A Search for Authenticity

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I. INTRODUCTION

The tremendous growth of the Islamic finance industry, valued globally at $1.357 trillion in 2011, conceals a deep-rooted paradox. Marketed as an ethical alternative to the conventional interest-based financial system, the economics of Islamic financial transactions have increasingly borne a likeness to their conventional counterparts, causing Islamic finance to seem like a mere outward revival and a ‘crass exploitation of religious sentiment’. This perceived duplicity has triggered widespread scepticism concerning the authenticity of Islamic finance – it is this notion of Sharia authenticity that forms the central focus of this Article.

1.1 What Is Sharia Authenticity?

The Article offers a fresh perspective on the notion of Sharia authenticity in Islamic finance and proposes a model that not only acts as an identifiable yardstick, which realistically measures ‘Sharia authenticity’; but also provides insight into the inherent complexity of such an endeavour. The principal research question this Article seeks to answer is: What is Sharia authenticity in Islamic finance? The existing difficulty of defining such a subjective term is made further complex with the highly interpretative nature of Islamic jurisprudence and concepts such as iktilaaf (juristic disagreement), which have consequently resulted in diverse bodies of law that all hold claim to legitimacy. In Islamic finance, the term itself denotes the level of a particular transaction’s legitimacy in light of the ‘principles’ of Islamic law. However, mere mechanical adherence to these principles is inadequate and hardly translates the more

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important underlying substance. A strict formalist\(^3\) approach is fixated on
reviving the form of classical principles and overlooks the ubiquitous and ever-
permeating effects of context, which may change the form these principles take
or the way they are expressed, whilst retaining their underlying substance. It is
therefore submitted that Sharia authenticity inextricably correlates with context,
and this forms the theoretical foundations of this Article. Our proposed model
of Sharia authenticity uses this underlying premise of a context-based approach
and glean principles from the commercial transactions of the classical period
of Islamic law,\(^4\) a period revered and idealised in Islamic orthodoxy, and its
return aspired towards by both modernists and traditionalists alike – either in
substance or in spirit.

The principles that will be used in this Article have been garnered from the way
commercial transactions have been described in the fiqh and the Cairo Geniza,
which are a collection of manuscripts that were discovered inside an old
synagogue in Cairo. They are dated from mainly the 11th to 13th centuries,
covering the Fātimid and Ayyūbid periods.\(^5\) These historic findings contain
some of the earliest records of actual commercial transactions of Muslim and
Jewish merchants in the form of invoices, contracts, court records and other
business correspondences. By confirming that aspects of the early fiqh manuals
were practised in reality, these ancient documents thus contain a unique and
authentic reflection of commerce during the classical period of Islam.

In employing ‘principles’, our approach takes inspiration from Al-Ghazali’s
Maqasid Al-Sharia (the objectives of the Sharia),\(^6\) which are principles that have
been gleaned from the Qur’ān and Sunna. However, whereas the maqasid are
generally applicable to all aspects of mu’amalaat (human affairs or transactions),
the present Article’s principles are specifically applicable to ‘commercial’
transactions. The process of ascertaining these principles was most arduous,

\(^3\) Haider Ala Hamoudi, ‘Jurisprudential Schizophrenia: On Form and Function in Islamic
\(^4\) Hodgson highlights the difficulty of categorising or defining civilisations, suggesting that each
scholarly approach will differ. The categorisation may be useful as a frame of reference, but it
should not be taken as fixed, nor universally agreed upon. See Marshall GS Hodgson, The Venture
of Islam: Conscience and History in World Civilization, vol 1 (University of Chicago Press 1961). This
Article adopts a broad categorisation of the classical period, following Foster and Ercanbrack who
define the classical period of Islamic law from the 7th century (623 AD) to the 19th century, prior
to the onset of modernity. See Jonathan Ercanbrack, ‘The Law of Islamic Finance in the United
\(^5\) SD Goitein, A Mediterranean Society: the Jewish Communities of the Arab World as Portrayed in the
\(^6\) See Mohammad Hashim Kamali, ‘Maqasid al-Shariah: The Objectives of Islamic Law’ (1999)
38(4) Islamic Studies 193, 4.
requiring hours of deliberation and research. A thorough exposition of these principles is provided in Section 4. The term ‘principles’ will be used broadly to describe the general characteristics of the classical transactions, as well as their underlying reasoning. It is reiterated that our list of principles is by no means exhaustive and more principles may be extracted. The following six principles will be used in this Article:

1. Consideration of customary practice
2. Prohibition of *gharar* (excessive uncertainty or risk)
3. Fairness
4. Commercial expediency
5. Attainment of profit
6. Prohibition of *riba* (defined as compound interest)

Ultimately, this approach seeks to harmonise traditional and modernist perspectives and creates a methodology through which we can view modern Islamic financial markets, in keeping with the underlying principles of the classical period – indispensable in the Islamic tradition due to its religious and historical significance.

1.2 **Overview**

This Article will be split into five Sections excluding this present introductory Section, each of which needs to be accepted in order to progress to the subsequent Sections.

Section 2 forms the theoretical foundations of this Article and provides a detailed rationalisation for the underlying premise that *Sharia* authenticity is intimately connected to context. This Section features a philosophical discussion of the ‘ontology of principles’, exploring whether principles can merely be revived in a completely different environment and remain in line with traditionalist Islamic conceptions of authenticity. It is ultimately concluded that this is unrealistic, as principles are so deeply influenced by the context in which they exist that overlooking the context would run the risk of distorting the principle’s underlying spirit.

Section 3 provides a brief introduction to the core components of Islamic law. It de-constructs the typical traditionalist ideologies of the primary sources being

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7 By ‘traditionalist’, the Author refers to the more conservative movements within the Islamic faith, such as *Salafism* or *Wahabism*. Both seem to employ a literalist approach to view Islamic law.
the sole regulators of Sharia authenticity through highlighting the important role of jurists in deriving new laws, such as those in Islamic finance, and ultimately upholds that Islamic law is a divinely inspired jurists’ law. It provides an overview of the academic criticisms of the fiqh (legal theory), which will ultimately form one of our sources of Sharia authenticity. This Section also reinforces this Article’s thesis of a context-based approach to Sharia authenticity through concepts within Islamic law, such as iktilaaf (juristic disagreement) and ijma (consensus of scholars), which are both heavily influenced by contextual environment.

Section 4 outlines our methodological framework and proposes a model of measuring Sharia authenticity. As stated above, our model utilises the principles we have gleaned from the classical commercial transactions via the Geniza documents and, building upon our underlying premise established in Section 2, interprets them in light of the present context. This Section provides a detailed justification for using the classical period of Islam and the Geniza documents as our sources of Sharia authenticity from which our core principles shall then be gleaned. It outlines and justifies our six principles, which are by no means exhaustive, and puts forward a framework in which they can be reinterpreted dynamically, so as to retain their underlying ethical substance.

Section 5 applies our proposed model of measuring Sharia authenticity in the context of modern Islamic finance by studying controversial derivative contracts. The mechanics of a derivative, specifically a futures contract, is analysed and measured against our model of Sharia authenticity as established in Section 4. The derivative is just one aspect of modern Islamic finance, and our findings regarding its authenticity are in no way generalisable to the whole of Islamic finance today. Rather the purpose of this analysis is to illustrate that the principles of classical Islamic commercial transactions can, in substance, be found in the modern world to a much greater degree when the ‘contextual dimension’ is taken into account. This Section also finds that there is rarely absolute adherence to all principles but neither is there complete violation; in light of this, this Section ultimately argues that Sharia authenticity should best be viewed on a scale, with differing degrees of authenticity.

The Conclusion ties together each of the preceding Sections and reiterates this Article’s primary thesis that Sharia authenticity is intimately connected to context and should hence be viewed contextually. The scale of Sharia authenticity is also emphasised upon as a tool that accurately reflects the

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Islamic characteristics of modern transactions. It is ultimately submitted that only such an approach can give effect to the true spirit of Islamic law and successfully harmonise the sacred classical Islamic principles with today’s economic reality.

II. THE ONTOLOGY OF PRINCIPLES

It is submitted that Sharia authenticity in the modern world centres on the degree of consonance there is today with the principles of the classical age. Thus, a central theme of this Article is that of ‘revival’ and the question of whether classical principles can be revived in a modern context. Through analysing the ontology of principles, this Section sets out to prove the deep-rooted relationship between context and principles and argues that a revival of any kind must be carried out in light of context – ultimately, the theoretical foundations underpinning this Article.

Principles are the fundamental values that influence one’s behaviour and thinking and express one’s notion of morality, which is the key determiner of what is viewed as right or wrong. Principles are often perceived to be reflecting universal values, a view supported by philosophers such as Kant who in relation to morality, argued for the existence of objective moral laws that are accessible to all rational people.9 This view is echoed in the sphere of religion where principles are believed to have divine origins, and it is their connection with God that reinforces the view that conceptions of right and wrong, or the principles they are contained in, are universally agreed upon.

However, it is argued that in reality principles are not objective and never exist in isolation as idealised concepts. They are in fact subjective and deeply interwoven with context. Their existence appears dependent on context and varies accordingly. Mackie’s ‘Argument from Relativity’10 demonstrates this premise when addressing moral principles. Based on empirical findings of differing moral values existing between societies, he concludes that universal objective morality does not exist. The alternative explanation that some societies are less moral than others is unconvincing and then begs the question, ‘Whose moral principles are correct?’ Mackie traces morality to the way cultures and societies live their lives and demonstrates this with the practice of monogamy: ‘[I]t is that people approve of monogamy because they participate in a monogamous way of life rather than they participate in a monogamous

9 Kant argued that there existed objective moral laws, which could be accessed rationally through the ‘categorical imperative’. See Immanuel Kant, Groundwork of the Metaphysics of Morals (CUP 1785).
way of life because they approve of monogamy’.\textsuperscript{11} He insists that a better explanation for the divergence in moral views regarding monogamy is that the practice developed in some cultures, but not in others, and the moral views later emerged as a result.\textsuperscript{12} Therefore, the principles can be seen as being the product of culture, which is an aspect of context. Not only do they exist within it, but they also gain their meaning from it. Ultimately, separated from their context, principles plain and simply cannot exist.

Another important aspect to the study of principles is the way they are perceived, since different perceptions may in substance lead to completely different principles. One’s perception of principles will be greatly influenced by the infinite number of contextual variables that exist, such as society’s thinking patterns. These are the most basic identifiable elements that influence all walks of life. They significantly affect our understanding of our own existence and, therefore, impact on the way we perceive principles. For instance, the Age of Enlightenment considerably changed the thinking patterns of the West, as well as the rest of the world, triggering widespread critique across all disciplines and revolutionising the way man perceived his own existence.\textsuperscript{13} The medieval worldview, characterised by an unquestioned adherence to religion and tradition as a source of true knowledge and direction to life, gradually diminished.\textsuperscript{14} There was an apparent shift in emphasis from divine revelation to reason; the latter no longer subservient to the divine will and in fact becoming an authority in and of itself. Man replaced God as being the central focus of the universe, and this view was reflected in the philosophical thinkers of the time, such as Descartes who ‘looked for certainty in knowledge within the individual [Man], not from an outside authority [God]’.\textsuperscript{15} This ‘awakening of intellectual power’ was in constant tension with the other sources of authority, such as religion and tradition, as it was viewed as undermining them.\textsuperscript{16} Thinking, and life in general, became increasingly secularised, whilst religion and tradition gradually became relegated to the sphere of private life, serving simply a customary and ritualistic function.\textsuperscript{17} The Post-Enlightenment world was no longer limited by these institutions, which resulted in a degree of flexibility in the exercise of reason and thinking that was previously absent. Society’s thinking is now less constrained,

\textsuperscript{11} ibid.
\textsuperscript{12} ibid.
\textsuperscript{14} ibid.
\textsuperscript{15} ibid.
\textsuperscript{17} ibid.
and this logically affects one’s perception of principles, which are likely to be vastly different than before – largely attributable to the different context. Similarly, in Islamic law, Coulson observes that the emergence of tools such as istihsan (seeking the most equitable solution) marked a significant shift in what was perceived to be the purpose of God’s law.\(^{18}\) The purpose was no longer seen as being the passive obedience to the divine will, but was now focused on man and the public interest, a principle made famous by Al-Ghazali: ‘Maslahah (public interest) was God’s purpose in revealing the divine law’ (to be discussed later).\(^{19}\) This change in approach liberalised thinking. Laws, and by extension principles, now had an extra layer of meaning that was again previously absent. Ultimately, the perception of principles and how they are received will inevitably differ in contexts with different thinking.

Principles are formulated in a particular context, and regardless of whether their underlying morality is believed to be of divine origin, they exist, operate, are adhered to and are translated within the earthly realm. It is therefore likely that the biases and influences of the formulator, who is socially conditioned by his wider context, also seep into the formulating process.\(^{20}\) Thus, the principles have an obvious suitability to the period from which they are extracted. It follows that applying these principles strictly in a significantly different environment, such as a modern context, will pose considerable difficulties because of the extent to which society has changed and developed. For instance, much of the complexities that exist in today’s financial markets, ranging from banks, regulatory bodies and financial institutions, were just non-existent. Paradoxically, it seems the only way to revive the form of these principles in any practical manner would be to re-create the context in which they emerged – an impractical fallacy. Otherwise, the fixations with reviving the form of old principles and legal interpretations need to be dispensed with, and instead, a conscious effort to revive its functional spirit needs to be put in place. Just as the formulation of principles and interpretations were suited to and inevitably reflected the contextual environments of its time, it seems that in order for principles to be valid in a different context, they must be reinterpreted in light of that different context.

This Article is a response to the question of whether classical principles can be revived in a modern context, as these are often associated with a traditionalist agenda. Principles cannot do so in and of themselves. They are too deeply influenced and shaped by the surrounding context to be detached from it and

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\(^{18}\) Coulson (n 8) 7.

\(^{19}\) Felicitas Opwis, ‘Maslaha in Contemporary Legal Theory’ (2005) 12(2) Islamic Law and Society 182, 188.

\(^{20}\) ibid 182.
transplanted to another context. This will distort the principles, as they will inevitably be viewed differently from the context in which they were extracted.\(^{21}\) It is thus evident that principles cannot exist independent of context. It is submitted that on the basis of this premise, principles of classical Islamic transactions will need to be reinterpreted in a way that takes account of context in order to meaningfully measure Sharia authenticity.

The next Section provides a brief outline of the nature of authenticity in Islamic law, discussing the sources suitable for carrying out a measure of Sharia authenticity. We also reaffirm the central premise established in Section 2 above, that Sharia authenticity is connected to context through using examples of legal tools within Islamic jurisprudence.

### III. AUTHENTICITY IN ISLAMIC LAW

This Section provides a brief overview of the nature of Islamic law as it pertains to the central theme of Sharia authenticity. It maintains that Islamic law is a jurists’ law, since large portions of man’s mu’amalaat (transactions) and ibadaat (liturgical worship) are governed by, and are the product of, juristic reasoning. It is thus argued, contrary to conservative Muslim presumptions, that the divine sources are not sufficient, in and of themselves, in constituting a source of authenticity. Alternatively, the use of the fiqh is advocated, albeit with caution. Despite it being sufficient, the fiqh seems to lack the authenticity of the divine sources, causing us to arrive at the authenticity/sufficiency conundrum, to be explained ahead. In order to resolve this conundrum, and having established the necessity of reason, this Section then explores the roots of authenticity, establishing how these non-immutable and reason-based laws gained an authentic status. Finally, this Section examines the academic criticisms of the validity of such legal material as a source of Sharia authenticity.

#### 3.1 The Authenticity and Sufficiency Conundrum

Authenticity in the Islamic legal system is undoubtedly rooted in divine revelation (wahy), consisting of the Qur’an and aspects of the sunna. However, although these divine sources are widely considered to be the highest sources of authenticity in the Islamic tradition, it is clear they cannot be used by

\(^{21}\) For instance, some communities in Somalia and Egypt observe the practice of female genital mutilation in order to preserve the chastity of young females. However, that same practice and the principle underpinning it will be viewed as an extreme form of child abuse in Western countries. See Ashenafi Moges, ‘What is behind the Tradition of FGM?’ (African Women Organization, 2003) <http://www.african-women.org/documents/behind-FGM-tradition.pdf> accessed 1 December 2013.
themselves to judge emerging phenomenon as they are out-dated and lack the comprehensiveness to do so, instead simply containing general guidelines. This is also noted by Coulson, who states that ‘the Qur’an and the sunna taken together in no sense constitute a comprehensive code of law’. However, usul-ul-fiqh (legal theory) allows these general guidelines to be used to uncover specific rulings for unprecedented cases, which are both detailed and updated. Shafi spoke of a category of knowledge that has ‘no scriptural text (nass kitab) nor with respect to most of it is there a text of Tradition (nass sunna)’, claiming that this type of knowledge was susceptible to interpretation (ta’wil) and was to be understood by deduction/analogy (qiya). In order to discover this type of knowledge, which, due to the rapid advancement of civilisation and the increasingly anachronistic nature of the primary sources (Qur’an and sunna), it was thus essential for the jurists to consult reason, especially with regards to commercial transactions. The interplay of reason and revelation ensured that the product of reason retained the essence of the divine revelation and therefore, its authenticity as, of course, the interpretive efforts of the jurists (ijtihad) could not be contrary to the explicit rulings of the primary sources. The methods of interpretation were varied and could be either through the strict rules of usul-ul-fiqh (sources of understanding), the liberal use of ra’y, (personal opinion) or any of the variety of accepted tools in between these two extremes on the spectrum of interpretation. Ultimately, the major role played by reason to extract rulings is why the likes of Coulson, Weber and Schacht refer to Islamic law, and more specifically fiqh, as a jurists’ law and not God’s law.

3.2 The Roots of Authenticity

The products of juristic interpretations of the primary sources are legally valid but remain contingent and can only reach probable validity. This is because it is acknowledged by all scholars that ‘no normative interpretation of the revelation can claim a privileged access to truth’ – encapsulated in the jurists’ epistemological scepticism. This theological limitation on the jurist’s ability to discover ilm al yakeen (knowledge of certainty) suggests that the highest source of authenticity in the Islamic tradition is effectively inaccessible, which

22 Coulson (n 8) 4.
25 Coulson (n 8) 3.
26 Barber Johansen, Contingency in a Sacred Law: Legal and Ethical Norms in the Muslims Fiqh (Brill 1999) 53.
27 ibid 37.
28 ibid.
29 ibid.
appears detrimental to this Article since this would be equivalent to there being no authenticity. However, this theological limitation did not hinder the application, interpretation and extraction of the primary sources. On the contrary, it facilitated Islamic law’s development and growth. It had the dual effect of establishing God’s supreme authority and, through *iktilaaf* (difference of opinion), also establishing a degree of flexibility and tolerance, contrary to conservative ideas of Islam’s strictness. Furthermore, the interpretative efforts of the jurists were not void of authenticity. Their authenticity derived from the recognition they received from the community as ‘constituting the most authentic representation of the divine intent’, reminiscent of *ijma* (consensus of the scholars) as a source of binding law. Therefore, it is submitted that authenticity in practice is rooted in the community’s approval and what they deem acceptable as constituting the essence of the divine will. This supports the Article’s proposal of authenticity’s intimate link with context, further suggesting that different standards of authenticity can exist across different communities and different periods of time – although within boundaries (explored later in this Article).

3.3 The *Fiqh*: A Source of Authenticity?

Caution must be taken when considering the *fiqh* as a source of authenticity. Western scholars have remained critical of the literature’s ideal nature and its development in ‘distance from social practice so that the jurists are not under the pressure to adapt their norms to the changing conditions of social life’. The likes of Goldziher and Hurgronje supported this incongruence between *fiqh* and reality, the latter stating that ‘… all classes of the Muslim community have exhibited in practice an indifference to the sacred law in all its fullness’.

Though these criticisms threaten the study’s proposals for adopting the non-divine materials, the *fiqh*, as sources of *Sharia* authenticity, this Article sides with Bergstrasser’s three category distinction: (1) Ritual, family and inheritance law, which notwithstanding occasional deviations based on custom, adhered closest to the *fiqh*; (2) Constitutional, criminal, and fiscal law, which deviated the most from and, in some cases completely from, the *fiqh*; and (3) Commercial law, which falls somewhere between the two extremes. Not all aspects of the *fiqh* diverged from reality and therefore, a balanced approach must be taken.

30 Calder (n 23) 71.
32 Johansen (n 26) 53.
34 ibid 114.
Udovitch formulates a convincing rebuttal to Hurgronje and Goldziher and their views on the *fiqh*’s limitations in reflecting the social environment of the classical period. Drawing from Professor Brunschvig’s studies on the divergent positions of the schools on specific questions of law, he states that these ‘norms exhibit a close connection to their social matrix, with each school’s opinions reflecting the differing level and needs of its respective sociological milieu’.\(^{35}\) This *iktilaaf* between the schools is an example of the *fiqh*’s receptiveness to practical life and is a testament to its usefulness in providing, at the very least, a useful indicator of the practices of the classical period. Udovitch points to there being consonance in the *fiqh* and practical life with regards to partnership and commenda contracts, which were said to be ‘instruments of remarkable flexibility and efficiency’.\(^{36}\) Their flexibility could not have existed in a vacuum and were surely inspired by the party’s demands for pragmatism in commercial transactions, illustrating an undeniable link between law and practice. Udovitch reaffirms this: ‘Far from being unmindful or isolated from the exigencies of practical life, these texts reveal an intimate and sympathetic familiarity with the conditions of the marketplace’.\(^{37}\) Therefore, in light of this, the use of the *fiqh* as a source of *Sharia* authenticity is advocated. This Article also later turns to the Cairo Geniza as a source of authenticity, providing a reliable and unbiased embodiment of the *fiqh* and a representation of the accepted commercial practices of the time, to address the doubts surrounding the relationship between the *fiqh* and practical life.

In conclusion, the reality of Islamic law being rooted in the intellectual endeavours of the early jurists debunk the modern conservative calls for the primary sources to be reinstated as sole regulators of commercial transactions. The *fiqh* performed this function from the very inception of Islam. It was used alongside the divine *Sharia* to find solutions for unprecedented cases, not to be pitted against it. Although the harmony between *fiqh* and practical life has been brought into question, and by extension the *fiqh*’s usage as a source of authenticity, the solution seems to lie with the use of the Cairo Geniza as an embodiment of the accepted transactions of the *fiqh* in the classical period (to be looked at in detail). By highlighting the contextual dimension inherent in Islamic legal concepts, such as *ijma* and *iktilaaf*, this Section also demonstrated the underlying thesis that *Sharia* authenticity is connected to context.

The next Section further underscores the importance of the Cairo Geniza as a source of *Sharia* authenticity and presents the Article’s proposed model of viewing *Sharia* authenticity in Islamic finance.

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\(^{35}\) ibid 114-15.

\(^{36}\) ibid 115.

\(^{37}\) ibid 114.
IV. MODEL OF SHARIA AUTHENTICITY

This Section outlines the proposed model for viewing Sharia authenticity in modern Islamic financial transactions. The first Section will discuss the classical period’s significance within Islamic tradition and how this is critical to our proposed notion of Sharia authenticity. The Geniza sources from which the principles of our model shall be gleaned will be used. The next Section will outline the core principles on the basis of the classical commercial culture as described in the Geniza. Finally, the manner by which these principles can be reinterpreted in the modern context to measure Islamic financial transactions will be discussed.

4.1 The Classical Period

Authenticity in Islam is often associated with the classical era, considered amongst Muslims to be of great religious and historical significance, as it is believed that practices were closely in accordance to God’s Law. It could be argued that its ‘authenticity’ derives from its proximity with the Prophetic period, which is in itself authentic by virtue of it being under the supervision of the Prophet Muhammad (PBUH) – arguably, the very personification of Islam. This idea is strengthened by an authentic hadith (recorded tradition) of the Prophet stating ‘the best people are those living in my generation, then those coming after them (tabi’een) and then those coming after (the second generation).’ Therefore, on the basis of this tradition, the classical period gains its religious authenticity by virtue of this chain that leads back to the Prophet. Examples of the tabi’een include the founder of the Hanafi school of law, Abū Hanīfa. In addition, followers of the Salafi sect of Islam, known to be one of the most conservative groups within the Islamic faith, strive to emulate the practices of the ‘pious predecessors’ (al salaf al salih), which include the Prophet Muhammad, his companions and the first three generations of his followers. Thus, this tradition of viewing the classical period as authentic exists across the whole of the Islamic faith. This classical period arguably represents the quintessential Islamic identity and is hence idealised in Islamic orthodoxy, its return aspired towards by both modernists and traditionalists in their endeavour to follow God’s law.

4.2 The Cairo Geniza

The Cairo Geniza are historic documents from mainly the 11th and 13th centuries and provide an unbiased picture of the commercial on-goings of the medieval period; but the works of scholars such as Udovitch further credit these documents for providing insight into the earlier classical period of Islam – a period in which it is thought the practices were in accordance with God’s law, and were hence authentic. Udovitch says there is ‘a striking similarity between the outlines of commercial institutions as we find them in early Hanafi texts [from the classical period] and the actual documented business practice of the 11th and 13th century merchants whose business records have been preserved in the Geniza’. 40 These similarities confirm that these early Hanafi writings were not merely theoretical, but reflected the actual commercial practices of the classical period. The fact that these practices were uncovered centuries later in the Geniza, albeit specifically in relation to partnership (sharika) and commenda (eg mudarabah) contracts, suggests that the ‘fiqh deserves a closer analysis for their reflection of legal practice’. 41 Therefore, it is through the use of both the fiqh manuals and the manuscripts of the Geniza that we endeavour to glean our principles of Sharia authentic transactions.

However, one criticism that emerges is that much of the scholarly findings from the Geniza are in relation to partnership arrangements (sharikah) within the Hanafi school of law, which appears too specific to generalise beyond those specific circumstances. However, Goitein’s research indicates that these types of arrangements served a primary role in the classical commercial context, and were widely used throughout the whole of the Geniza. 42 They were contracts of great breadth, and ‘encompassed practically every economic activity in the Geniza period due to the fact that they substituted for large fields of economic activity …’. 43 Given the widespread use of partnership contracts during the classical periods, the observations made on the basis of the Geniza, as well as the principles that will be gleaned there-from, are in fact representative of the classical period, and can thus validly be used in our model.

43 Ercanbrack (n 4) 109.
4.3 Guiding Principles of Sharia Authenticity

4.3.1 Consideration of Customary Practice

Consideration of customary market practice (urf), the so-called ‘merchant’s law’, is seen frequently throughout the early fiqh texts and in the Cairo Geniza, and is hence a fundamental principle of commerce in the classical period. This principle shaped commercial law, and Udovitch highlights this: ‘[J]urists were guided by a sympathetic and informed responsiveness to the needs of trade and conscious attention to prevalent mercantile customs’. Thus, jurists understood that rules that were receptive to their environment would enrich the law and would be conducive to commercial transactions. The lawmakers facilitated commerce through accommodating many of the customary practices, at times, even where they appeared to contradict the strict letter of the law (fiqh). In this case, jurists would depart from the law in favour of the particular customary practice, supposing it did not conflict with the other principles of Islam. This illustrates that a flexible approach was taken to reconcile the strict nature of the law with market practice, as well as an appreciation that jurists’ rulings were not of themselves immutable – unlike Islamic law today which seems to have canonised jurists and their interpretations, a trend adopted in modern Islamic finance, with its strictly formalist rule-focused approach and unwillingness to depart from their interpretations.

Udovitch presents a case of a Hanafi partnership between a stall-owner and a craftsman, which can be used to illustrate the jurists’ respect for the prevailing customary practice. He describes a scenario where a stall-owner offers the use of his stall, a usufruct, to a craftsman on the condition that the latter does all the work, while sharing his profit equally with the stall-owner. Udovitch highlights that under traditional rules of the fiqh, such an arrangement should be invalid considering that the stall-owner is bargaining with the usufruct of the stall, an intangible property, which is not suitable in partnership arrangements. He further argues that this arrangement would also fail to qualify as either a valid lease or hire contract, an ijarah, since neither the rent nor the sum agreed upon was specified. However, the early Hanafi jurist Shaibani seemed to recognise the hindrance that such rigid enforcement of traditional legal considerations caused to commerce in the case of a ‘foreign’ craftsman, and instead dispensed with the ruling in these circumstances through exercising istihsan (juristic preference) in favour of this customary practice. In allowing this partnership,

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44 Udovitch, ‘The “Law Merchant” of the Medieval Islamic World’ (n 33).
45 ibid 108.
46 See Hamoudi (n 3).
47 ibid 117.
all parties attained their desired business objectives: ‘The craftsman receives compensation for his labour; the people derive the benefits of his services; and the stall-owner receives compensation for the use of this stall’. 48 This accommodating approach was employed frequently throughout classical commerce and illustrates that jurists employed a functional approach even in the early classical period.49

Another embodiment of the principle of ‘respect for customary practice’ was the existence of shurut, legal formularies (model documents) or precedents.50 This was the outcome of law accommodating an indispensable customary practice at the expense of existing Islamic legal theory, which, contrary to the Qur’anic rulings which demand that transactions be written down, ‘denied the validity of documentary evidence and restricted proof to oral testimony of witnesses’.51 Despite clear Qur’anic instructions stating the contrary, this legal rule still prevailed and it was the strength of the customary practice that ultimately caused its suspension – testament to the central role that customary usage had, in being able to do what the explicit declaration of the Qur’an could not.

4.3.2 Avoidance of Gharar

Rooted in the Qur’an and sunna, the prohibition of gharar is a ubiquitous feature of Islamic finance that is capable of invalidating a contract or transaction, which makes it a core principle of Sharia authenticity. Typically defined as excessive uncertainty or risk,52 it has developed a broad meaning that could also mean the uncertainty of one or both parties regarding the substance or attributes of the object of sale, or doubts as to the existence of the subject matter at the time of exchange.53 Hamoudi outlines the development of gharar having originated from specific Qur’anic prohibitions of games of chance and hadith forbidding speculative activities such as the sale of fish, and, through qiyas (analogy) having extended to ‘a prohibition of astonishing breadth’.54 In the Geniza records, disputes relating to gharar can hardly be identified, which may imply that the principle was well adhered to. However, what is clear from the Geniza

48 Al Sarakhsi in Udovitch (n 33) 117.
49 ibid 118.
52 Karasik (n 39) 382.
53 Nabil A Saleh, Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking (CUP 1986) 115.
54 Hamoudi (n 3) 611.
is that transactions did not lack transparency, which also comes within the remit of gharar. The prohibition of gharar is thus one of our core principles of authenticity.

4.3.3 Fairness

Islamic law has a qualitative approach to commerce based on the core principles of equality and fairness,\(^{55}\) which are evidenced in the commercial transactions of the classical period, as presented in the Geniza texts. These arrangements were intrinsically fair as they ensured profits, and losses were shared in equal parts where parties contributed equally and, where different shares existed, profits, losses and expenditures were divided in proportion to the investment. Even seemingly unequal, monetary partnerships were fair in actuality. Goitein points to a partnership where two individuals contributed a sum equally towards a drug store and where it was agreed that profits and losses were to be shared equally. It seemed that a third party who was also a partner in the business, but did not contribute regularly, was nevertheless allowed a share because of his social position (jah), as his connection with the business increased its profitability. Udovitch strengthens the authenticity of this practice through drawing a parallel with al-Sarakhsi’s Kitab al Mabsut, a famous Hanafi jurist’s work, where this contract is foreseen.\(^{56}\)

Similarly, another partnership described an arrangement where parties invested 600 dirhams and twenty dirhams respectively in a store of drug juices. The latter sat in the store and was responsible for selling, whilst the former purchased goods for supply. The shopkeeper received nine dirhams weekly but the partner only received four; the difference was regarded as compensation for the shopkeeper’s work,\(^{57}\) which, when viewed holistically, seemed the more important role. By taking into account these so-called ‘imponderables’,\(^{58}\) such as the benefit from another party’s social position and any of the other number of things that could practically be identified as having an effect on the partnership, the classical context demonstrates an unparalleled concern and emphasis upon maintaining fairness. This holistic approach ensures that the outcomes of commercial dealings reflect reality and everyone is merited or charged fairly, reflecting both monetary and non-monetary involvement.

\(^{55}\) Karasik (n 39) 381.

\(^{56}\) SD Goitein, ‘Commercial and Family Partnership in the Countries of Medieval Islam’ (1964) 3 Islamic Studies 315, 321.

\(^{57}\) ibid 323.

\(^{58}\) ibid 322.
4.3.4 Commercial Expediency

Commercial expediency appears to be a principle of great importance to classical Islamic commerce. Although it is clear that Islamic law, particularly the Hanafi School of law, allowed considerable flexibility and leeway for commercial transactions, there remained significant legal limitations. Udovitch mentions that these restrictions ‘placed certain aspects of practice on an inevitable collision course with legal theory’. However, the law prescribed a remedy through the use of hiyal (legal devices or stratagems), which took what was otherwise considered a violation and made it conform to the letter of the law, while circumventing it in reality. It should be noted that these tools were not built to undermine the prevailing rule of law, which would seem absurd since the same law gives it its legitimacy. They were tools whose purpose was to ease hardship that was created by another human being deriving the law. These instruments were used by jurists to give effect to what they believed was God’s desire to ease hardship for his people, caused by restrictive laws like the prohibitions of interest and using commodities as investment. According to Udovitch, the latter ‘would have presented a severe handicap, especially for merchants engaged in long-distance trade’ and ‘those with all their capital tied up in merchandise which could not be advantageously sold at that place’. Thus, the law yielded to those practices that were conducive to practicality.

4.3.5 Attainment of Profit

From the very inception of Islam, attainment of profit or *tahsil ar-ribh*, has always been a central principle in Islamic commerce. Not only was Islam’s birthplace, Mecca, a centre for trade, but the Prophet himself was a tradesman, and so were many of the respected jurists, such Abū Hanīfa, who was a silk merchant in the Baghdad market. Therefore, attainment of profit is unquestionably important. The texts themselves recognise this to be an essential principle, transcending one’s *madhab* (school of law) or religious or ethnic affiliation. Udovitch regards this to be of considerable importance, stating that ‘actions which promote the attainment of profit are permitted, and those that are extraneous or inimical to this goal are excluded’. He further indicates that this

59 Foster (n 50) 15.
60 ibid 10-11.
61 ibid 11.
62 ibid 120.
63 He was the founding father of the Hanafi school of law in Sunni Islam.
64 Foster (n 50) 26.
66 Udovitch, *Partnership and Profit in Medieval Islam* (n 51) 253.
principle took precedence over legal analogy and other religious-ethical considerations, which could even be suspended where conflict between them arose.67

The principle is evident within partnership arrangements, such as mudarabah, where a mudarib (agent) is given almost limitless freedom in dealing with the rab al-mal’s (investor’s) capital, as Udovitch confirms: ‘[T]he agent’s freedom of action extends almost unto the commercial horizons in which he functioned’.68 This was to ensure the investor was uninterrupted in his quest to attain maximum profit. Udovitch also mentioned that ‘[t]he jurists epitomised the chief purpose of partnership and commenda simply as ‘the attainment of profit’,69 further illustrating the significance of this principle in classical Islamic commerce. The principle can also be seen as an extension of ‘protecting one’s wealth’ under Al-Ghazali’s Maqasid al-Sharia (objectives of Sharia).

4.3.6 Avoidance of Riba

Avoiding riba is perhaps the most identifiable principle of Islamic finance, as it is derived explicitly from Qur’anic verses.70 Typically defined as increase or gain, but also associated with interest or usury (excessive compound interest),71 riba’s legal meaning is incredibly intricate as it encompasses a range of different types, and is hence the subject of differing scholarly opinions. Of the three main types of riba identified,72 this Article focuses on riba al-jahiliyya, known as the pre-Islamic riba, and is considered by scholars as the type that is referred to in the Qur’an. It arises where the lender asks the borrower at maturity date if he will settle the debt or increase it, which means that interest would be charged on the debt initially accrued,73 akin to compound interest. The Geniza records confirm this principle, but specifically in relation to interest on loans: ‘[L]ending money for interest was not only shunned religiously but was also of limited significance economically’.74 It seems this was partly due to the social stigma attached to a borrower, expressed in the maxim, ‘[T]he borrower is a slave to the lender’.75 Furthermore, evidence of parties ‘concealing interest’76 within

67 Udovitch, ‘The “Law Merchant” of the Medieval Islamic World’ (n 33) 122.
68 ibid.
69 ibid.
71 Saleh (n 53) 13.
72 There is also riba al-fadl and riba al-nasi’a. See ibid.
73 ibid.
74 Goitein, A Mediterranean Society: Economic Foundations (n 42) 170.
75 Foster (n 50) 317.
business correspondences\textsuperscript{77} reinforces the prevalence of this principle during this period since parties needed to practice \textit{riba} in secrecy.

4.4 Framework of Interpretation

On the basis of this Article’s central premise that \textit{Sharia} authenticity is intimately linked with context and, in order for these underlying principles of classical commerce to be applied in modern Islamic markets, the principles need to be viewed in light of our modern context. However, this has to be done in a way that does not compromise their ethical substance. This approach is thus one of substantive rationality,\textsuperscript{78} since these principles encapsulate the substance and underlying spirit of the classical transactions, as opposed to just their form. However, absent of context, simply employing those classical interpretations or principles today in a cut and paste fashion resembles the inadequate formalist approach that presently exists in some aspects of Islamic finance, which Hamoudi describes as an ‘interpretive methodology relying almost entirely on logic and excluding more contextual and experimentally based techniques …’\textsuperscript{79} This approach adheres to the form of these classical principles, but not their underlying spirit. In fact, disregarding the contextual dimension and focusing solely on form may, quite ironically, undermine or even distort their underlying spirit.

As well as considering context, the new interpretations of these principles need to be conducted in a way that best expresses that underlying Islamic morality or spirit of the classical period – a bond that ultimately makes these principles Islamic. The principles may remain unchanged, but their interpretations cannot. They otherwise provide interpreters with great flexibility given the breadth of the principles’ interpreting capacity – limited only by interpretations that are contrary to the principles’ underlying essence. For instance, the principles of ‘justice and fairness’ may in fact mean different things to different people in different contexts, but one’s understanding of this principle is not infinite, and is limited to the possible interpretations of ‘justice and fairness’, such as excluding that which is unjust and unfair. After acclimatising these principles to the modern context through such reinterpretations, it is submitted that transactions that are in consonance with these classical principles will indicate a higher level of \textit{Sharia} authenticity, and those that are contrary will indicate a lower level.

\textsuperscript{76} Udovitch, ‘The “Law Merchant” of the Medieval Islamic World’ (n 33) 257.

\textsuperscript{77} For instance, where a valuable pawn was deposited by Muslims to Jewish Bankers in the 11th century. See ibid 254.

\textsuperscript{78} Opwis (n 19) 192.

\textsuperscript{79} Hamoudi (n 3) 607.
To summarise, our proposed model of *Sharia* authenticity described above employs the principles that we have gleaned from the accepted transactions of the authentic classical period, as presented in the historical findings of the Geniza, and views them through the lens of our modern day context. The next Section will apply this methodological framework to the case study of derivatives in modern Islamic finance.

**Figure 1: The Proposed Model for Viewing Sharia Authenticity**

![Model Diagram]

### V. MODERN ISLAMIC FINANCE

In this final Section an endeavour has been made to apply the model of viewing *Sharia* authenticity in the context of modern Islamic finance. This Section shall focus on analysing derivatives, highly controversial in both Islamic and conventional financial systems and widely recognised as being instrumental in bringing about the global financial crisis in 2008. The purpose of this analysis will be two-fold: firstly, to uncover whether classical Islamic principles, in substance and in light of a changed context, are evident in derivatives, and secondly, on the basis of the derivatives case-study, illustrate that *Sharia* authenticity should be viewed on a scale in order to most accurately reflect a transaction’s standing in light of authentic Islamic principles.

#### 5.1 Sharia Authenticity of Derivatives

A derivative is a generic term describing a transaction whose value derives from an underlying asset or instrument. Futures contracts are one of several derivative structures and will be the sole focus of this Section. They can be viewed as having evolved from forward contracts, whereby farmers for instance, could transact to sell their crops months in advance at a more advantageous price than at the time of delivery. The price agreed upon in advance was known as the strike price. Forwards were a means through which farmers could try to insure themselves against season price fluctuation,\(^\text{80}\) which was by no means foolproof, as they could equally incur a loss on potential profits if the market price turned out to be more favourable to them upon delivery than when the contract was transacted. A futures exchange then

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emerged where trading took place, which had strict standards pertaining to quality and size. Trades taking place on the exchange were called futures. Clearing-houses were also established which administered the transactions and guaranteed the performance of contracts. Besides buyers and sellers, there emerged speculators who were not interested in the delivery of the underlying asset, but were willing to assume the risk for the potential profits that derived from the price movements. In fact, the underlying assets were hardly delivered in the futures market, in which case the difference between the strike price and the market price was paid out; but if they ever were delivered, they were bought and sold several times before the date of delivery, referred to as short selling, as a seller does not own or possess the items he sells.

5.1.1 Gharar

The central issue with derivative structures, such as a futures contract, is gharar, typically understood as excessive risk, uncertainty or speculation. Avoidance of this is also one of our core principles of Sharia authenticity as established in Section 4. However, since a degree of gharar exists in almost all transactions, it must be stressed that the crucial issue is ‘one of degree’ and whether the gharar in question is exorbitant – a factor which is itself relative to context. The modern commercial environment is a vastly different reality compared to that of the classical period, and with modern technological advances, classical Islamic concerns of gharar relating to the object of the sale, its delivery or pricing are all issues that have been significantly reduced. Kamali admits that the increase in technology has introduced further complexities and different types of uncertainties, but maintains that ‘a medieval farmer of food grains naturally experienced greater anxiety about the prospectus of a good harvest than his 20th century counterpart’, implying that uncertainty in commerce has undoubtedly been reduced in the modern context. For instance, the existence of clearing houses today ensures that contracts are fulfilled, which reduces the counter-party credit risk, the risk that counter-parties will default on their obligations. From a mundane perspective, these risks could be seen as the underlying reasoning (ila) behind rulings and principles prohibiting the trade of things one does not yet possess or that do not yet exist – both aspects of futures contracts that are criticised and both supposedly within the remit of gharar. However, Al-Jundi contests the latter, stating that the subject matter of futures contracts cannot be said to be non-existent because ‘the market operates on a permanent basis’ and the underlying commodities being traded are

81 ibid 4.
82 ibid 86.
83 ibid 146.
expected to be available on the open market. Furthermore, writers such as Yusuf Musa, Ali Abd al-Qadir and Yusuf al Qardawi have highlighted that the marketplace of Madina and the classical period could not guarantee regular supplies at any given time, an issue which is resolved by clearing houses in the modern context, which fulfil the function of those prohibitions and arguably render them inapplicable. Ultimately, it seems that the utility of the prohibition of *gharar*, understood in its classical sense, has significantly diminished in light of the changed context.

### 5.1.2 Commercial Expediency and Attainment of Profit

Islamic legal criticisms of derivative contracts typically focus on its risky nature, which is another dimension of *gharar*, but its primary function is actually to hedge against risk, which is ironically the exact opposite. Elements of commercial expediency are evident in a seller’s ability to simultaneously hedge against risk, ensuring they receive a reasonable amount for the transaction, and, where the strike price turns out to be better than the market price, also allows them to attain profit. They facilitate the needs of all parties by taking the risk out of the hands of those who do not want it, and allocating it to those that do – hence, personifying the principle of ‘commercial expediency’. This principle becomes increasingly obvious in situations where farmers possess an excess amount of crops in comparison to market demand. The absence of derivative contracts leaves the farmer selling his crops at a reduced price or storing them until demand increases, which is both costly and risky. The forward contract would alleviate the farmer’s situation, allowing him to sell those crops in advance, at a time where prices were more advantageous. Therefore, derivative contracts seem to evince the dual classical principles of ‘attainment of profit’ as well as ‘commercial expediency’.

### 5.1.3 Customary Usage of Market Practice

In today’s commercial world, speculation has become something of a market custom, and can thus be classified under our classical commercial principle of respecting market or ‘customary practice’, often accommodated by jurists in the law-making process. Al-Khatib emphasises that speculation is essential for providing liquidity in today’s markets and is necessary to keep the futures

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84 ibid 116.
market functioning. Speculators buy and sell futures contracts and assume the risk of price fluctuation, whilst also injecting large amounts of money into the market and therefore increasing liquidity levels. They also allow hedgers an economical means of locating counter-parties who are actually willing to assume the risk. The fundamental role speculation plays in the functioning of the futures market and its overall utility makes it the equivalent of a modern day ‘merchant’s law’ and hence, within the scope of Sharia authenticity. However, even Al-Khatib cautions that ‘speculation can become an instrument of abuse that can easily compromise the integrity of the market’, referring to excessive speculation, which effectively turns futures contracts into forms of gambling and hence renders them unlawful. The issue, once again, is one of degree. The modern financial world has tried to limit speculation and other potentially damaging economic activities through employing strict and well-regulated frameworks. For instance, Malaysia’s Kuala Lumpur Options and Financial Futures Exchange (KLOFFE), governed by The Futures Industry Act 1993, provides a well-regulated framework for derivatives with sufficient measures in place, including heavy fines and even prison sentences, to minimise exploitation and manipulation. The existence of such measures seems to render laws prohibiting speculation, another form of gharrar, inapplicable as their functions are carried out by these regulatory measures. Their existence means that the restrictive approach of an almost blanket prohibition held by the likes of Justice Taqi Usmani is needless, especially in light of the several advantages speculation provides. Kamali mentions that ‘a cautious and well-regulated approach to commercial speculation in futures and options, such as the one taken in Malaysia, is advisable if it can serve the public interest or maslahah …’ Therefore, even speculative aspects of derivatives, when well-regulated, indicate a level of Sharia authenticity under the classical Islamic principle of respecting market practice.

5.2 Shades of Sharia Authenticity

The existence of these classical Islamic principles merely indicates that there are levels of Sharia authenticity even within the most controversial of financial structures. The irony is that there exist contracts such as the murabaha, a relatively more basic building block structure of Islamic finance, which, when

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87 ibid 168.
88 Udovitch, ‘The “Law Merchant” of the Medieval Islamic World’ (n 33).
89 Kamali, Islamic Commercial Law: An Analysis of Futures and Options (n 80) 168.
92 Kamali, Islamic Commercial Law: An Analysis of Futures and Options (n 80) 219.
similarly viewed from a functionalist perspective, reveals strikingly obvious violations of classical Islamic principles such as *riba*, or circumventions of them. A *murabaha* is simply a cost plus sale, where an object is sold at the price it was acquired, with the addition of an agreed upon mark-up or profit margin. In contemporary Islamic markets, *murabaha* is used by Islamic financial institutions to finance the purchase of cars and even finance mortgages, but in a manner that mimics conventional financial arrangements. The profit margin is predetermined and often parallels the prevailing market interest rates, such as LIBOR (London Interbank Offered Rate), which are hidden, much like the practice of concealing interest in classical transactions as evidenced in the Geniza. In fact, Useem notes that *murabaha* ‘is simply a thinly veiled version of [interest]’.

The economic substance of these modern *murabaha* transactions is ultimately the same as their conventional counterparts, despite their significantly different form. This is attributed to Islamic finance’s greater focus on reviving the form of the classical jurisprudence, rather than its underlying spirit, which, ironically, provides it with the opportunity to manipulate and create such parallel structures and effectively circumvent the jurisprudential underlying spirit.

Both derivative and *murabaha* structures individually display the same complex ambiguity; neither of them entirely adheres to or contradicts the authentic classical principles of Islamic transactions. They contain aspects of both. The same pattern is demonstrated above with modern Islamic finance as a whole. Tyan, in being critical of the Geniza’s scope, inadvertently confirms this to be the case in even the classical period, where, in practices such as *hawala* (transfer of debt), there existed a wide divergence between legal theory and practice. This has important implications for the question of *Sharia* authenticity as it illustrates that in reality transactions cannot be limited to strict binary categorisations of authentic and non-authentic, or, in the terminology of modern Islamic finance, *Sharia* compliant or non-compliant. Alternatively, it seems there are different shades of *Sharia* authenticity in Islamic financial transactions. This approach of viewing *Sharia* authenticity seems to bear a greater semblance to the classical Islamic ethical scale, which included varying levels of ethical standards in measuring acts within the area of *mu'amalaat*. These included acts that were: obligatory (*wa'ijib*), recommended (*sunna*, *mustahabb*), indifferent

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93 Hamoudi (n 3) 607.
95 Hamoudi (n 3) 618.
96 Udovitch, ‘The “Law Merchant” of the Medieval Islamic World’ (n 33) 257.
97 El-Gamal (n 94) 17.
98 Foster, ‘Islamic Perspectives on the Law of Business Organisations 1’ (n 50) 25.
(mubāh), reprehensible (makrūh) and forbidden (harām). Islamic finance clearly cannot adopt the same categories, but a scale with a greater range would be better reflective of a transaction’s level of Sharia authenticity. Furthermore, it becomes clear that the present strict binary categorisation yields distorted and limited results, such as the prohibition of derivatives by the likes of Justice Taqi Usmani. Instead, reviving this ethical scale of classification in the area of commercial transactions and alternatively, viewing transactions’ legitimacy on a spectrum denoting differing degrees of Sharia authenticity seems to be more in line with classical Islamic law and hence, more Sharia authentic.

VI. CONCLUSION

So far the efforts of Islamic finance to harmonise the sacred classical Islamic principles with today’s ever-increasingly complex socio-economic environment has resulted in a legal system that seems burdened by its very classical Islamic roots, limited by large bodies of jurisprudence that emerged during this acclaimed golden era of Islam. What this Article has tried to underscore is that we must steer clear of such burdensome efforts, which too narrowly focus on conservative-inspired mechanical adherence to the ‘form’ of the law or its principles. This is but one aspect of Sharia authenticity. Such a formalist approach in Islamic finance today has proven inadequate and fails the classical Islamic principles, which it claims to adhere to, through adopting highly technical legal gymnastics and hence, circumventing the classical principles in reality. It also fails to be economically efficient, as illustrated by the prohibitions of derivatives by the likes of Justice Taqi Usmani based on its perceived formalist violations of gharar.

This Article has shown that there is a need for a more effective methodology, such as our proposed context-based model of Section 4, which takes those same classical principles and re-energises them in light of the modern context and thus, creates a framework which satisfies the competing interests of devout Muslims: to revive the classical principles and also to remain economically efficient in a 21st century context. Ultimately, we should yield to the reality that a changed context logically precludes formalism from effectively taking place and, in some instances, renders attempts of such formalism an unnecessary hindrance as the changed context adequately facilitates the functions of those prohibitions, as illustrated in Section 5 with the existence of clearing houses rendering the prohibition of gharar inapplicable within derivatives. We should delve deeper into the underlying functions and reinterpret these principles,

99 Johansen (n 26) 69.
100 Bacha (n 91) 17.
whilst staying true to their ethical substance, viewing them through the lens of the modern context in all its complexity, as it is here that these principles are operating. Only after viewing Sharia authenticity ‘contextually’ can we truly measure to what extent modern transactions evince those same classical principles that devout Muslims across the world so long to revive. Emphasis is given to the word ‘measure’ as our analysis of derivatives illustrated above in Section 5; modern Islamic transactions never ‘completely’ reflect Islamic principles, but neither do they entirely contradict them. They all seem to have differing degrees of adherence, which indicates that the most appropriate way to view them is on a scale depicting differing shades of Sharia authenticity. This approach not only acknowledges the inherent complexity of these transactions, but also provides a means through which the beneficial elements of Islamically-suspect transactions may be retained through simply providing lower ratings on a scale reflecting their Sharia authenticity – which is a far better approach than any blanket prohibition. So let us embrace this inherent flexibility and livingness of ‘Sharia authenticity’ – forever shaped by context and forever a guiding tool for Islamic finance’s unpredictable future.
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