Inequality and the Law of Damages: Towards a Coherent Islamic and Constitutional Theory of Redress

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The quantification of contractual damages presents a persistent jurisprudential challenge in legally pluralistic jurisdictions, where competing legal doctrines shape remedial outcomes. In Pakistan, this challenge has assumed renewed significance, following the 26th Constitutional Amendment's mandate to eliminate ribā *(interest/usuary) from the legal and economic system by January 1, 2028. Common law offers the remedial principle of* restitutio in integrum*, which aims to place the aggrieved party in the position it would have occupied had the contract been performed duly. It seeks to protect the aggrieved party's contractual expectations, whereas Islamic legal theory confines compensation to actual and proven loss, rejects speculative opportunity costs, and prohibits the award of* ribā *as a component of damages. These divergent remedial philosophies reveal a fundamental tension between expectation-based compensation and an Islamic conception of compensatory justice. This Article examines whether the prevention of inequality can serve as a legitimate normative consideration in the quantification of contractual damages within a pluralistic legal system. Drawing upon the normative principles of common law embodied in Pakistani statutory law, its jurisprudence, and Islamic legal theory encompassing* qawā'id fiqhiyyah*, this Article develops a coherent jurisprudential framework for assessing damages for breach of contract in Pakistan. It argues that the existing law has yet to develop a principled reconciliation between common law's approach and Pakistani constitutional and Islamic legal commitments. The Article proposes an egalitarian theory of contractual damages grounded in the normative framework of preventing inequality, thereby avoiding unjust enrichment and advancing a more equitable distribution of contractual risks and benefits. In doing so, it offers a principled framework for implementing the constitutional mandate to eliminate* ribā *without undermining the compensatory function of damages in commercial transactions.*

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I. INTRODUCTION

The traditional conception of contract law limits its function to ensuring fairness and efficiency in contractual exchanges. Notions like the reduction or prevention of inequality and fair distribution of wealth are deemed primary concerns of public law, addressed through fiscal regimes, rather than private law.[1] Davis and Pargendler contend that emerging contract jurisprudence, in selected developing countries, suggests that contract law has also assumed the responsibility of addressing structural economic inequalities by invoking contractual principles that promote substantive justice.[2] Furthering their contention, this Article suggests that in an egalitarian society where justice, fairness, and equality must prevail, the significance of avoiding inequality extends beyond the domains of public law and authorities. It has equally crucial implications in private law, particularly the fundamental rules governing remedial consequences in contractual breach cases.

The contractual breach is redressed through damages. It is traditionally grounded in the paradigm of compensatory justice,[3] seeking restitution for the aggrieved party while preventing unjust enrichment on the part of the party in breach. Yet a fair and equitable quantification of damages has remained a crucial question for courts. This is because in

1. Francesco Parisi and Brian H. Bix, 'Fairness in Contract Law: An Impossibility Theorem?' (2026) 61 European Journal of Law and Economics 77, 78 https://doi.org/ https://doi.org/10.1007/s10657-025-09858-8; Kevin E. Davis and Mariana Pargendler, 'Contract Law and Inequality' (2022) 107 Iowa Law Review 1485, 1487 https://ilr.law.uiowa.edu/print/volume-107-issue-4/contract-law-and-inequality.

2. Davis and Pargendler (n. 1) 1487.

3. Peter Benson, *Justice in Transactions: A Theory of Contract Law* (Harvard University Press 2019) 263.

almost all legal systems contractual damages are almost universally regarded as compensatory, yet divergent normative doctrines differently determine the compensable loss and legitimate scope of contractual damages.[4] The key challenge lies in ensuring a balanced and equitable approach in the assessment of damages. Thus, courts grapple with the issue that an award of damages must neither result in an undue advantage upon the aggrieved party; nor impose a disproportionate burden upon the party in breach. Such a disproportionate award could frustrate the objectives of corrective justice.

The challenge assumes even greater significance in legally pluralistic jurisdictions, where multiple normative systems prescribe different conceptions of compensable loss. The courts in Pakistan face the challenge of reconciling statutory law, inherited from the English common law tradition,[5] with constitutional and legal framework requiring adherence to Islamic legal norms. A recent constitutional amendment requiring the elimination of *ribā* (interest/usuary) from the economy by January 1, 2028 has further intensified this normative tension by placing the courts under an obligation to reconsider the theoretical foundations of contractual damages and compensable loss within an evolving constitutional framework.

The courts in such a legal system usually struggle with conflicting questions, such as: Should the award of damages reflect the contractual expectations of the aggrieved party, thereby prioritizing the benefit of bargain principle through awarding full compensation, or must the award be limited only to actual, proven loss to prevent unjust enrichment? Likewise, the courts struggle with questions about the permissibility of awarding interest in the form of late payment penalties. While awarding interest is justified under common law conceptions, it amounts to *ribā*, which is prohibited under Islamic law on the grounds that it results in unjust enrichment without any productive activity.

Against this backdrop, this Article answers three questions: First, whether the prevention of economic inequality must be recognized as a normative objective of contractual damages alongside corrective justice? Secondly, what is the key difference(s) between common law and Islamic law regarding compensable loss and the permissible scope of contractual

4. Guenter H Treitel, 'Volume 7 Contracts in General, Chapter 16: Remedies for Breach of Contract (Courses of Action Open to a Party Aggrieved)' *International Encyclopedia of Comparative Law* (Reprint 2020, De Gruyter 1976) 24 https://doi.org/https://doi.org/10.1515/9783112322864.

5. The Contract Act 1872.

damages? Finally, how may we develop a coherent framework for quantifying contractual damages that reconciles constitutional commitments to Islamic law while ensuring fairness and preventing inequality? Drawing upon the normative principles of common law, Pakistani jurisprudence, and Islamic legal theory, the Article develops a coherent framework for assessing contractual damages that reconciles commercial certainty with the demands of socioeconomic justice.

The Article proceeds in five parts. It first examines the normative relationship between inequality and damages. It then analyzes Pakistani jurisprudence governing compensation for breach of contract and the constitutional principles that inform the assessment of damages. The third part critically examines the relevant principles of Islamic legal theory concerning contractual compensation and the redress of economic harm. Fourthly the Article details a preventive methodology of Islamic law of transactions to eliminate inequality. Finally, the Article proposes a principled hybrid framework to guide adjudicators operating within legally pluralistic legal systems by harmonizing the objectives of contractual compensation with the constitutional commitment to equality and socioeconomic justice.

II. THE NORMATIVE NEXUS BETWEEN DAMAGES AND INEQUALITY

The framework of "preventing economic inequality" is grounded in the normative values embodied in the rule of law, where justice and fairness require that similarly situated contracting parties receive equal treatment. Compensatory justice ensures restitution, yet no contractual party must earn at the cost of the counterparty. At the international level, states are obligated to take appropriate measures to "reduce inequality."[6] Domestically, this commitment is embedded in the fundamental guarantees provided by states to their citizens.[7] Yet persistent structural and economic inequalities across the globe reflect that public law and state institutions alone are unable to achieve this objective.

Several private law scholars have asserted a paradigm shift in the conception of distributive justice, which was traditionally reckoned as the

6. Martin, 'Goal 10: Reduce Inequality within and among Countries' (*United Nations Sustainable Development*), https://www.un.org/sustainabledevelopment/inequality/ (accessed November 17, 2025).

7. Pakistan has assumed this constitutional responsibility through the enforcement of fundamental rights and policy principles like those of equal treatment and nondiscrimination among its citizens.The Constitution of the Islamic Republic of Pakistan 1973 arts 4, 25, 38.

exclusive responsibility of the state.[8] They contend that the persistence of structural inequalities in the society necessitates a broader understanding of responsibility; thus, private actors including contracting parties must also bear responsibility to prevent economic inequality from society. This emerging perspective has challenged the traditional separation between roles of public and private law by acknowledging that contractual rules may either exacerbate or prevent existing socioeconomic disparities.

The law of damages is one of the most significant areas that can influence distributive outcomes. Common law offers remedial principle of *restitutio in integrum,* which aims to place the aggrieved party in the position it would have occupied had the contract been performed duly. Consequently, damages are compensatory rather than penal. The courts generally have to decide the protection of certain interests of contracting parties while awarding damages—key interests being restitution, then reliance, and lastly expectation interests.[9] At the same time other doctrines are considered, such as foreseeability, remoteness, and mitigation of losses in order to limit damages and prevent unjust enrichment.[10]

Despite their established normative status, these doctrines continue to generate considerable scholarly debate regarding the appropriate measure of compensable loss. Unduly relying on expectation interests risks an expansive award of damages, exceeding the actual loss of the aggrieved party, whereas limiting damages too narrowly may leave genuine injury uncompensated. Thus, the quantification of damages involves the consideration of normative values concerning fairness, justice, and proportionality rather than a technical exercise of damages calculations. A purely expectation-based award of damages, without consideration of the values of proportionality and fairness, has the potential to generate inequality, thereby aggravating injustice and

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8. See the literature suggesting integration of distributive justice in private law. John Rawls, *A Theory of Justice* (Revised edition, Harvard University Press 1999); Aditi Bagchi, 'Distributive Injustice and Private Law' (2008) 60 Hastings Law Journal 105 https://repository.uclawsf.edu/hastings_law_journal/vol60/iss1/4/.

9. Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds.), *UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary* (2nd., Hart Publishing; Baden-Baden, Nomos 2018) 958.

10. L.L. Fuller and William R. Perdue Jr., 'The Reliance Interest in Contract Damages: 1' (1936) 46 Yale Law Journal 52, 54. The courts are primarily concerned with protecting the restitution of plaintiffs, who, relying upon a defendant's promises, made expenses which were lost due to the defendant's breach. Courts consider compensating him for all such expenses. Damages may also be measured with reference to the monetary value of the promised performance, referred to as "expectation interest" of the aggrieved party.

unfairness in society.[11] Therefore, careful application of such doctrines is required to ensure the awards of damages neither disproportionately benefit one party nor impose excessive financial burdens on the other.

Different legal traditions respond to this challenge in markedly different ways. Common law would generally protect the contractual expectations of the aggrieved party. Accordingly, it recognizes damages for lost commercial opportunities where such losses satisfy established limitations on recovery, whereas Islamic legal principles would limits compensation to actual and proven loss, while rejecting damages for speculative opportunity costs and the award of interest (*ribā*), considering them unjust enrichment. These divergent conceptions expose a fundamental tension between expectation-based remedies and the Islamic legal tradition that seeks to prevent unjust enrichment and preserve distributive justice. Despite such doctrinal differences, both Islamic and common law aim to reach an ultimate goal of justice in contract law. The core challenge lies in exploring the common normative framework, which could help courts to reconcile the competing doctrines of the law of damages.

The practical significance of this divergence may be illustrated through a simple example. If a seller breaches the contact by not delivering possession of a house on the agreed date, should the purchaser be allowed to recover his financial loss incurred due to rental expenses during the delay? The answer would be yes, according to all legal systems as the loss directly arises from breach of seller. A further challenging question would be: Should the court go further to protect his contractual and legitimate expectations and allow damages for the opportunity loss where he had expectations to lease out the first floor of that house right after occupying the ground floor? Common law would acknowledge it as part of the legitimate expectations of the party, whereas Islamic law would deny it, reckoning such recovery as unjust enrichment. This illustration demonstrates the broader question confronted by courts: How should the law of damages bring an equilibrium between corrective justice, the

11. Jason argues how the *Tethyan Copper* award's expansive interpretations of investors' legitimate "expectations" may expose developing states to extraordinary financial liabilities. See Jason Beckett, 'A Quest for a "TWAIL" Approach in International Investment Arbitrations: An Appraisal of Tethyan v. Pakistan' (2024) 8 Islamabad Law Review 1 http://irigs.iiu.edu.pk:64447/ojs/index.php/ilr/article/view/5660 (accessed March 2, 2026); *Tethyan Copper Company PTY Limited (Claimant) and Islamic Republic of Pakistan (Respondent)* [2019] ICSID Case No ARB/12/1 (International Centre for the Settlement of Investment Disputes).

prevention of inequality, and unjust enrichment, while determining the appropriate measure of damages?

The contemporary implications of this question in the law of damages have, therefore, become increasingly significant, particularly in an era where contractual disputes frequently involve unequal bargaining power, complex commercial transactions, cross-border bargains, and substantial financial claims. Contractual justice demands equal treatment between parties; thus, neither party should derive an undue or unequal benefit from a contractual relationship. To uphold contractual justice, Lord Denning had invoked the doctrine of inequality of bargaining power and afforded relief to vulnerable parties at the contract formation stage.[12] While the doctrine primarily addresses inequality at the formation stage, its application to the enforcement of contractual rights and, more specifically, to the quantification of damages following breach has received comparatively little attention in legal discourse. Nevertheless, the same concern for preventing inequality remains equally relevant once the contractual relationship has moved from formation to the enforcement stage.

International sales law jurisprudence increasingly acknowledges the need to prevent inequality in the award of damages. This normative dimension has been explicitly recognised by the CISG Advisory Council in its interpretation of Article 74. The Council emphasizes that an interpretation permitting unequal recovery of damages between contracting parties would be incompatible with the architecture and objectives of the Convention.[13] Such jurisprudential developments demonstrate that the assessment of contractual damages must no longer be viewed solely as a mechanical process of compensating loss but also as a contractual value, which requires careful attention to equality, proportionality, and fairness between the parties.

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12. *Lloyds Bank Ltd v. Bundy* [*1974*] *EWCA Civ 8*. His doctrine suggests that at times, formally consensual bargains may result in substantive unfairness, particularly when the bargaining power of parties is compromised due to their vulnerable circumstances, which is then exploited by the counterparty imposing undue influence. The courts in such cases may set aside a contract where contractual imbalance results in an exploitative bargain economically affecting the weaker party.

13. See Comment on AC Opinion, 'CISG AC Opinion 6 Damages' (CISG Advisory Council) pt 5.4, https://cisgac.com/opinions/cisgac-opinion-no-6/ (accessed November 17, 2025); Kröll, Mistelis and Viscasillas. (n. 9) 988.

III. DOCTRINAL FOUNDATIONS OF DAMAGES IN PAKISTANI LAW

This Part discusses how the Pakistani legal and constitutional framework already contains doctrinal foundations for accommodating this approach of preventing inequality through contract law, specifically through the law of damages. Pakistani jurisprudence continues to recognize compensation as the overarching objective of damages. The statutory law, rooted in the British common law tradition, is embodied in two sections of the Contract Act of 1872. Section 73 defines the damages in terms of their compensatory nature, seeking restitution on behalf of the aggrieved party.[14] This provision is historically rooted in the landmark decision of *Hadley v. Baxendale,* which limits recovery of damages to losses arising as natural consequences of breach which were foreseeable at the time of contract, thereby excluding remote claims of damages.[15] Section 74, on the other hand, prescribes the limits of the penalty clause, or liquidated damages. These principles determine how damages are assessed and awarded following a two-fold rule for compensation, natural consequences, and reasonable contemplation or foreseeability of losses. However, proving special damages (compensation for losses that would not ordinarily flow from a breach) specific criteria is required; the claimant must prove that the other party had express notice of the special circumstances at the time the contract was formed.

Significantly this statutory framework is not supposed to operate in isolation. The constitutional and legal framework in Pakistan is framed in a manner which envisages a gradual Islamization of the inherited body of common laws through judicial interpretation. A key component of this framework is the Enforcement of Shari'at Act 1991, which prescribes the rules for interpretation of laws in Pakistan.[16] It declares the supremacy of *Sharī'ah* (Islamic law) in the legal system of Pakistan, subject to the Constitution. It establishes a vital rule of statutory interpretation: that wherever statutory provisions are capable of multiple interpretations, the courts must adopt an interpretation that is consistent with Islamic principles and jurisprudence.[17] Consequently, for implementation

14. The Contract Act 1872 s 73.

15. *Hadley v. Baxendale* (1854) 9 341 (Court of Exchequer).

16. Enforcement of Shari'at Act 1991 § 4.

17. Ibid. This law declares the supremacy of *Sharī'ah* in the legal system of Pakistan. It lays down the rules of interpretation for statutory laws, so that wherever multiple interpretations of a statutory provision are available, the courts must adopt "the one consistent with the Islamic principles and jurisprudence."

purposes, the courts have a responsibility to interpret the provisions of contractual damages through the lens of Islamic law and must be harmonized with Islamic legal norms.

For instance, Section 74 supplements the legal framework for damages and prescribes limits of reasonableness on liquidated damages.[18] It suggests that liquidated damages must be subject to judicial scrutiny, thereby reinforcing the principle that damages should be proportionate to the loss suffered. However, its explanation clause allows a stipulation for "increased interest" upon default of a debtor, as a form of contractual penalty. This clause is incompatible with Islamic law, as any increase in a monetary obligation due to a delay in payment constitutes *ribā* and is, therefore, void. Accordingly, an interpretation of Section 74 in terms of Islamic law would limit recoverable compensation to actual, proven loss and exclude any amount stipulated as interest and rescheduled due to a delay.[19]

Notwithstanding the constitutional and legal framework of Pakistan, the courts in Pakistan have generally applied the conventional common law framework in awarding contractual damages, including the award of interest or mark-up in appropriate cases.[20] The judicial reasoning demonstrates a willingness to interpret the statutory provisions governing damages through broader constitutional notions of justice and fairness rather than through a purely formal application of common law doctrine. Most significantly, the mandate of Islamic interpretation has yet to be fulfilled.

The courts have consistently observed the need to prove actual loss so that the award must not become a means for speculative recoveries or unjust enrichment. In *Azizullah Sheikh*, the court held that a claimant must provide "sufficient, trustworthy, independent and cogent evidence" to prove the quantum of damages, thereby ensuring that damages do not rest upon conjecture or speculation. Likewise, the courts have remained reluctant to award unquantifiable loss, for special claims of losses, that do not arise naturally from breach. In such cases, the defendant is held liable only when they had prior knowledge that the special loss was likely to occur. In *Daoud Shami v. Emirates Airlines*, a passenger's claim for

18. The Contract Act § 74.

19. Islamic law is described in detail in the next part of this Article.

20. *Arabian Sea Enterprises Limited v. Abid Amin Bhatti* [2013] PLD 290 (Sindh High Court); *Karakorum Cooperative Bank v. Mst Sofia Begum and others* [2022] YLR 1207 (Gilgit-Baltistan Chief Court); *Pakistan International Airlines Corporation Limited v. Muhammad Saleem Sherwani* [2025] PLD 116 (Islamabad High Court).

damages upon missing his graduation ceremony was rejected on three grounds: First, he failed to prove the airline was informed of this specific purpose when he purchased the ticket; secondly, he could not establish with specific evidence a quantifiable loss for his injured feelings or the diminished value of an experience due to nonparticipation;[21] and thirdly, he failed to show how nonparticipation made lessened the value of his degree or resulted in a lost job opportunity. Accordingly, the courts have maintained a rigorous evidentiary standard for moving from general to specific redress:

Category	*Evidentiary Requirements/Precedents*	*Judicial Outcome*
Actual Loss	"Sufficient, trustworthy, independent and cogent evidence" (*Azizullah Sheikh v Standard Chartered Bank*)	Dismissal of claims upon failure of plaintiff to prove a quantifiable, non-speculative loss.
Special Damages	Express notice of special circumstances at formation, and proof that loss was likely (*Daoud Shami v. Emirates Airlines*)	Rejection of claim if notice is absent; the court protects against "injured feelings" or unproven diminished value.

Table 1: Evidentiary Requirements for Compensable Loss

The strict requirements to furnish proof of actual loss, however, have not prevented the courts from acknowledging that such rigid evidentiary requirements could defeat substantive justice. Thus, in appropriate cases, the courts awarded "reasonable compensation" even when the claimant failed to prove actual loss[22] or tended to determine a "fair sum" that society would deem appropriate to compensate the sufferer.[23] In a recent judgement, the court invoked the principle of "proportionality" to avoid "unjust enrichment."[24] Such decisions reflect the cautious judicial approach of Pakistani courts to maintain a balance between competing

21. *Daoud Shami v. Emirates Airlines* [2010] PLD 282 (Supreme Court).

22. *Trading Corporation of Pakistan v. Sadan General Trading LLC* [2025] CLC 525 (Sindh High Court).

23. *Azizullah Sheikh v. Standard Chartered Bank Ltd.* [2008] CLD 173 (Supreme Court of Pakistan).

24. *Trading Corporation of Pakistan v. Sadan General Trading LLC* (n. 22).

demands of compensatory justice, fairness, and prevention of inequality, by disallowing both over-compensation and under-compensation.

A notable illustration of such development was seen in the *Abdul Rehman* case, where the court invoked the Islamic doctrine, prohibiting *ribā*, and moved beyond the "classical theory" of contracts, which in the court's reasoning only focuses on procedural fairness, to ensure substantive fairness in outcomes.[25] The court in this case had to determine the legality of cost of delayed payment. Thus, it provided an extensive analysis of how the Constitution of Pakistan of 1973 mandates an egalitarian legal framework. The judgment observes that the preamble to the 1973 Constitution guarantees "social, economic and political justice" to meet the "egalitarian expectations of the populace." The court further noted that Islamic principles and modern equitable doctrines, including "unconscionable bargains," the "inequality or un-conscionability of bargaining power," and "economic duress," allow courts to strike down terms that lead to "extremely unfair, unjust and unreasonable" consequences.[26] Thus, the objective of damages is no longer confined to restoring the aggrieved party's bargain but has evolved into a normative inquiry concerning the fairness and legitimacy of the remedy itself.

The analysis suggests that although the statutory framework remains rooted in the common law tradition of *restitutio in integrum* Pakistani jurisprudence has gradually moved beyond treating damages as a purely compensatory mechanism, designed to protect the contractual expectations of parties. Pakistani courts have infused statutory provisions with broader constitutional commitments to global norms of equality, fairness, and justice. In rare cases specific reference to Islamic principles is also made which require the prevention of exploitation and unjust enrichment for redress of economic harm.[27] These developments, however, do not signify a departure from the traditional compensatory nature of contractual damages, nor do they amount to a shift towards adoption of Islamic doctrines of compensation. Instead, they reflect the judicial endeavour to reconcile the common law framework of damages with Pakistani constitutional, and occasionally with Islamic, legal principles in the pursuit of justice.

Following the 26th Constitutional Amendment, all organs and authorities of the State of Pakistan have assumed an explicit constitutional

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25. *Abdul Rahim and 2 Others v. Messrs United Bank Ltd. of Pakistan* [1996] PLD 62 (Sindh High Court (Karachi)) [14].

26. Ibid. 25.

27. *Abdul Rahim and 2 Others v. Messrs United Bank Ltd. of Pakistan* (n. 25).

obligation to eliminate *ribā* from the economy by January 1, 2028.[28] This reform aligns with the broader economic objectives of the Constitution, which mandate the promotion of the economic well-being of citizens without discrimination and caution against the concentration of wealth in a few hands.[29] Consequently, the judiciary must harmonize its interpretation of monetary awards with such updated policy principles. Judicial interpretation under the Contract Act of 1872, particularly regarding the award of general and special damages, therefore, requires reconsideration in light of the constitutional mandate.

IV. THEORETICAL FOUNDATIONS OF DAMAGES IN ISLAMIC LAW

Early Muslim jurists engaged extensively with the law governing tortious liability cases, hence developing a robust set of legal maxims (*qawā'id fiqhiyyah*)[30] on the law of liability (*ḍaman*). Breaches of contractual obligations, particularly cases of a commercially related nature, as well as the consequential quantification of damages, received comparatively limited doctrinal elaboration.[31] However, the principles relating liability could not be limited to tortious liabilities alone. Rather, they constitute general principles of *Sharīʿah* which regulate legal responsibility whenever anyone causes harm to another. Hence, contemporary Islamic commercial law has derived the principles of contractual compensation from these broader doctrines of liability. Accordingly, the cases of contractual breach maybe divided into two broad categories: (1) breach of monetary obligations arising form a default in the repayments of debts, and (2) breach of nonfinancial liabilities, emerging through other categories of contracts including services, construction, agency, and similar arrangements.

As far as the first category is concerned, a breach of a debt obligation cannot be remedied through rescheduling the debt with an increased

28. Constitution of Pakistan art 38 (f).

29. Ibid. 38 (a).

30. Mohammad Tahir Mansoori, *Sharī'ah Maxims: Modern Applications in Islamic Finance* (Shariah Academy, International Islamic University 2012) 9. Islamic legal maxims are concise theoretical abstractions of the objectives of the Islamic law distilled through a comprehensive study of the entire corpus of Islamic law. They derive their normative authority from the *Qur'ān, Sunnah*, and Islamic jurisprudence (*fiqh*). Some of the maxims are expressed in the exact words of the *Qur'ān* or *Sunnah*, while others are expressed through jurists' articulation after careful reflection upon Islamic law.

31. See Zayn al-Din Ibn-Nujaym, *Al-Ashbāh Wa'l-Naẓā'ir 'alā Madhhab Abī Hanīfah'l Naumān* [*Similitudes and Analogies in the Legal Thought of Abu-Hanifa Al-Nauman*] (Dār al-Kutub al-'Ilmīyah 1999).

amount on account of granting further time for repayment, as this constitutes *ribā*, which is explicitly prohibited.[32] The solution proposed in modern Islamic commercial law is in the form of liquidated penalty as a "compulsory charity" clause requiring the defaulter promisor to undertake to pay in charity once the breach is proved. The creditor is not entitled to receive that amount to avoid profiting from *ribā*.[33] This mechanism, however, remains controversial among modern Muslim jurists, due to its self-contradictory nature, as payment in charity requires volition, and hence, must not be coercive. Alternatively, some Muslim scholars have suggested imprisonment or a travel ban on a procrastinating resourceful debtor, to create a deterrence for those who deliberately breach their financial commitments.[34]

For non-monetary breaches, the guidance is based on general principles of redress of harm. The fundamental principle governing liability is found in the legal maxim: removal of harm (*al-ḍarar yuzāl*).[35] It is rooted in the saying (*Hadith*) of the Prophet Muhammad (peace be upon him), "Neither shall harm be inflicted nor reciprocated (*lā ḍarar wa lā ḍirār*)."[36] This Prophetic tradition is also reckoned as legal maxim and it is comprehended in two complementary ways. First, it proscribes both the infliction of harm upon others, and its retribution by causing harm in return. Thus, neither the initiation nor the reciprocation of harm is permissible. Second, it establishes a broader normative principle of Islamic tort law: that no person should either cause harm or be subjected to harm.[37]

Ibn Nujaym (d. 1563), while regarding the above maxim as one of the foundational principles of the law of liabilities, mentions numerous instances where it forms the basis of contractual remedies. Among those applications are the right to rescind the transaction of sale for defective

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32. Mufti Mohammad Taqi Usmani, *Islāmi Benkāri: Tārīkh-o- Pas-e-Manzar aur Ghalat Fehmiyon ka Izālah* [*Islamic Banking: Historical Context and the Deconstruction of the Misconceptions*] (Al-Afnān 2009) 39.

33. 'Resolution No. 109 (3/12): Penalty Clause', *Resolutions and Recommendations of the International Islamic Fiqh Academy (Translation of the Original 5th Edition from Arabic into English)* (3rd, International Islamic Fiqh Academy 2024) 226.

34. See Nabil Saleh, 'Remedies for Breach of Contract Under Islamic and Arab Laws' (1989) 4 Arab Law Quarterly 269, 283, https://www.jstor.org/stable/3381943.

35. Zayn al-Din Ibn-Nujaym (n. 31) 72.

36. Mālik b. Anas (d. 795), *Muwaṭṭaʾ Malik (The Well Trodden Path by Imam Malik), Book 36* (*Legal Disputes/Judgements*)*, Hadith 1435,* https://sunnah.com/urn/514340 (accessed July 11, 2026.

37. Mohammad Tahir Mansoori (n 30) 64.

products (*radd bi al-ʿayb*) and numerous other options of rescission (*khiyārāt*) when contract obligations are not duly met. Likewise, its application in cases of compensation for destroyed property (*ḍamān al-mutlafāt*) is discussed under this maxim.[38] Although these remedies differ in their legal form, they share a common normative objective, the removal of harm.

Its juristic application was further enriched through other legal maxims stemming from it. Most notably, the maxim "harm cannot be removed by another harm (*al-ḍarar lā yuzāl bi al-ḍarar*)," prevents excessive burden on the party inflicting harm; the axioms "the greater harm is removed by bearing the lesser harm (*al-ḍarar al-ashadd yuzāl bi al-ḍarar al-akhaff*)" and "where two harms conflict, the lesser harm is preferred to avert the greater one (*idhā taʿāraḍat mafsadatān ruʿiya aʿẓamuhumā ḍararan bi irtikāb akhaffihimā*)" require the adjudicator to consider a balance while deciding the interests of disputing parties.[39] Collectively, these principles establish that a legal remedy should neither leave an injury uncompensated nor eliminate one party's loss by imposing an excessive or disproportionate burden upon the other.

While his discussion can not be construed as the formulation of a formal theory of contractual damages for breach, it demonstrates that contractual remedies are juristically grounded in the objective of this maxim. This doctrinal foundation provides a strong support for developing a principled approach to contractual compensation that remains grounded in the underlying rationale of this maxim. Accordingly, if a party suffers a harm due to the action or omission of another, it necessitates the recovery of loss. However, compensation is allowed only to the extent that it addresses actual and proven loss. Another related maxim, "the entitlement to profit is linked to bearing the risk of loss (*al-ghunm bi al-ghurm*)," further complements this approach. Thus, a claim for gain or compensation cannot be detached from the assumption of contractual risk. Damages should therefore compensate actual loss rather than secure speculative or unearned profits. Thus, unlike expectation or reliance-based approaches, Islamic jurisprudence traditionally exhibits caution toward speculative or unearned gains.

38. Zayn al-Din Ibn-Nujaym (n. 31) 73.
39. Ibid. 73-79.

V. PREVENTIVE METHODOLOGY OF ISLAMIC LAW TO AVOID INEQUALITY

An overview of the Islamic law of contract reveals that it employs a preventive methodology while setting stringent rules at the formation stage to avoid inequality at the breach stage. It offers a comprehensive set of principles and rules to avoid inequality, injustice, and unlawful enrichment. Put another way, the approach of Islamic law is preventive rather than reactionary. It involves the precise consideration of the "fundamental principles of the law of financial transactions" as well as the "general principles" of Islamic law. The injunctions of the *Qur'ān*[40] articulate fundamental rules for a trade or investment to qualify as legal. Likewise, the Prophetic tradition (*Sunnah*) provides essential interpretation of the *Qur'ānic* injunctions and further directions about the variety of financial deals vogue in that period. The Islamic legal philosophy thus delineates the major governing principles for regulating financial transactions, instead of listing the minutiae of every-day dealings. The Muslim jurists enriched the relevant jurisprudence while applying those principles. In contemporary times, the contracting parties, judges, and arbitral tribunals may be guided by these principles while quantifying damages in breach cases. In the following sections these principles are briefly outlined.

A. Qualified Freedom of Contract: A Dual Sphere Model

The foremost of such governing principles is the "freedom of contract," provided the divine framework of prohibitions is not violated by the contracting parties.[41] This doctrine is rooted in the principle of permissibility (*al-ibāḥah*) of everything. An Islamic legal maxim articulates this principle: "the fundamental principle in matters of human conduct is permissibility." Significantly, such freedom justifies the

40. The book of *Allāh* was revealed unto the Prophet of Islam, Mohammad (peace be upon him), in the Arabic language 1,400 years ago in the Arab peninsula. It contains the final message of *Allāh* through His direct speech, covering the history of the early Prophets and their nations in the paradigm of their religious situation; His bounties inside the Heavens and Earth; tenets of faith; rules regarding *harām* and *halāl* in the domains of edibles, human relations, financial and social interactions, and crimes and their punishments; and descriptions about the destination of human beings after resurrection, that is, paradise and hell.

41. Kasib bin Abd Al-Karim Al-Badran, *'Aqd Al-Istisnā' Fī al-Fiqh al-Islāmī Dirāsā Maqārnah* [*The Contract of Manufacturing in Islamic Law—A Comparative Study*] (2nd, Jamiah Al-Malik Faisal 1984) 37.

objectives of Islamic law (*maqāsid-al-Sharīʻah*) relating to wealth as well. *Sharīʻah* promotes not only the protection of wealth, but rather it also emphasizes transparency in dealings and the avoidance of unjust enrichment, while sustaining justice for all stakeholders.[42] An inductive analysis of Islamic legal texts reveals the dual sphere of Islamic mandates—the immutable (*al-thawābiṭ*) and the mutable (*al-mutaghayyirāt*) domains of Islamic law.[43] Significantly, both spheres operate side by side.

The legal principles and rules falling in the first sphere are ordained with meticulous details, thus leaving no room for modification in the given law through further interpretations or syllogism. Hence, this sphere is the immutable domain of Islamic law, such as the obligatory rituals, (including prayers, fasting, and mandatory alms).[44] Likewise, prohibition of unlawful enrichment (*akl al-mal bi-al-batil*),[45] *ribā*,[46] gambling,[47] short measuring in trade,[48] hoarding,[49] and speculative and exploitative trade are all fixed laws, as their prohibition from the divine law has been revealed in express terms. The governing rule of interpretation for this domain is proscription (*al-taḥrīm*).[50] These laws are ordained through the

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42. Mohammad Tahir Mansoori, *Maqāṣid-e-Sharīʻat Aur Jadīd Islāmi Benkārī-o-Māliyāt* [*Objectives of Sharīʻah and Modern Islamic Banking and Finance*] (Sharīʻah Academy 2021) 63-66.

43. The early Muslim jurists did not mention this nomenclature in their treatises. However, some early jurists, like Ibn al-Qayyim, did discuss the norms permitting a change of rules with changing times or situations.

44. Ra'id Nasri Jamil Abu-Mo'nas, 'Al-Thawābiṭ wa 'l-Mutaghayyirāt fi 'l-Tashrīʻ 'l-Islāmī [The Immutable and Mutable in Islamic Legislations]' (Doctoral dissertation, Jordanian University 2004) 19.

45. Moḥammad bin Ahmad bin Abi-Sahal Shams'l-A'imma Al-Sarkhasī, *Al-Mabsūṭ* [*The Extensive*], vol. 12 (Dār'l-Maʻrifah 1993) 108.

46. The Qur'ān, 2:275.

47. The Qur'ān, 5:90.

48. The Qur'ān, 83:1-6.

49. There are verses of the Qur'ān that generally lead to a conclusion that the practice of hoarding by traders is prohibited due to its harmful impact on society. However, there are particular *ahādīth* that establish the prohibition of hoarding, such as the words of the Prophet Mohammad: "The one who hoards, is a sinful person," in Imam Abul-Hussain Muslim, 'Kitāb 'l-Musāqāh Wa 'l-Muzāraʻah [Book of Contract of Irrigation and Contract of Cultivation], Chapter on The Prohibition of Hoarding Staple Foods, Hadīth 1605' in Hafiz Abu Tahir Zubair Ali Zai (ed), Nasiruddin Al-Khattab (tr), *English Translation of Sahih Muslim*, vol. 4 (Maktab Dar-us-Salam 2007) 332.

50. Taqī al-Dīn Abū al-ʿAbbās Aḥmad ibn ʿAbd al-Salām ibn ʿAbd Allāh ibn Muḥammad Ibn-Taymiyyah, *Al-Qawâid 'l Nūrāniyyah 'l Fiqhiyyah* [*The Illuminating Principles of Islamic Jurisprudence*] (Dr. Ahmed bin Mohammad Al-Khalil ed, Dār Ibn 'l Jawzi 2001) 164.

direct and express command of Allāh, sent and further elaborated through the revelation upon His last Prophet (peace be upon him). Hence, human intellect is precluded from reviewing, revising, and adding further upon these ordainments. It further implies the stringent prohibition of every type of innovation or introduction of new rituals or variation in fixed laws, as determining the matters of worship is beyond the capacity of humans.[51] Moreover, as the conduit of the orders of Allāh is closed, after the demise of the last of all the Prophets of Islam, Mohammad (peace be upon him), there is the impossibility of considering new developments in this domain.

The other sphere of divine mandate pertains to the regulation of legal relationships between individuals regarding their financial issues. This category comprises of the day-to-day dealings of individuals. Due to their ever-evolving propensity, the divine sources have provided core governing principles for their essential legal framework, without offering any designated form of contractual models or operational particulars. These governing principles mostly include the "divine set of prohibitions" that contracting parties must abide by. Notably, these domains of Islamic law do not operate in isolation; rather there exists a kind of perfect harmony in their functioning. In fact, they complement each other. The flexible or mutable domain of law is bound to take its foundational principles from the immutable domain of law.[52]



Figure 1: The Immutable and Flexible Spheres of Islamic Law.

51. Abu Ishāq Al-Shāṭibi, *Al-Muwāfqāt fi Usūl 'l Sharī'ah* [*The Harmonization of the Principles of Islamic Law*], vol. 1 (Abu-Ubaida Mashhoor bin Hasan Aal-e-Sulaiman ed, Dār Ibn 'Affān 1997) 440.

52. Imran Ahsan Khan Nyazee, *The Methodology of Ijtihad: Old and New (Comparative Jurisprudence)* (Advanced Legal Studies Institute 2021) 127.

The juristic discourse developed over time has generally concluded that Islamic legal theory has placed the financial dealings under the principle of general permissibility. Ibn-e-Taymiyyah emphasized the significance of the presumption of permissibility of everything. He mentions the inference that may be drawn from the *Qur'ān*, by citing the implications of avoiding it.[53] Say (O Muhammad to these polytheists): "tell me, what provision Allāh has sent down to you! And you have made of it lawful and unlawful." Say (O Muhammad): "Has Allāh permitted you (to do so), or do you invent a lie against Allāh?"[54] In this verse Allāh has condemned those nonbelievers, who self-construed the revelation and converted the permissible to the prohibited and vice versa. They falsified the words of Allāh, and hence, were reprimanded by Him.[55]

B. Proscription of Unjust Property Gains

The next fundamental principle about the financial transactions of parties is to avoid the unjust acquisition of property belonging to others, whether it is stipulated by the parties at the formation of the contract or received as remedy in breach cases. Al-Sarkhasī,[56] one of the leading Hanafī jurists, commences his discussion in the chapter of sales, with an argument on the purpose of wealth and its relationship with man. Accordingly, he illuminates that Allāh created wealth for the well-being of human beings; however, everything is not made permissible for everyone. Grabbing from others leads to chaos and disorder, which Allāh despises. Therefore, He decreed the mode of trade for wealth acquisition.[57]

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53. Ibn-Taymiyyah (n. 50) 164.

54. The Qur'ān, 10:59; Muhammad Muhsin Khan and Muhammad Taqi-ud-Din Al-Hilali (trs), *Translation of the Meanings of the Noble Qur'ān* (King Fahad Complex for the Printing of the Holy Qur'ān) 278.

55. Al-Shāṭibi (n. 51) 440.

56. Imam Al-Sarkhasi was a prominent Hanafi Muslim jurist of Transoxiana (beyond the Oxus River, in Arabic *Mā warā' al-nahr*). He is reckoned an authority on the jurisprudence of Hanafi Fiqh. He was imprisoned in Uzcand (Ozkent) prison, for nearly fifteen years, due to his speech against the ruler of his time. While in prison he taught Islamic Law to the students who would gather outside his prison cell. His disciples wrote his lectures as dictation notes and a thirty-volume *Al-Mabsūṭ* was written in this way. N. Calder, 'Al-SaraKhsī' in P. Bearman and others (eds.), *Encyclopaedia of Islam, Second Edition* (Brill 2012), https://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/al-sarakhsi-SIM_6620 (accessed November17, 2022).

57. Al-Sarkhasī (n. 45) 108.

Further, a trade activity is deemed just and legitimate only when the parties, freely and without any coercion, deception, or misunderstanding, concur upon its terms and conditions. *Qur'ānic* injunctions make it evident that Allāh characterized the trade transactions with free mutual consent (*tarāḍī*) of the contracting parties over the terms and conditions of their contract.[58] Otherwise, it is declared to be consuming or procuring others' wealth by unjust means. "O you who believe! Eat up not your property among yourselves unjustly except it be a trade amongst you, by mutual consent . . . ."[59] Thus, whenever free consent is prevented, owing to elements of fraud, misrepresentation, undue influence, drunkenness, and mistake, et cetera, the transaction is annulled.[60]

C. Prohibition of Ribā (Interest)

To understand the Islamic prohibition of *ribā*, one must first understand how Islamic law views money, loans, and trade. The Holy *Qur'ān* makes a very sharp distinction between two things that might look similar on the surface but are legally opposites, that is, legitimate trade (*bay'*) and illegitimate interest (*ribā)*.[61] *Ribā* is generally understood as stipulating an increase on capital amount (in the form of loan or investment) without any consideration. Hence, the lending activity is not allowed to be profitable or return-based. Lenders are rather commanded to facilitate borrowers by granting more time or even foregoing the loan claim, if the latter are facing hardship in the repayment of their loans. This concept is known as benevolent loan (*qard al-hasan*).

In other words, Islamic law rejects the notion of commercial lending that allows money to generate additional value merely through the passage of time, a principle commonly reflected in the conventional theory of the time-value of money (TVM). It is significant to clarify here that Islamic law recognizes TVM; however, it is fundamentally distinguished by its application to contracts of exchange rather than to contracts of loan. The jurists permit a price differential between on-the-spot and deferred prices, justified by market forces and the assumption of risk in real economic activities. However, TVM is strictly prohibited in lending relationships. Thus, any predetermined, contractually stipulated

58. Ibid.

59. The Qur'ān, 4:29; Khan and Al-Hilali (n. 54) 112.

60. Mohammad Tahir Mansoori, *Islamic Law of Contracts and Business Transactions* (Sharīʿah Academy 2008) 5.

61. Al-Sarkhasī (n. 45) 108.

increment on a loan is classified as *ribā*, as money in Islam is viewed primarily as a medium of exchange rather than a commodity capable of generating a return solely through the passage of time.[62]

A doctrinal analysis of the notion of *ribā* reveals that Allāh has categorically permitted sale or trade while forbidding *ribā.*[63] This verse of the Holy *Qur'ān* generally grants permission to every kind of sales; alongside, there is a clear ban on usurious trade.[64] Al-Sarkhasī deliberates that various types of trades are directly inferable from the words of Allāh while He has clarified the misconceptions of those disbelievers, who could not figure out the difference between sale and interest, saying sale is just like *ribā*.[65] Moreover, the trade practices were in vogue when the Prophet Mohammad (peace be upon him) came up with the Divine Message and he gave tacit approval to those practices,[66] which is a valid mode of legislation in Islamic law. According to Islamic legal theory, a proscriptive order of Allāh is reckoned definite (*Qaṭa'ī*) in its character, due to its source being a "primary source" of Islamic law. Such definitive order is categorized as universal and immutable for all times and places. Further, the Prophetic tradition (*ḥadīth)* of six commodities interprets the meaning of *Qur'ānic* term *ribā*:

> The Messenger of Allāh said: "Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, like for like, same for same, hand to hand. But if these commodities differ, then sell as you like, as long as it is hand to hand."[67]

An explicit breakdown of how the legal rules work in practice, based on the standards set by this *ḥadīth*, reveals that it relates to two types of legitimate trades only. Monetary exchange is represented by the exchange of gold and silver, and barter is represented by the exchange of the next four commodities, which belong to the class of edible, fungible, and weighable commodities. However, these are extendable to other

62. Samir Alamad, *Financial and Accounting Principles in Islamic Finance* (Springer Nature Switzerland AG 2019) 44.

63. The Qur'ān, 2:275; Khan and Al-Hilali (n. 54) 62.

64. The complete verse mentions the worst endings of those people who consume usury while posing a fallacy that trading is like usury. So, *Allāh* has renounced their fallacy by expressly declaring that He has permitted the trading while forbade the usury. (The Qur'ān, 2:275.)

65. The Qur'ān, 2: 275. Khan and Al-Hilali (n. 54) 62.

66. Al-Sarkhasī (n. 45) 108.

67. Imam Abul-Hussain Muslim, 'Kitāb 'l-Musāqāh Wa 'l-Muzār'ah [Book of Contract of Irrigation and Contract of Cultivation], Chapter on Exchange and Selling Gold for Silver on the Spot, Hadīth 4063' in Hafiz Abu Tahir Zubair Ali Zai (ed), Nasiruddin Al-Khattab (tr), *English Translation of Sahih Muslim*, vol. 4 (Maktab Dar-us-Salam 2007) 306.

commodities of similar characteristics through syllogism. In other words, Islamic law sanctions a few trades as real-time trades, whereby on-the-spot or simultaneous exchange of properties is mandatory. They include monetary exchange (*bay' 'l-ṣarf*) and barter (*bay' 'l-muqāyaḍah).*[68] Islamic legal injunctions unconditionally proscribe a stipulation of delay in these trades, as it leads to *ribā*. The above stated tradition decrees the following rules[69]:

1. Equal Quantity Rule: There is the prohibition of stipulating an increase or excess (*tafāḍul*) for any one of the contracting parties in two types of trade transactions, money-for-money (monetary) and barter exchanges, when exchanging homogeneous commodities. It means parties cannot trade ten grams of gold for eleven grams of gold or exchange ten dollars for twelve dollars. It must be exactly "same for same."

2. Hand-to-Hand Rule (Real-Time Exchange): Likewise, in homogeneous exchange, there is the prohibition of stipulating delay (*nasā'*) in performance for any one or both of the parties.[70] A seller cannot give his wheat today and receive the buyer's wheat next week. It is the most important rule for a fair deal that monetary exchange and barter must be real-time trades—they must happen "hand-to-hand," or right on the spot. The rationale is that fluctuations in price over time may unfairly prejudice one of the contracting parties. Thus, if parties stipulate a delay in these specific types of trades, it leads to *ribā*.

3. Trading Things of the Same Type (Homogeneous): While exchanging or trading "gold for gold" or "wheat for wheat," the law requires two strict rules to keep the deal fair and prevent interest: (1) the trading of equal quantities and (2) the hand-to-hand rule.

4. Trading Things of Different Types (Heterogeneous): Where a trade involves the exchange of different items such as "gold for silver" or "wheat for barley," the parties are allowed to agree on different amounts (for example, one gram of gold for fifty grams of silver). However, there is still one major rule to be followed, the hand-to-hand rule. Thus, even if the amounts are different, the

68. Absolute sale (*bay' 'l-muṭlaq*) may also be included in this category, though it is merely a mode of sale without any mandatory requirements of on-the-spot exchange.

69. Al-Sarkhasī (n. 45) 110.

70. Ibid. 111.

exchange must still be on-the-spot, and parties cannot agree in the contract to delay the performance to a later date.

Barter Exchange in Fungibles	Homogeneous Goods	Exchange in Equal Quantities, Spontaneous Exchange
	Heterogeneous Goods	Spontaneous Exchange
Monetary Exchange	Homogeneous	Exchange in Equal Quantities, Spontaneous Exchange
	Heterogeneous	Spontaneous Exchange

Table 2: Islamic Legal Rules for the Barter of Fungible Goods & Monetary Exchange

This is where the concept becomes very clear for modern contractual relationships and consequential legal damages in breach cases. Thus, in commercial loans, the following situations will lead to *ribā*:

1. When a person gives a loan and requires the borrower to pay back more than they borrowed amount (interest), the equal quantity and hand-to-hand exchange rules are violated.

2. In case of a legal breach, a debt cannot be rescheduled by adding extra interest or compounding interest for granting more time for repayment. Doing so would turn the added compensation into *ribā*.

3. *Ribā* is essentially profit made from TVM or charging for a delay in a transaction where items should have been exchanged equally and immediately. By requiring specific trades (monetary exchange and barter) to be hand-to-hand and "equal-for-equal," the law seeks to prevent one person from growing their wealth at the cost of another's misfortune or delay.

D. Proscription of Evasion of Financial Risk

Another important principle relates the contractual liability of the parties. Thus, the contracting parties must be ready to bear the associated business risk of loss. This principle is based upon the verdict of the Prophet Mohammed's saying, "The (entitlement to) profit depends upon the liability to bear the loss (*Al-kharāj bi al-ḍamān*)."[71]

71. Imam Muhammad Bin Yazeed Ibn-Majah, 'The Chapters on Business, Chapter on the Entitlement of Profit on Bearing the Risk of Loss, Book 12, Hadith No. 2243' in Hafiz Abu Tahir Zubair Ali Zai (ed.), Nasiruddin Al-Khattab (tr.), *English Translation of Sunan Ibn Majah*, vol. 3 (Maktaba Dar-us-Salam 2007) 282.

The application of this fundamental principle is reflected in several financial matters, such as in contracts of exchange including sale, lease, services, and the investment contracts, in the form of either securities or equities.

The benefits arising out of financial contracts, like sale, are entitled for the buyer and weigh against the intrinsic risk of ownership. Likewise, the profit earned by the contracting parties is justified only when the contracting parties do not exempt themselves from the risk of loss. This ultimately throws the inherent financial risk onto the other contracting parties. Ultimately, it amounts to receiving financial profits at the cost of others. Hence, no investment deal is legal if the parties ensure receipt of profits along with a guarantee of capital.

E. Uncertain and Speculative Deals

As a general rule, Islamic law makes it mandatory that the contractual obligations pertaining to financial matters are agreed to and executed as real-time exchanges, in order to avoid inherent risks due to future uncertainties (*gharar*).[72] This principle is based on a collective understanding of several *ahādīth*, which lay down certain governing principles, such as the prohibition of selling a nonexistent object (*bai' 'l-ma'dūm*) or an object whose acquisition is in doubt.[73] Thus, if a person does not own and possess an object at the time of entering a financial contract, he is not permitted to strike that deal. A couple of *ahādīth* are enumerated here to comprehend the foundation of this principle. It was narrated that Ibn 'Abbas said: "The Messenger of Allāh forbade *gharar* sale."[74]

Gharar sale is explained as one in which the consequences are unknown, because the subject matter is either not in the custody, or power, of the seller or it does not exist at all. It was narrated that Hakim bin Hizam said, "I said: "O Messenger of Allāh, a man is asking me to sell him something that I do not possess; Shall I sell it to him?" He said, "Do not

72. This is inferred from the principle of *majlis 'l-'aqd*, which requires that contracts must be concluded within the same session of contract.

73. Mansoori (n. 60) 39; Al-Sarkhasī (n. 45) 124.

74. Abū 'Īsa Muḥammad ibn 'Īsa ibn Sawrah ibn Mūsa ibn al Ḍaḥḥāk al-Sulamī Al-Tirmidhī (824-892), 'The Book on Business: Chapter on What Has Been Related About Sales of Gharar Are Disliked, Hadith 1230' in Hafiz Abu Thhir Zubair 'Ali Za'i (ed.), Abu Khaliyl (tr.), *Jami' al-Tirmidhi*, vol 3 (Darussalam 2007) 41, https://sunnah.com/tirmidhi:1230 (accessed December 10, 2025).

sell what is not with you."[75] On the premise of this tradition, the jurists ruled that where the parties do not own or possess the subject matter, involved in the financial deal, the transaction is not legal.[76] However, on the basis of human need, certain trades are permitted with delay in performance as well, such as advance sales (*salam*) and manufacturing contracts (*istiṣnāʿ*).

VI. PLURALISTIC LEGAL NORMS FOR EQUALITY-BASED DAMAGES

In the light of the legal principles discussed above, a hybrid model of guidelines may be proposed for pluralistic legal frameworks. The just quantification of damages within such pluralistic legal framework requires a rigorous synthesis of the full compensation objective found in international regimes with the actual loss mandate characteristic of Islamic and Pakistani jurisprudence. To achieve this alignment, legal practitioners and adjudicators must keep in consideration the following guidelines:

1. To prioritize the redressal of tangible, proven harm over speculative expectations, adhering to the fundamental Islamic legal maxim *al-ḍarar yuzāl* (harm must be redressed) and the Pakistani judicial requirement for "sufficient, trustworthy, independent and cogent evidence" to establish the quantum of loss. This approach necessitates the exclusion of speculative gains and unearned opportunity costs, which Islamic legal theory identifies as inherently uncertain (involving *gharar*) and potentially exploitative, thereby diverging from a broader common law principle of expectation damages.

2. To achieve the constitutional mandate established by the 26th Constitutional Amendment of Pakistan, the quantification process must strictly eliminate *ribā*-based decrees and awards. Thus, the adjudicators must replace stipulation of "interest" with a "reasonable compensation" or a "fair sum" that restores the claimant to their "but-for" position without facilitating usurious profit from a delay in payment.

3. Adjudicators must treat the principle of equality not as a peripheral moral concern but as a legally relevant interpretive tool, ensuring that damage awards do not result in unequal recovery between

75. Imam Muhammad Bin Yazeed Ibn-Majah, 'The Chapters on Business, Chapter on the Prohibition of Selling What Is Not with You, and from Profiting on What You Do Not Possess, Book 12, Hadith No. 2187' in Hafiz Abu Tahir Zubair Ali Zai (ed.), Nasiruddin Al-Khattab (tr.), *English Translation of Sunan Ibn Majah*, vol 3 (Maktaba Dar-us-Salam 2007) 250.

76. Al-Sarkhasī (n. 45) 124.

contracting parties or exacerbate existing socioeconomic disparities. Eventually, the award must be filtered through the principle of proportionality, ensuring that the financial restoration of the injured party is balanced against the categorical prohibition of *akl al-mal bi-al-batil* (unjust acquisition of property belonging to others).

4. The liability must remain limited by the criteria of foreseeability and express notice, ensuring that the defaulting party is only held accountable for losses reasonably anticipated at the time of contract formation.

5. Finally, by anchoring the assessment in risk-sharing principles, where the entitlement to profit remains intrinsically tied to the liability to bear loss, the law of damages can effectively serve as a safeguard against the structural inequalities inherent in modern capitalist market dynamics.

VII. CONCLUSION

The quantification of damages for contractual breach serves as a critical junction where technical law meets socioeconomic justice. This study demonstrates that the quantification of damages is not a value-neutral process. Rather, the manner of quantifying damages has far-reaching implications on contractual fairness and preventing inequality. An award of damages could reflect contractual imbalance when it exorbitantly benefits the strong party while leaving the other party to bear the loss they had not foreseen when entering the contract. The assessment of contractual damages is, therefore, not merely a technical exercise to calculate the losses of the aggrieved party up to their expectation, but a normative question concerning the relationship between contractual justice and socioeconomic equality.

The doctrinal comparison reveals that neither the common law nor Pakistani jurisprudence, is entirely indifferent to these concerns. Common law principles of restitution and even international sales law recognize that awards should not result in unequal recovery between parties. Pakistani jurisprudence mirrors this objective through the principle of proportionality, seeking to prevent unjust enrichment while struggling to reconcile traditional common law damages with an impending anti-*ribā* constitutional mandate. Although Pakistani law has not yet made a comprehensive shift towards an Islamic doctrine of compensation, its constitutional and statutory framework already provides sufficient interpretive foundations for harmonizing the inherited common law rules with Islamic legal principles. Nevertheless, the courts must adopt an Islamic theory of damages, which provides a preventive and egalitarian

alternative by grounding redress in tangible, proven harm rather than speculative opportunity costs. By strictly adhering to principles such as the prohibition of *gharar* (uncertainty) and the requirement that profit must follow risk-sharing, Islamic law acts as a safeguard against the wealth concentration and structural inequalities inherent in capitalist market dynamics. Integrating these values into modern judicial practice is not merely a religious obligation but a necessary evolution toward a more equitable global legal order. This study aims to construct a nexus between the norms of equality and assessment of damages in contractual breach cases, as inequality leads to socioeconomic injustice.