, to pass judgments and say: since the purchaser in futures does not pay the worth to the vender nor does the latter take delivery, they transact over debts and indulge in *bay' al-kali bil-kali*, which is banned [67].

The following *hadith* is quoted as proof on the subject: mūsa ibn [ubayd reported from [abd allah ibn [umar simply that "the prophet prohibited *bay' al kali bi al kali*." [68].

This *hadith* merely appears in some collections, such as al-darqutni and al shawkani reproduced darqutni's version in *nayl al awtar* saying that al-hakim al-nishapuri considered it to be sound conforming to the conditions of muslim, but that many famous scholars regard as it



untrustworthy. Its precise meaning is also subject to doubt as *kali* is somewhat unfamiliar even to native arab speakers. Nevertheless, it is usually understood to indicate the sale of one debt for another. According to al shawkani, merely mūsa ibn [ubayda al rabdhi reported it and its authenticity is weak. Imam ahmad ibn hanbal said that he knew of no other *hadith* transmitted by ibn [ubayda; no one else transmitted it and taking it from al-rabdhi was therefore not sensible. The imam added, Nevertheless, that there seemed to be a people's consensus (*ijma'* *al-nas*) on the prevention of *bay' al-kali bil-kali*. Yet imam al shafi'i had commented even previous that the *hadith* scholars considered this *hadith* to be weak [69]. Ibn qudama and ibn taymiyah concurred with this and stated that no *hadith* prohibiting the transaction at subject had been established. Ibn taymiyah stated that no words or statements leaving out the "sale of one debt for another" had been transmitted from the prophet and that the *hadith* of *bay' al-kali bi l-kali* was a broken one (*munqatif*) [70].

Imam ibn hanbal's reference to "people's *ijma'*" on this is indistinct and it does not meet, as [azzam noted, the requirement of a certain *ijma'*. For a decisive ruling of *ijma'* must meet three conditions: (1) it is explicit and verbal (*qawli*) as opposed to a tacit (*sukuti*) *ijma'*; (2) it has reached us by means of continuous transmission (*tawatur*); and (3) the broadcast conveys optimistic and indisputable knowledge beyond doubt. Since the said *ijma'* does not complete these conditions, it is doubtful (*zanni*) and can merely convey a speculative ruling that remains open to *ijtihad*. It is "therefore allowable for us to question it, based on the proof that is stronger than the alleged *ijma'*." [71]. Furthermore the assert of an *ijma'* in a situation of obvious disagreement is out of place: evidence shows that the [*ulama'* are not in agreement over the meaning of this transaction nor on the various forms it can take.

Ibn qayyim has explained that not all varieties of *bay' al-dayn* are forbidden. The prohibited variety is one which involves the sale or exchange of one deferred debt for another. The reason given is that *bay' al-dayn* of this kind prolongs the liabilities of the parties for no helpful purpose. Ibn qayyim's examination of the source proof on *bay' al-dayn* furthermore led him to the conclusion that "there is neither explicit nor implicit text in the *shari'ah* on its ban. On the contrary the principles of *shari'ah* indicate its acceptability" [72]. Ibn taymiyya has furthermore indicated that *bay' al-kali bi-kali* is a particular variety of *bay' al-dayn* which essentially consists of one deferred

counter value for another, neither of which is taken into possession. The prophet did not forbid payment of one debt in exchange for another both of which are established and proven, particularly if it involves merely the nonpayer and not a third party. For this manner of permission absolves both sides of their debts and this is obviously permissible [73].

Nazih hammad has summarized the argue against *bay' al-kali bil-kali* (or *ibtida' al-dayn*) in the following five points: (1) there is no suitable legal profit in it; (2) that it becomes a means to *riba*; (3) it may lead to divergence and disagreement between the parties; (4) it leads to *gharar*, and (5) the risk in it is unwarranted.

Both hammad and his commentator tijani have inexpensive three of these to be less than precise and not relevant to futures and have discussed merely two, namely the nonattendance of a lawful benefit and too much risk. Then it is added that modern research has clearly shown that *bay' al-dayn* does serve a helpful purpose, a conclusion which many have upheld. With regard to the point over extreme risk-taking in *bay' al-dayn* and in futures, hammad and tijani have held that the vigilant ready procedures of the clearing house guarantees over fulfillment of contract, daily clearance procedures and margin taking have removed or minimized the risk over the parties' incapacity to complete their obligations.

The maliki school has furthermore upheld the acceptability of certain types of *bay' al-dayn* prior to delivery and *qabd* when the debts involved in that do not arise from the swap of produce and useable goods and the transaction is furthermore free of *gharar* [74].

Rafiq al-misri has argued that there is no extra *gharar* in deferring both counter values compared to the postponement of one of them only. If one of the counter values has been delivered while the other is deferred to a future date, or when both are so deferred, the level of risk would be the same and no additional *gharar* is likely when both are deferred.... misri added that the *hadith* of *al-kali bil-kali* is really not authentic [75].

Mukhtar al-salami has rejected the claim of *gharar* leading to disputes in the postponement of both counter values [76]. Masoomi nia furthermore rejects the idea of *gharar* [77].

Tijani has quoted sami hamoud who wrote that "in the total history of the london's futures exchange over the last 100 years, there has not been a single case in which the broker has fallen back over a transaction." If the [*illa* of the alleged prohibition of futures is *gharar*, then

there is no *gharar* in the futures market given the clearinghouse guarantees and cautious regulation of the market [78]. It may be concluded then that *bay' al-dayn*, which is incurred in futures, is in the nature of the fulfillment of exceptional obligations and of debt repayment by the debtor. This is evidently allowable and conforms to the *qur'anic* norm on the fulfillment of contracts (cf. Al-ma'ida, 5:1).

**The Counterbalanced Transaction:** Many commentators have taken the *salam* structure as the basis of psychoanalysis on the validity or otherwise of off-setting trades in futures. Through the offsetting sales and purchases, the futures market enables the traders to close out an open position by incoming a matching business. The question as to whether this would be lawful in Islamic law has received a negative reply from badr al-mutawalli al-basit, *shari'ah* advisor to kuwait finance house (*al-mustashar al-shar'i li-bayt al-tamwil al-kuwait*), who responded to a question posed to him on the subject:

Sale of the subject matter of *salam* prior to taking it into ownership is prohibited and i know of no one to have held otherwise. This is the position taken by ibn qudama in al-mughni, which is a trustworthy work.

Al-basit further explained that repeated sale of the same product in a chain event in which none of the participants take possession "adds to the burden of the consumers as profits that are taken by each member are finally added to the price and passed on to consumers." [79].

Mustafa al-zarqa has recorded a similar view and resembled off-set sales in futures to a chain of unformed *salams* in which the purchaser vends the goods he has paid for to someone else before taking them into possession and then this latter vend s the same to a third person and so on. What happens here is "a succession of sales and purchases going on over one debt. The debt here refers to the undelivered goods by the unique vender in this chain. Zarqa then adds that "this manner of trading over the subject matter of *salam* is illegal in *fiqh* as it proceeds over the sale of *salam* goods prior to maturity, delivery and possession" [80].

Majd al-din azzam has disputed and correctly so in my view, the point that the profits made in the chain of offsetting trades in futures add to the burden of the consumers. To begin with, it is inaccurate to suppose that everyone in the chain of sales makes an income. They may make profits, or some may do, but it is uniformly possible they may vend at a loss or make no profit. One

must furthermore bear in mind that purchasers and venders in futures and in every offsetting deal buy and vend, not at the price they determine, but at market price, on which they both agree. The cost is advertised in advance and implemented by the swap. Since the exchange quoted price is the market-clearing price arrived at by the communication of many purchasers and venders, it would by definition be a "fair" price. All traders in the said chain of offsetting trades observe the market price of the day and the question over a chain of income made at every step to the harm of the customer is therefore not pertinent. Azzam speaks positively of the accessibility of offsetting trades in futures and illustrates this by saying that some people may need to resort to a overturn transaction before taking delivery... one can give many examples of people who may need to vend what they have bought prior to taking delivery and possession, particularly in view of the enlarged range and diversity of modern trades and financial services. Then to try to include these variations under one or the other of the predictable contracts may neither be helpful nor justified [81].

Since it is not sure whether the first sale was *salam*, then to subsume the reverse transactions again under *salam* is even more doubtful. The basic answer over the validity of the offsetting trade should, in my view, be sought under the standard of permissibility (*ibahah*). To apply *ibahah* one would need merely to ascertain that the reverse trade does not violate any clear textual injunction or principle of the *shari'ah* and if there is none that one could identify, then offset transactions may be said to be lawful.

#### **A Reappraisal of the Qur'anic *Āyat Al-muda'yanah*:**

The *qur'an* validated deferred transactions involving future obligations as follows:

When you deal with each other in transactions involving future obligations for a fixed era of time (*idha tadayantum bi daynin ila ajalin musamman*) put them in writing. Let a scribe jot down faithfully as between the parties (2:282).

The consequent segment of this text accentuates further the significance of accurate documentation in future transactions. Whether large or small, such transactions must be for a fixed period and all material facts, as well as rights and obligations of the parties concerned, must be certain, written down and witnessed. The text leaves no uncertainty as to the validity of future transactions in which the parties' rights and liabilities are

clearly defined and documented. The problem is whether “transactions involving future obligations for a fixed period of time” in this verse should furthermore include futures trading.

*Dayn* and *tadayantum*, the key terms here, call for some explanation. First, *dayn* in this context means a deferred liability arising from a contract involving exchange of values. An emblematic instance is a contract of sale in which one value, either imbursement or delivery, is deferred to a future date. Any liability arising from this deferment is referred to as *dayn*. This is different from a legal responsibility arising from a straight loan (*qard*), which is a deferred liability arising from a contract containing no exchange of values. Since the *shari'ah* prohibits *riba* (interest) on loans, *qard* is a benevolent loan given without interest and without expectation of anything in exchange.

Our information of arab commercial life at the time of the prophet indicates that deferred transactions based on seasonal farming patterns were frequent. Some of the famous contracts of exchange in vogue at that time were *bay' al mu'ajjal* or *bay' bi thaman ajil* (deferred sale), *bay' al murabahah* (cost plus profit sale), *ijarah* (leasing), *salam* (advance payment sale) and *istisnaf* (manufacturing contract) [82]. These were contracts of exchange in which delivery of one counteract value was deferred to a future date. In general, the deferred liability arising from these transactions was well-known as *dayn*. The following *hadith* furthermore reflects some of the realities of arab commercial life in the early days of islam:

Ibn [abbas narrated that when the prophet arrived in madina, he found that the people had been practicing *salam* in fruits for one or two years (the sub reporter is not sure whether it was one or two years or two to three years). The prophet said: “anyone who pays money in advance for dates (to be delivered later) should pay it for a individual measure, a specified weight and a particular period” [83].

The verb *tadayantum*, a derivative of *dayn* (the present tense in the plural and reciprocal mood), indicates that *dayn* was a recurring occurrence. *Tadayantum* suggests reciprocity and exchange of goods and services on a deferred liability basis. The fact that *tadayantum* in the text is followed instantly by *bi daynin* implies emphasis, which reinforces the centrality of this theme (i.e., *dayn*) to the whole of the verse, which is why it is identified as *ayat al mudayana*. Ibn kathir established this categorically by stating that the verse is concerned absolutely with deferred transactions (*mu'amalat*

*mu'ajjala*) practiced among people and that the *qur'an* regulated the manner in which they were to be concluded [84].

It is furthermore useful to differentiate between the two concepts of *dayn* and *[ayn*. *[ayn* refers to an object or goods that is present at the time of transaction, such as the sale of an object in a spot sale. *Dayn*, on the other hand, refers to an benefit that has no tangible existence but represents a charge or a individual commitment on its bearer's *dhimma*. This juristic distinction is significant, for only a *dayn* can be deferred. Future transactions are absolutely concerned with individual liabilities. Transactions involving the exchange of tangible objects can be either in the present and on spot (an exchange of one *[ayn* for another, as in barter), or in currency exchange (no transaction over *dayn*). But when there is a deferment either in payment or delivery, a deferred liability or *dayn* is created. The verse under discussion is concerned merely with such transactions.

In contradistinction to transactions involving future obligations for a fixed period, the subsequent portion of the same verse reads, “unless it be a spot trade that you carry on among yourselves” (*illa an takūna tijaratan hadiratan tudirūnaha baynakum*), which is exempted from the necessity of precise documentation and witnessing. *Tijaratan hadiratan* here means a contract of exchange that is concluded and completed on the spot and one in which both counter values are delivered upon conclusion.

Having reviewed the main *qur'anic* proof on deferred transactions, it is attractive that the jurists have confined the universal concept of *mudayana* to deferred sales and *salam*. According to a report attributed to ibn [abbas the verse was revealed about the *salam* contract merely [85]. Fakhr al razi commented that the text under consideration applied to usual sales (i.e., *bay' al [ayn bi al dayn*) in which the price of the object sold becomes, upon the conclusion of contract, a debt on the purchaser. It furthermore applies to *salam*. Barter sales (*muqayada*), or the sale of one object for another (furthermore identified as *bay' al [ayn bi al [ayn*), which were common at the time did not fall within the purview of this verse [86].

Fakhr al razi commented further that although *bay' al dayn bi al dayn* resembles *mudayana* (a deferred contract of exchange), it is not valid in *shari'ah*, for when the text says *idha tadayantum bi daynin* (when you handle each other in transactions involving future obligations), it is indirect that there is merely one *dayn*. *Bay' al-dayn bil-dayn* is therefore excluded. According to this explanation,

the verse applies to two types of sales: a deferred sale in which the price is paid at a later date and a *salam* sale, each consisting of a debt on one side of the transaction merely [87].

Imam al shafi'i maintained that the *qur'anic* text under discussion is general and can comprise all varieties of *dayn*. This would mean that deferment of any debt is valid, just as it is valid for *salam*. Ibn [abbas has particular the meaning of *dayn* to *salam*, but by *salam* or *salaf* he perhaps meant any period loan or else that we can expand, through analogy, the *qur'anic* ruling to all debts that fall within its purpose (*qulna bihi fi kull dayn qiyasan [alayh li annahu fi ma[nah]*) [88]. In effect, ibn kathir upheld the same view and commented that the *qur'anic* text here allowed muslims to enter into "deferred transactions" (*mu[amalat mu'ajjala*) with the stipulation that they be written down [89].

therefore, it seems that the *[ulama'* have interpreted *dayn* in a variety of ways. while some have restricted it to certain types of debts, others have applied it usually to all deferred liability transactions that can fall within its broad meaning. obviously, the *qur'an* has not specified the general meaning of *dayn* or *mudayana* and there is no forceful proof to warrant departure from this position. Our analysis furthermore concurs with the conclusions of al [attar in his *nazariyah al ajal* (theory of deferment in *shari[ah]*) [90]. The preferred view would appear to be that the text's language should convey its universal and unqualified meaning. Even if we accept ibn [abbas's interpretation, it may be said that his interpretation was based on the occasion of revelation (*sha'n al nuzul*) of the *ayat al mudayana*. According to the rules of *usuul al fiqh*, a text's *sha'n al nuzul* may be specific, but that does not unavoidably limit its general purport and ruling. so, it may be concluded that even if the text were revealed for *salam*, its language is general and appropriate to all debts. This would imply the basic legality, in the eyes of the *shari[ah]*, of all deferred transactions.

On the other hand, there is a clear *qur'anic* text on the legality of sale and the prohibition of usury: "god allowed sale and forbidden usury" (2:275). This announcement is general (*[am*) and includes all sales, sales without *riba* and *gharar* and sales not forbidden specially in the *sunnah*. All are allowable by virtue of this general proclamation [91]. For a *haram* can only be established merely by an explicit textual injunction [92]. Since the *qur'an* validates sale and commerce generally, as well as deferred liability transactions and since there is no specific prohibition in the *qur'an* and *sunnah* on futures sales, these may be considered lawful, provided no *gharar*, usury, or gambling is involved.

Goods futures do not involve *riba*, in that they do not operate on the basis of a fixed and predetermined income without the possibility of loss. All futures trading involve the possibility of both profit or loss. The margin money, being merely sum deposited at the time of contract, does not earn any interest; it is a good-faith deposit with one's broker and agent and is returnable to the depositor should the transaction conclude without a loss.

**Speculation and Gambling:** Many observers regard speculation and gambling as equal terms. One hears of "investing in securities" and "gambling in futures". Others regard them as definitely dissimilar activities. The main difference between them relates to the nature of risk and potential contribution to the social good. Gambling involves creation of risk for the sake of risk. Horseracing and poker, for example, create risks that would not be present otherwise. The gambler chooses to look for out risks that were not there before. Even if they had been there before, they had not concerned him personally and no social good is accomplished by gambling. Investing, on the other hand, consists of committing capital to an enterprise in the hope of earning a income. The distinction between investment and speculation is principally semantic, but most would agree that commitments with time horizons longer than several months qualify as investment despite of whether the commitment is in securities, real estate, or commodities [93].

Futures speculation directs the hunger for risk into an economically productive channel. Futures markets are basically risk-transfer mechanisms that redistribute price risk and speculators are those who assume it. Without them, there would be no one to whom hedgers could shift their risks. Speculation in the optimistic sense consists of intelligent and rational forecasting of future price trends on the basis of proof and knowledge of past and present conditions [94]. Speculators in commodities are not only gamblers, for the risks are actual commercial risks, quite a unlike matter than the activity of a gambler, who assumes no risk other than that created by the rules of the game [95].

Evidence obtained from considerable research suggests that "speculation maybe does more to smooth price fluctuation than to increase it" [96]. Research on the performance pattern of such goods as onions and live beef cattle before and after the organization of futures markets have supported, in general, the conclusion that futures trading has not increased price fluctuation in the cash market [97]. arithmetical analysis shows that the volatility of futures prices is roughly the same as that of

equity prices [98]. What makes futures trading more prone to speculative risk taking is the high degree of leverage that results from low margin necessities. This low margin ability is not available in the stock market and is the main factor that is accountable for the high volume of speculative trading in futures.

Ibn qayyim al-jawziyya's explanation of *qimar*, *maysir* and *rihan* (betting) underscored the part of play in them which is staged for no other reason but beating the opponent in a game in order to suitable his assets. *Maysir* is the same with *qimar* but merely the former occurs in the *qur'an*. The bottom line of the *maysir* game is "either of us who wins take the other's property." The merely difference between *maysir* and the allied concept of betting (*rihan*) which furthermore occurs in the *qur'an* (cf. Al-baqarah, 2:283) is that betting involves four parties, two of whom are involved in a game and the other two who are outsiders bet over the outcome thereof. These outsiders are otherwise playing exactly what is involved in *maysir* [99].

*Gharar* is a wide concept and has been given a variety of definitions, which will not be reviewed here. Suffice it for our purposes to highlight an aspect of *gharar* which coincides with *maysir* and *qimar* and that is the doubt over gain and loss, which is in common between *gharar* and gambling. Although many jurists in the maliki and shafi'i schools have distinct *gharar* by this description, it is not an correct definition as this would also apply to many contracts such as partnership and *mudarabah* [100]. It is obviously hard to draw a clear difference between *gharar* and *maysir*. One thing that merits notice though is that *maysir* is played for its own sake often as a game while *gharar* proceeds over sales and contracts. *Gharar* is usually not the purpose of a contract but incidental to it while *maysir* is the purpose of the game, which has no other subject matter, or purpose then winning and beating one's opponent in order to take his property [101].

In an attempt to determine the association between gambling and *gharar* and its bearing on commercial transactions, ibn taymiyya pointed out that if a sale contains *gharar* and devouring of the property of others (*akl al mal bi l batil*), it is the same as gambling, which is clearly forbidden. Unlawful devouring of the property of others takes two forms: usury (*riba*) and gambling (*maysir*). The *qur'an* has prohibited both and the *sunnah* has merely explained and elaborated upon the *qur'an*. He then added that *gharar* sales, which the

prophet forbade, usually partook in gambling. There were certain types of sales that were common among the arabs and then forbidden by the prophet on these grounds [102].

Ibn taymiyya therefore attempted to establish a common denominator between *gharar* and gambling: the devouring and unlawful appropriation of the property of others. A commercial transaction cannot be equated with gambling unless it is accompanied by this factor. He based this conclusion on *qur'an* 4:29, where unlawful devouring of the property of others is affirmed forbidden and muslims are encouraged to conduct "trading by mutual consent." Unlawful devouring is a broad *qur'anic* concept that includes gambling, fraud, usurpation, bribery and income gained from unlawful transactions.

It thus appears that risk taking, which involves unlawful appropriation and the gain of one party at the expense of the other, is central to ibn taymiyya's understanding of the *qur'anic* concept of *maysir*. When this is applied to futures trading, the problem is whether financial speculation in futures exposes the other party to risk and, if so, whether it furthermore involves unlawful gain and appropriation of someone else's property. clearly, there is no misappropriation of another's property in futures, for the purchaser in such a contract is occupied in a transaction aimed at making profit through trading and not through the dishonest appropriation of another's property. Speculative risk taking in commerce, which involves investment of property, labor and skill, is not forbidden; what is forbidden is extreme *gharar* and gambling. Financial risk taking is likely to involve gambling if it is staged and created for its own sake, but not if it is incidental to useful activity and trade [103]. Typical descriptions of *qimar* and *maysir* furthermore suggest the involvement of two parties in a combative game played for the sole purpose of winning at the expense of one's opponent. One party's gain is equal to the other's loss. The gain accruing from such a game is unlawful, as is the act of playing it, for it diverts one's attention from productive occupation and virtuous conduct [104].

The exchange authorities and the government must be cautious in order to make certain that commercial speculation is actually reflective of the natural flow of market forces. Imposing quantitative limits on daily trading volume and position limits, as is usually practiced in futures markets, is one way to contain speculation within acceptable bounds. But this is a subject that can

best be dealt with through house rules and operative floor procedures by the exchange authorities. On the other hand, legislative guidelines should look for to regulate contractual relations between the parties, brokerage activities and disciplinary procedures in serious violations. Legislative and government supervision should not be over impressive, for that would limit flexibility and initiative on the part of the exchange authorities.

**Final Remark:** The argument of the *hadith* “sell not what is not with you” led to the conclusion that it applies merely to sales involving specific objects and not to fungible commodities. Since futures, as a rule, merely apply to fungible commodities, they fall outside the purview of this *hadith*. To this, I have added that the above *hadith* is concerned not so much with ownership or possession, but with preventing *gharar* due the vender’s ability to deliver. Since delivery and fulfillment are forever guaranteed by the clearinghouse procedures, the vender’s ability to deliver is not a subject of concern in futures trading.

in addition, the necessity of *qabd* in the *hadiths* reviewed is limited clearly to foodstuffs and extending the same necessity to other commodities is not supported by the text. But even in foodstuffs, it is most likely concerned with perishable foodstuffs that are usually not fit for futures transactions. *Qabd* is related to the question of liability for loss. Nevertheless, since delivery and *qabd* are not dominant factors in futures I submit that the question of liability and loss should be determined not by reference to *qabd* but by reference to the contract.

My analysis of the sale of debts particularly of *bay' al kali bi al kali* led to the conclusion that there is no conclusive evidence in the *sunnah* on its prohibition. The manifest text in *ayat al mudayana* furthermore accommodates an assenting ruling on futures trading. I have also revealed that a direct correlation between futures sales and conventional sales which the critics have attempted is not justified, mainly because trading procedures in futures provide in-built safeguards against *gharar* that reduce doubt over delivery and payment. and finally, my analysis of financial speculation indicates that speculation is basically lawful and that the subject over its propensity toward gambling must be tackled through constant supervision and effective position limits that would put a check on speculative risk taking.

Present trade has witnessed a large number of new and unprecedented modes of trading which were not known in previous times. To endorse the people’s

prosperity through trade is distinctively beneficial and in principle represents an eminent *maslaha* of our time. For those who take unduly prohibitive views of these varieties of trade simply because a certain mode of trading was not recognized to the *fuqaha*’ of earlier times and then pass negative judgments on speculative grounds without clear *shari'ah* evidence is tantamount to acting contrary to the objectives (*maqasid*) of *shari'ah*. The basic norm and maxim of *shari'ah* is prohibition (*al-hazar*) in the realm merely of *ibadat* (worship matters) and it is permissibility (*ibahah, idhn*) in *mu'amalat* and commercial transactions. nothing in this latter area must be declared prohibited without decisive and indisputable proof. Since there is no decisive proof on the prohibition of futures, then it’s permissibility in *shari'ah* is established. A transaction is valid from the *shari'ah* perspective when it does not violate a decisive principle, it is clear of *riba* and it does not partake in extreme *gharar*. When these conditions are met, the transaction in question is valid and may be practiced in spite of as to whether or not it agrees with the discourse of the *fuqaha*’ on transaction and contract. The general guidelines of the *qur'an* must certainly be applied separately of the time-bound discourses of the *fuqaha*’ of earlier times. The *qur'an* upholds the people’s needs and *maslaha* at all times and in manners that may be appropriate to their conditions, provided that none of its decisive principles are violated. Commodity futures falls under the basic principle of permissibility, with the proviso that we engage ourselves in a continuous process to improve vigilance and develop more refined safeguards against abuse, extreme speculation and *gharar*.

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