How to cite this article:
Zare, M. R., Mazloom Rahni, A., & Rostam Far, A. (2025). A Jurisprudential Inquiry into the Legitimacy of Participatory Contracts. *Journal of Historical Research, Law and Policy, 3*(3), 1-13. https://doi.org/10.61838/jhrlp.95

Article history:
Original Research

Dates:
Submission Date: 12 April 2025
Revision Date: 02 August 2025
Acceptance Date: 13 August 2025
Publication Date: 01 September 2025

A Jurisprudential Inquiry into the Legitimacy of Participatory Contracts

1. Mohammadreza. Zare [1] : Ph.D. student, Department of Private Law, Qe.C., Islamic Azad University, Qeshm, Iran
2. Alireza. Mazloom Rahni[2*]: Department of Private Law, ShQ.C., Islamic Azad University, Shahr-e Qods, Iran
3. Ali. Rostam Far [3]: Department of Private Law, Qe.C., Islamic Azad University, Qeshm, Iran

*corresponding author's email: a.mazloom@qodsiau.ac.ir

ABSTRACT

The rapid expansion of the economy has led humanity to seek mechanisms for pooling small-scale financial resources, uniting capital, and forming participatory companies to optimize the use of assets. In participatory contracts, individuals gather and combine their capital, labor, and credit, thereby creating opportunities for investment and activity aimed at generating profit. Participatory contracts—such as partnership (sharikat), mudaraba, musāqāt, and muzāra'a—have long existed, and with the growth of societies, they continue to evolve and advance. However, the overall legitimacy of such partnerships has never been fully inferred. This has prompted jurists and legal scholars to examine the barriers and foundations of legitimacy and illegitimacy in participatory contracts, so that an Islamic society may rely on the principles and foundations of these contracts to advance economic development and greater welfare consistent with their jurisprudential rules. In this article, we seek to answer several questions, including whether these contracts are fundamentally aligned with legal principles or contrary to them; and how issues such as gharar (profit whose occurrence is uncertain) and the transfer of nonexistent property (the transfer of profit that has not yet materialized) can be justified within these contracts. Through examining the views of opponents and proponents of the legitimacy of these contracts, we conclude that meeting the economic needs of society requires dynamic ijtihād in jurisprudence. In principle, the Shariah is compatible with the formation of all contracts unless there is an explicit textual prohibition. Regarding participatory contracts, by clarifying and defining the boundaries and elements of participation, gharar can be moderated and transformed into a tolerable and acceptable level of risk.

Keywords: *principle, participatory contracts, legitimacy, risk, information transparency*

Introduction

When two or more individuals cooperate to engage in an economic activity, a partnership is formed. Each party entering a participatory contract contributes value exclusively within that partnership. Participation may take the form of capital or credit facilities, technical expertise, the provision of skills, or even machinery, land, or other assets. Generally, in participatory contracts, the parties stand alongside one another—rather than opposite each other—in order to obtain profit, and through mutual consent and the establishment of a contractual relationship, a form of union is created to achieve shared profit or a common outcome. For this reason, these contracts differ in nature, form, and legal effects from other contractual categories.

One of the major challenges that has long occupied the minds of jurists and legal scholars—both classical and contemporary—is the question of the legitimacy of such contracts.

Among contemporary jurists, one may refer to Ayatollah Ja'far Subhani, who published an article titled *Sharikah al-A'māl* in the *Fiqh Ahl al-Bayt* journal, in which he briefly discusses several obstacles to the legitimacy of partnership contracts, including *gharar* and the transfer of nonexistent property (1).

Likewise, the late Ayatollah Musavi Ardabili, in his works *Fiqh al-Sharikah* and *Fiqh al-Mudharabah*, addressed the jurisprudential barriers to participatory contracts (2). The legitimacy of participatory contracts has always been debated for two primary reasons: first, the existence of *gharar*, and second, the transfer of nonexistent property.

First—On the issue of *gharar:*

In participatory contracts, the parties unite in order to obtain profit; however, this profit may never materialize, and the counter-value for the property or effort contributed to the partnership may not be realized. The profit is probabilistic and subject to speculative risk, which is prohibited under jurisprudential principles, as Islamic law consistently emphasizes healthy, non-usurious, and non-gharar-based economic transactions (3, 4).

Second—Transfer of nonexistent property

One of the essential pillars of transactions is the subject matter of the contract. In participatory contracts, the subject matter is typically the profit; however, this profit has not yet come into existence. This conflicts with general contractual rules that emphasize the necessity of certainty and determinacy in the subject matter. Thus, transferring a profit that does not yet exist creates a jurisprudential challenge with respect to the requirement that contractual objects be known and determinate (5, 6).

In some jurisprudential texts, it is stated that partnership is a *shar'i* contract whose validity is contingent upon authorization by the Lawgiver, and from this premise the rule is inferred that the default state is non-partnership, since *gharar* arises from partnership and it is unknown what each partner will receive in return for their efforts (7).

On the other hand, increasing social welfare and the necessity of economic development require the existence of such contracts. If such contracts were deemed illegitimate, society would face profound economic difficulties; thus, we encounter a conflict between legitimacy and illegitimacy.

Some legal scholars have sought ways to resolve this tension. Among them is Shahid Sadr, who argued that in order to uncover the fundamental principles of Islam's economic system, one must synthesize, revise, and reorganize jurisprudential rulings—considered as the superstructure—to ultimately derive the underlying principles, rather than evaluating each ruling in isolation. He maintains that certain conceptual frameworks clarify the content of legal rulings and facilitate their interpretation (8).

Based on his perspective, one would not encounter exceptions to the legitimacy of participatory contracts; rather, their default presumption would be validity.

Accordingly, both opposing and supporting views on the foundational legitimacy or exceptional status of participatory contracts must be considered. One prominent scholar, the late Abbas Musavian, examined the criteria of *gharar*, the boundaries of risk, and the degree to which *gharar* affects modern contracts (9, 10). Similarly, authors of the volume *Foundations of Financial Engineering and Risk Management* have discussed barriers to the legitimacy of participatory rights—such as *gharar*—from an economic–jurisprudential viewpoint (11).

Furthermore, some scholars analyze the nature of participatory contracts by examining the Islamic superstructure and infrastructure and by employing discovery-based interpretive approaches.

Formulating the Theory of the Illegitimacy of Participatory Contracts

According to opponents of these contracts, only those contractual forms explicitly legislated and endorsed by the Lawgiver are valid, whereas other contracts contradict established principles. Under the jurisprudential maxim *"al-nās musallatūn ʿalā amwālihim"* (people have authority over their property), the profit derived from property belongs exclusively to the owner, and the agent is only entitled to wages for the work performed. Consequently, distributing profit to someone who is not the owner of the capital is impermissible (12).

Furthermore, based on the well-known prophetic tradition *"the Prophet forbade gharar-based transactions"*, any transaction involving ambiguity or uncertainty in the counter-values, conditions, or obligations—and in which one party's property is exposed to destruction—is deemed void and excluded from permissible contracts because it contradicts principles of transparency and the prohibition of *gharar* (13, 14).

Opponents further argue that wrongful consumption of property (*akl māl bi-l-bāṭil*) is forbidden in Islamic jurisprudence. For example, in civil partnership contracts used by banks, customers often waive their right to revoke the contract through a binding ancillary stipulation. Since such waiver is only valid when accompanied by fair and proportional consideration, its absence renders the transaction a form of wrongful appropriation (15).

Arguments of Opponents of the Legitimacy of Participatory Contracts

The Principle of "Tawqīfiyyah" (Restricted Nature) of Contracts

In jurisprudential thought, the world is viewed as belonging to God, and fundamentally, human beings lack inherent authority to dispose of nature. It is the Lawgiver who grants permission to act within defined boundaries. Thus, the authority to establish legal transactions—including contracts—derives from divine authorization, whether directly or through validating rational custom (*sīrah al-ʻuqalā'*). This framework leads to the theory that contracts are tawqīfī, meaning that they require explicit sanction by the Lawgiver (16).

Some jurists maintain that the principle of tawqīfiyyah is authoritative, holding that the default rule in transactions is invalidity unless there is evidentiary proof of permissibility (2, 17).

Other jurists contend that the Qur'anic verse *"O believers, fulfill your contracts"* applies only to the contracts customary at the time of revelation, and that any agreement outside those forms, lacking authoritative proof, is void (18).

Based on this principle, when it is unclear whether a contract is legitimate or illegitimate, and no evidence supports its validity, jurisprudential proofs apply only to transactions established in earlier eras, not to newly created forms. Consequently, such contracts are deemed void (2).

Accordingly, the validity of participatory contracts depends on explicit authorization by the Lawgiver. The command to fulfill contracts (*awfū bi-l-ʻuqūd*) applies only to forms validated by the Sharia. Mere mutual consent does not suffice to establish legal effects such as transfer of ownership or benefit. Therefore, the default rule is non-partnership and each party retains ownership of the results of their own labor (19).

It should also be noted that when a transaction occurs and doubt arises regarding its validity, many jurists apply the principle of "presumption of invalidity" (*aṣālat al-fasād*) (20). The rationale is that the presumption of validity conflicts with the presumption of invalidity, which is based on *istishāb* (legal continuity). When uncertainty arises over which principle to apply, *istishāb* is treated as having priority (21). Thus, if a new type of transaction occurs and its validity is uncertain, the presumption of invalidity is applied.

The Requirement of Avoiding *Gharar*

Gharar is a customary concept derived from *taghrīr*, meaning to expose something to peril. Imam Ali (peace be upon him) states that *gharar* is an action in which a person is not safe from loss (22).

Linguists describe *gharar* as involving uncertainty or unknown elements. Shahid al-Awwal distinguished *gharar* from mere ignorance and described them as overlapping but not identical. The author of *Jawāhir* defined *gharar* as risk arising from ignorance about the attributes or quantity of the subject matter (23). Muhaqqiq Iravani described *gharar* as a matter whose outward appearance deceives the buyer while its inner reality is unknown (24).

In participatory contracts, the shared profit sought by the parties is probabilistic. It may never materialize, and its exact amount cannot be determined with precision (7). Thus, ignorance about the subject intended for transfer causes harm, and the speculative nature of profit in such contracts introduces *gharar*. There is no jurisprudential evidence validating *gharar*-based transactions. The Qur'anic phrase *"God has permitted trade"* does not apply to invalid contracts, and when combined with the Prophetic prohibition of *gharar*-based sales, such transactions are deemed void (25).

The contract referenced in the tradition is not exclusive to sale; rather, it applies analogously to all transactions (26). In participatory contracts, the exact amount of profit is unknown, and since probabilistic contracts are also prohibited due to their *gharar*, one may analogically extend the prohibition to other contracts whenever *gharar* is present—unless there is explicit evidence of permissibility.

Opponents argue that rules governing participatory contracts include mandatory and supplementary provisions, and parties cannot contract contrary to mandatory rules. Avoiding *gharar* is mandatory. In economic interactions involving *gharar*, social welfare declines, and asymmetric information creates excessive and undesirable risk (4).

Transfer of Nonexistent Property

In participatory contracts, profit is transferred to the partner even though it is neither known nor specified; since there is no definite and determined profit and its realization is merely probable, its transfer is regarded as the transfer of nonexistent property. If we assume that the profit is deemed realized and its realization is guaranteed by the partner, we would, in effect, eliminate the objection of its probabilistic and indeterminate nature. However, guaranteeing profit by the partner is itself problematic. In participatory contracts, profit is not generated in a definite and determinate form; rather, its realization is only probable, and the transfer of a merely possible property is impossible. Muhaqqiq Karaki states in *Jāmi' al-Maqāṣid* that ownership, as an accidental attribute, belongs to the category of accidents and, in philosophical terms, to the category of things that require a subject. Just as whiteness and blackness need a locus in which to appear, ownership likewise needs a locus and an object; as long as ownership is not possible, transfer of ownership—which is the creation of ownership—will also not be possible. In other words, what does not exist cannot be owned, and what is not owned cannot be transferred (27).

Among earlier jurists who discussed the nonexistence of profit at the time of its transfer in participatory contracts, one may refer to Ayatollah Hashemi Shahroudi. In his book on *Muḍāraba*, he argues that, according to the general rule, contracts such as *muzāra'a*, *muḍāraba*, and *musāqāt* are void because the transfer of benefits by the parties to the contract is not unconditional and guaranteed. Rather, it is conditioned on the occurrence of profit and growth, and such conditional transfer is invalid. Moreover, the acquisition of a share of the profits and yields by the agent from the outset is contrary to principle, since benefits follow the corpus, and until the agent performs an act, no

share belongs to him. If we assume that the agent becomes the owner of a share of the benefits during the course of a *muḍāraba*, *muzāraʿa*, or *musāqāt* contract, this is also invalid, because what is required is an immediate and actual transfer of ownership, whereas here the transfer is suspended upon the realization of external profit. This suspension renders the contract void. Furthermore, the owner does not yet have full dominion over the future yield so as to be able to include another person in it or transfer it to him (28). If the generation of profit were to be guaranteed by the partner, one might claim that the problem of transferring nonexistent property no longer arises. However, in response it must be said that a partner's guarantee of profit does not remove the objection of the profit's indeterminacy, and, moreover, such a guarantee faces other significant difficulties.

First, the agent, like a lender charging interest, bears the investment risk alone; therefore, the owner's share of the profit should also belong to him. Imposing loss upon him thus becomes a contractual imposition of harm on a party who does not truly benefit, which is unjustifiable (29).

Second, in light of the principle *"ribḥ mā lam yuḍman"*—profit without liability—meaning a situation in which the profit-taker bears no guarantee or obligation, if money or property is loaned to another and both principal and profit are stipulated, such an arrangement falls outside the sphere of legitimate Islamic profit because of the risk of *ribā* and is no longer regarded as profit arising from partnership. Consequently, profit during the partnership period is treated as an instance of transferring nonexistent property (3, 30).

Third, the establishment of liability (*ḍamān*) is a matter of divine law, and the enactment of Sharīʿa rulings lies beyond the authority of individuals.

Unlawful Appropriation of Property (*Akl al-Māl bi-l-Bāṭil*)

The term *bāṭil* (void) derives from the root *baṭl*, meaning nullity and lack of endurance. What is meant by *bāṭil* is anything unjust, purposeless, and irrational that stands in opposition to *ḥaqq* (truth/right). From the perspective of Islamic jurisprudence, there are two types of *bāṭil*: (a) legal invalidity (*bāṭil sharʿī*), and (b) customary invalidity (*bāṭil ʿurfī*). That which is explicitly declared void by the Sharīʿa—such as gambling and usury—is legally void, whereas that which is regarded as invalid by the understanding and judgment of reasonable people is customarily void. The scope of legal invalidity is limited and determined by the Lawgiver, while customary invalidity is broad and expansive (31).

From the Islamic viewpoint, any disposition of property and assets must be based on right and justice and grounded upon a sound legal basis; otherwise, it is void and prohibited.

The late ʻAllāmah Tabatabaei, in explaining the Qur'anic verse *"do not consume your property among yourselves in falsehood …"*, maintains that all wealth originally belongs to all people collectively, but God, through the enactment of just laws, has apportioned wealth among individuals in order to regulate rightful ownership and prevent corruption. Any disposition outside these legal frameworks is void. He further holds that mentioning examples such as gambling is not restrictive but illustrative; the verse thus covers all wrongful appropriations and has a general scope (32).

Regarding objections raised against participatory contracts, Ayatollah Hashemi Shahroudi, in his book on *Muḍāraba*, argues that the latter part of the verse *"except that it be trade by mutual consent among you"* cannot be used to validate such contracts, because that clause primarily concerns sale and purchase and does not extend to participatory contracts such as *muḍāraba*, nor to the consumption of property by the agent. In other words, the basis of entitlement is not participation in profit but wages or compensation. Thus, the general phrase *"trade by*

mutual consent" does not, by itself, establish the validity of *muḍāraba*, even if one might, by legal stratagems, attempt to present such transactions as Sharī'a-compliant (28).

Ayatollah Fazel Lankarani, one of the contemporary jurists, reasons that although participatory contracts may possess a certain wisdom (*ḥikmah*), this alone is insufficient as a legal foundation. According to the jurisprudential maxim *"al-nās musallatūn 'alā amwālihim"*, the profit arising from property belongs to the owner of that property, and the agent is merely entitled to a fair wage (*ujrat al-mithl*) for the work performed. For example, if someone gives money to an architect and says, "Purchase these ten plots of land for construction, sell them, and we will divide the profit," such a contract is invalid, because the profit arising from the capital belongs to the owner of the money, not to the person who bought and sold on his behalf. This arrangement may have a rational wisdom behind it, but legal rulings do not revolve solely around wisdom; wisdom cannot, by itself, serve as a decisive proof of the Sharī'a validity of a ruling. In light of these points, it can be concluded that any unjust disposition of property falls under the scope of this principle and is void, and the identification of unjust instances is based on customary understanding. Newly emerging unlawful transactions may also fall into this category, and participatory contracts are among those that may lead to *akl al-māl bi-l-bāṭil*; therefore, such contracts are deemed illegitimate (33, 34).

In contrast, another group of scholars fully consider participatory contracts to be valid and in accordance with jurisprudential principles. We shall first present the views of this group and then examine their arguments.

Formulating the Theory of the Legitimacy of Participatory Contracts

The primary objective of the Lawgiver in the Islamic economic system is the creation of wealth, progress, and economic justice in society, and any economic policy or mechanism that can realize these two pillars is considered valid (15). The social rulings of Islam, which encompass numerous subject matters—including economic relations—have been established to regulate the economic interactions of human societies. At the same time, the enduring vitality of Islam is preserved through dynamic and evolving *ijtihād*, and the gate of jurisprudential reasoning and renewal has been left open by the Imams themselves: *"'Alaynā ilqā' al-uṣūl wa 'alaykum an tufarri'ū"*—"Our duty is to lay down the principles, and yours is to derive the branches from them" (35).

Arguments of Proponents of the Legitimacy of Participatory Contracts

The General Application of the Principle of Validity to All Contracts

Given that the majority of Islamic rulings concerning transactions are *imḍā'ī* (endorsing existing rational practice), it may be accepted that Islam accords special weight to social relations and transformations rooted in rational custom as the context in which legal rules and institutions take shape. Many contracts have been formed on the basis of rational and customary foundations, and it is precisely this rational–customary basis that provides one of the principal avenues for the evolution and dynamism of *ijtihād*. Some contracts are, in fact, "customary constructs" (*ḥaqīqat 'urfīyah*); when their subject matter changes, their legal ruling also changes, and such change in subject matter follows the transformation of custom and social context. Thus, when custom changes, the ruling pertaining to that subject can also change, and social transformation may lead either to an expansion or to a restriction of the scope of a given ruling (36, 37).

According to those who support the principle of the legitimacy of participatory contracts, the Qur'anic verse *"awfū bi-l-'uqūd"* ("fulfill [all] contracts") indicates a general obligation to honor all covenants, except those excluded by

specific evidence. Participatory contracts have not been excluded from this general command. Numerous verses require fidelity to covenants and agreements; if generality is understood from these verses, there is no reason to restrict contracts to a closed list. Some jurists, including Imam Khomeini, hold that the definite article *al* in *al-ʻuqūd* is distributive and thus denotes generality (26). Accordingly, the obligation to fulfill covenants is not confined to contracts known at the time of the Lawgiver; it applies to every type of transaction and agreement that produces legal effects. The absence of a prohibiting text and the existence of general evidences are sufficient for recognizing the legitimacy of all contracts concluded among people (21, 38).

From the perspective of proponents, the verse *"do not consume your property among yourselves in falsehood, except that it be trade by mutual consent"* applies to every type of trade and all its particular instances, and participatory contracts are not among the void contracts. In this verse, the type and nature of the transaction are broad, encompassing both nominate and innominate contracts, and its subject matter is directly property or an obligation whose fulfillment leads to the transfer of property. The validity and legitimacy of each contract arise from the consent of its parties, because the term "trade" has no technical Sharīʻa meaning; rather, it denotes any activity that is customarily regarded as trade, and there is no evidence restricting it to specific contracts (39, 40). By relying on these verses and their interpretations, together with the narrations *"al-nās musallatūn ʻalā amwālihim"* and *"al-muʼminūn ʻinda shurūṭihim"*, it appears that the principle of the tawqīfī nature of contracts has been de facto overridden, and that the validity and enforceability of contracts rest upon mutual consent rather than prior explicit authorization by the Lawgiver. Therefore, any consensual arrangement that is deemed legitimate within the practice and custom of Muslims is valid and binding, since the categories of contracts are not exclusive and the Lawgiver did not invent specific contractual forms; he merely endorsed the transactions prevalent among people (41, 42).

In the early Islamic period, most of the transactions commonly used today already existed, yet the Lawgiver did not address each in a devotional and explicit manner as being valid or void; rather, every contract concluded between two parties was recognized as effective, whether or not it had historical precedent, unless specific evidence indicated otherwise (43). Moreover, contemporary jurists such as Imam Khomeini and the late Na'ini reject the notion that Sharīʻa contracts are limited to a fixed set. In their view, any agreement or contract that falls within the general and unqualified evidence concerning transactions is valid and legitimate, even if it does not fit into one of the familiar classical contractual forms (44, 45).

Ayatollah Na'ini, after acknowledging the rational necessity of certain modern legal concepts, does not insist on forcing them into traditional jurisprudential molds. In this way, he distances himself from the doctrine of the tawqīfī nature of contracts, does not restrict the verse *"awfū bi-l-ʻuqūd"* to familiar jurisprudential contracts, and similarly recognizes generality in the verse *"trade by mutual consent"* (46).

The Non-Requirement of Existing Property at the Time of Transfer

In defining "nonexistent" (*maʻdūm*), scholars distinguish between two types: actually nonexistent (*maʻdūm bi-l-fiʻl*) and potentially nonexistent (*maʻdūm bi-l-quwwah*). The actually nonexistent is that which, at the level of actuality, does not exist but has the capacity to come into existence. The potentially nonexistent is that which, even at the level of possibility, has no capacity to exist; philosophers classify this latter as an absolutely and essentially nonexistent entity. The qualifier "absolute" refers to something that has no existence whatsoever—neither in the mind nor in external reality—such that one cannot even truly predicate anything of it. Essential nonexistence means that the very essence of the thing, in and of itself, neither necessitates existence nor nonexistence (47).

Accordingly, in order to deny the requirement that the transferred property must exist, we must first ask whether the profit in participatory contracts is absolutely and essentially nonexistent, or merely actually nonexistent. In profit derived from participatory contracts, it is true that no property exists at the moment of contracting to be transferred; however, the parties conclude the contract with the intention that profit will accrue to them from the partnership, and they put in place the conditions and means necessary for the generation of such profit. When capacity and suitability are combined with the absence of impediments, the intended result can be realized for the parties. Natural risk can be regarded as the absence—or presence—of impediments, which is inherent in all transactions, though its intensity may vary. Therefore, what is transferred is a *possible* object of ownership, not an impossible one, and thus this "nonexistent" has the capacity to come into existence.

The late Hashemi Shahroudi, addressing the purported lack of dominion of the owner to transfer or assign future profit arising from the corpus in a *muḍāraba* contract, argues as follows: the profit derived from the principal belongs to the owner, and his dominion over it is present and actual, even though the realization of the yield is deferred to the future—similar to the future benefits of a property or the sale of produce for future years. The owner may transfer future yield because, as a corollary of ownership of the principal, he is also the owner of its yield. In such cases, the transfer is suspended upon the realization of the yield, and although transfer is conditional, this degree of suspension does not invalidate it. He further states that the sale of yield before its actual realization in *muḍāraba*, *musāqāt*, *muzāraʿa*, and partnership is not a novel Sharīʿa construct but arises from the owner's dominion over his property. The rule that "yield follows the corpus in ownership" does not contradict the appearance of that yield in the ownership of another with the owner's consent and commitment, because the owner, by virtue of his dominion over the profit, transfers that right to another. The yield of a thing, like the thing itself, is the owner's right, and there is no inconsistency between its manifestation in the ownership of another and the owner's prior dominion. The principle that yield follows the corpus does not mean that the owner lacks the right to create a usufructuary interest for another in his property within a contract. The best evidence of the customary and rational nature of this practice is its widespread acceptance among people; it is one of the deeply rooted assumptions of rational agents (28).

The Non-Requirement of Absence of *Gharar*

The possibility that capital may be exposed to loss due to the ignorance of one of the parties to the contract is one of the most important criteria of *gharar*, and at times leads to the invalidity of the transaction. In assessing the validity of participatory contracts, the challenge of their alleged *gharar*-based nature is central. In light of the general evidences affirming the validity of contracts and agreements, it is necessary to clarify which forms of *gharar* are legally relevant. Does risk differ from *gharar*? What type and degree of *gharar* invalidate a contract, and what level of risk leads to invalidity?

If a transaction is considered *gharar*-based in customary understanding, it falls under the prohibition of the Lawgiver. For this reason, some jurists have explicitly stated in their works that *gharar* is a customary concept (20, 32). *Gharar* and the loss arising from ignorance invalidate a contract when they are not tolerable according to common social standards (13). Rational custom (*'urf al-'uqalā'*) does not treat every harm as legally significant damage; only where a transaction inflicts substantial loss on one of the parties due to ignorance of the counter-values will that transaction be regarded as *gharar*-based. Thus, only such *gharar* is legally relevant as is sufficient to characterize the transaction as *gharar*-based; customary tolerance or non-tolerance is therefore the criterion for the presence or absence of *gharar* (14).

As to what kind of *gharar* is operative in transactions, it should be said that the *gharar* that affects contractual validity is that which results in harm and loss, and harming others—whether in small or large measure—is prohibited. However, if the buyer knowingly and willingly enters into a transaction despite being aware of the loss, or where harm fluctuates between lesser and greater degrees, the ruling of damage may not apply in the same way. Essentially, *gharar* is a relative concept, and its extent—greater or lesser—may vary according to time and place. Some jurists maintain that the legally relevant *gharar* is that which pertains to the subject matter of the contract itself, not to its accessories and ancillary conditions. Only that *gharar* which leads to harm and loss is operative, not every form of uncertainty. As for what is meant by "accessories," some have interpreted them as unknown conditions or matters that do not entail real loss (17).

In reality, *gharar* is a type of uncertainty in the essential elements of a contract that can expose one or both parties to risk. In other words, *gharar* may be conceived as heightened uncertainty and risk arising from insufficient information. Contemporary jurists hold that mere uncertainty is not sufficient to render a transaction *gharar*-based (9, 10).

From an economic perspective, risk is necessary for economic development and wealth creation, and contributes to welfare and job creation. If there is a reasonable likelihood of success, it is possible to affirm the legitimacy of transactions that contain risk (9). In common usage, risk is the danger that arises from uncertainty about the occurrence of a future event, and any fluctuation in returns is also defined as risk (11).

Islam does not prohibit all forms of risk; in fact, in every economic activity, some level of risk is inevitable. By clarifying the necessary connection between wealth creation and the acceptance of risk, the Sharī'a encourages a certain degree of risk-taking. A clear example of this is the prohibition of *ribā* (usury). One of the key wisdoms behind the prohibition of *ribā* is economic: anyone who wishes to engage in economic activity must share in both profit and loss. One of the reasons usury is prohibited is that there is no risk for the lender, who is never exposed to loss. Of course, risk must be kept within limits such that potential loss is removed or reduced to a minimum, and the degree of determinacy must be such that neither party is ordinarily expected to suffer undue harm. In other words, if the principal is exposed to annihilation, or if the profit is significantly lower than what is reasonably expected, the transaction is *gharar*-based. However, if the uncertainty concerns only the precise amount of profit within a range between a minimum and a maximum, such a transaction is not considered *gharar*-based (11).

According to many contemporary jurists, customary knowledge is sufficient to negate *gharar*, even if such knowledge does not encompass all details (26). In certain contracts, such as partnership and *muḍāraba* and similar arrangements in which the possibility of loss exists, there is no conclusive evidence that they are invalid due to *gharar*, because the specific ruling of invalidity on the basis of *gharar* pertains to the contract of sale. To generalize that ruling to all contracts would conflict with deeply rooted customary assumptions, since the partnership contract is a type of exchange contract with its own specific rules. Partnership is also an authorization-based contract whereby each partner grants permission to the other to use and profit from his property in kind or in usufruct. Thus, in light of the views of contemporary jurists, this contract is based on tolerance, and *gharar* is not deemed to be present in it (12).

The value of the contract's subject matter and the creditworthiness of the counterparty transform uncertainty into a tolerable and acceptable level of risk that the Sharī'a can endorse. On the basis of these principles, it can therefore be said that the legitimacy of participatory contracts is the rule, and instances of invalidity are exceptional.

The Non-Requirement of Avoiding *Akl al-Māl bi-l-Bāṭil* in All Cases

In earlier eras and during the dawn of Islam, given the circumstances of time and place and the specific social and economic conditions of that period, certain things and practices were considered void, and certain acts were categorized as *akl al-māl bi-l-bāṭil* (unlawful consumption of property). However, this is not necessarily the case in our time. Jurists have sometimes regarded the exchange of elements or objects lacking "property value," or without clearly perceived rational benefits, as void. It is evident that in the past, due to the absence of modern scientific foundations, limited technology, restricted exploitation of natural resources, and slower transport and exchange of goods and services, rational custom often considered some items and goods to be worthless. Yet in today's world, profound and extensive transformations have occurred. With the harnessing of nature and the discovery of myriad benefits in the four elements and other phenomena, the scope of productive use has expanded significantly. It is now difficult to find anything that cannot serve as a rational and lawful object of benefit. Accordingly, in identifying *bāṭil* and its instances, the elements of time and place must be taken into account (31).

Verse 29 of Sūrat al-Nisā' declares the prohibition of intentional and wrongful appropriation of another's property, but the verse also contains a second part, in which trade based on mutual consent is mentioned as an exception. The *mustathnā minhu* (that from which the exception is made) is the unrestricted category of consuming one another's property, and the term *"bi-l-bāṭil"* describes the state of such consumption. According to this verse, every form of property consumption is prohibited when characterized as *bāṭil*, except when such consumption arises through mutual consent. This raises the question: Is mutual consent the only legitimate basis for dealings with another's property?

According to another interpretation, the phrase *"bi-l-bāṭil"* is restrictive, meaning that the prohibited consumption is that which does not arise from legitimate causes. Dispositions arising from mutual consent within a valid legal framework are therefore sound.

Some contemporary jurists argue that participatory contracts are not examples of *akl al-māl bi-l-bāṭil*. The claim that the condition of profit-sharing (i.e., consumption of property through mutual consent) is contrary to Sharī'a rests on the assertion that yield and profit follow the corpus and that one cannot stipulate otherwise. This claim has been answered by arguing that the transfer or removal of the principal from the owner's estate through one of the recognized forms of contract does not contradict the principle of dominion and control of the owner. Moreover, with respect to the validity of such a condition, it is argued that, had such a condition been void in Sharī'a, there would have been a clear ruling to that effect, and in the absence of such a ruling, the presumption of validity applies (28, 33).

Conclusion

A review of participatory contracts shows that their general permissibility faces certain obstacles, including the principle that contracts are divinely restricted in form, and the issue of transferring nonexistent property. In such contracts, profit is considered one of the essential elements, and it is determined at the time of contracting. How, then, can something that does not yet exist be divided? Moreover, the attainment of profit is only probable, which conflicts with the requirement that the subject matter of a contract be known and determinate—an essential condition for contractual validity. For this reason, such contracts may be deemed *gharar*-based due to insufficient knowledge of their outcome.

In contrast, another group considers these contracts entirely valid and responds to the above objections by arguing that the permanence of Islam and the dynamism of jurisprudential reasoning require that the needs of each era be addressed. Jurisprudence is continuously evolving, and the nature of Islamic law necessitates adaptation to current circumstances. Based on numerous verses, traditions, and jurisprudential principles—such as “fulfill your contracts,” “trade by mutual consent,” and “people have authority over their property”—Islamic law supports all contracts unless there is explicit textual evidence prohibiting them. Therefore, the classical notion of contracts being strictly restricted has largely been set aside in the course of legal development.

In response to the objection regarding the transfer of nonexistent property, it is argued that “nonexistent” may refer either to what is absolutely nonexistent, having no capacity for existence, or to what is actually nonexistent but capable of coming into being. The transfer of profit in participatory contracts pertains to the latter category. Although the profit does not yet exist, its emergence is contingent upon conditions that, when fulfilled, bring it into being. This does not prevent its valid transfer. Given contemporary economic needs, such contracts are generally regarded as valid—just as the early sale of a tree’s fruit at the beginning of its ripening is deemed permissible.

To those who consider participatory contracts *gharar*-based, it must be said that not every level of *gharar* invalidates a transaction. *Gharar* must result in certain and unavoidable loss, with capital being entirely exposed to destruction. A distinction must be drawn between *gharar* and ordinary risk. In contracts such as insurance, one encounters risk, not *gharar*. Similarly, participatory contracts involve risk rather than prohibited uncertainty.

Therefore, considering all the above, participatory contracts—which are essential and unavoidable for preventing economic decline—should be regarded as valid. To remove them from the sphere of *gharar*, reassurance can be introduced into the essential components of the contract through increased access to accurate information and by eliminating informational deficiencies. The risks associated with informational uncertainty can be reduced by enhancing transparency: clarifying the subject matter of the contract, its requirements and obligations, the nature and characteristics of the business, the necessary budget, information relevant to the value of the contract’s object, and the financial and creditworthiness conditions of the partner. These measures transform harmful uncertainty into acceptable risk to the extent permitted by Islamic law.

Thus, based on jurisprudential analysis, the presumption is that participatory contracts are legitimate, and any claim of their illegitimacy must be regarded as an exception to this general rule.

Acknowledgments

We would like to express our appreciation and gratitude to all those who helped us carrying out this study.

Authors’ Contributions

All authors equally contributed to this study.

Declaration of Interest

The authors of this article declared no conflict of interest.

Ethical Considerations

All ethical principles were adheried in conducting and writing this article.

Transparency of Data

In accordance with the principles of transparency and open research, we declare that all data and materials used in this study are available upon request.

Funding

This research was carried out independently with personal funding and without the financial support of any governmental or private institution or organization.

References

1. Subhani Jf. The Contract of Partnership of Actions in Islamic Jurisprudence. Fiqh Ahl al-Bayt Journal. 2009(58-59).
2. Musavi Ardabili A. The Jurisprudence of Partnership according to Jurisprudence and Law1994.
3. Taleb Ahmadi H. The Impact of Gharar Risk on Transactions. Journal of Social Sciences and Humanities, Shiraz University. 2001(33).
4. Derakhshan M, Vaez Barzani M. A Comparative Analysis of Gharar Risk Based on Game Theory and Contract Theory. Journal of Islamic Economics. 2015;14(56):119-47.
5. Davoudabadi Farahani ME, Ghayyoum Zadeh M. Sale of Future Property. Jurisprudential Research Journal. 2017;12(4):795-820.
6. Pir Hadi MR. Transfer of Ownership in the Sale of Future Property. Legal Justice Opinions Journal. 2006(4 and 5).
7. Katouzian N. Civil Law: Partnerships, Reconciliation2004.
8. Sanhouri ARA. The Compendium on the General Theory of Obligations in Egyptian Civil Law.
9. Musavian SA, Alizadeh Asl M. Islamic Economics Journal. 2015(59).
10. Musavian SA, Alizadeh Asl M. Investigating the Criterion of Gharar Risk in New Transactions. Bimonthly Journal of Islamic Financial Research. 2015(9).
11. Raei R, Saeidi A. Foundations of Financial Engineering and Risk Management2004.
12. Hashemi Shahroudi SM. The Book of Partnership2013.
13. Al-Darir A-SMa-A. Al-Gharar and Its Effect on Contracts in Islamic Jurisprudence1990.
14. Baharvandi A. Substantive Difference Between Transactions Based on Gharar Risk and Risk Hedging Contracts from the Perspective of Imami Jurisprudence. Strategic Development. 2009(18).
15. Gholich W, Mollakarimi F. A Strategy to Strengthen the Principles of Sharia in Banking Contracts.
16. Bigdeli A. The Sovereignty of Will in Imami Jurisprudence, Romano-Germanic System, and Iranian Law. Islamic Law Research Institute. 2015(1).
17. Hosseini Amili MJiM. The Key to Dignity in the Commentary on Allamah's Rules1998.
18. Ja'fari Langroudi MJf. Civil Law: Mortgage and Reconciliation1999.
19. Arian Kia R, Ma'doulat E. The Legal System of Participation Contracts Joint Ventures in Domestic and International Industry and Trade2015.
20. Ansari SM. The Book of Earnings1995.
21. Erfani T. The Principle of Presumption of Validity or the Principle of Validity of Contracts. Kanoun Monthly. 2004(53).
22. Ansari SM. The Book of Earnings1998.
23. Najafi MH. Investigation by Sheikh Abbas Quchani1988.
24. Iravani Aia-H. Marginalia on Al-Makasib1986.
25. Najafi MH. Jewels of Discourse in the Commentary on the Ways of Islam1984.
26. Khomeini R. Liberation of the Means.
27. Karaki Aia-H. The Comprehensive of Objectives1991.
28. Hashemi Shahroudi SM. The Book of Profit Sharing2012.
29. Iravani J. Investigating the Rule of Exclusion of the Source of Income to Labor. Bimonthly Journal of Civil Jurisprudence Teachings. 2014(9).
30. Ali Akbari Baboukani E, Moqaddam V, Abbaspour R. A Jurisprudential Analysis of Specific and Uniform Forward Contracts. Journal of Islamic Legal Foundations. 2017;9:93-119.
31. Makarem Shirazi N. Lights of Jurisprudence - Kitab al-Bay'1993.

32. Tabatabaei MH. The Balance in the Interpretation of the Qur'an.
33. Bujnourdi MH. The Jurisprudential Rules1999.
34. Hilli HiY. Rules of Rulings1993.
35. Hurr Amili MiH. Means of the Shi'a1989.
36. Ja'fari Langroudi MJf. Legal Terminology Terminologhi Hoghuq1989.
37. Katebi HQ. French-Persian Legal Dictionary1985.
38. Gorji A. Verses of Rulings: Legal-Criminal2004.
39. Hilli HiY. Memorial of the Jurists1994.
40. Jassas AiAa-R. Rulings of the Qur'an1995.
41. Hosseini Maraghi MAF. The Jurisprudential Headings1997.
42. Khui SA. The Lamp of Jurisprudence1983.
43. Motahhari M. A Jurisprudential Study of the Insurance Issue1982.
44. Na'ini M. The Aspiration of the Seeker in the Marginalia on Al-Makasib1994.
45. Emami SH. Civil Law2004.
46. Na'ini. The Best Reports1992.
47. Tabatabaei. Gardens of Issues in Verification of Rulings with Proofs1998.