

Shari`ah Maxims and Their Implication on Modern Financial Transactions

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Abstract

The practices of contemporary Islamic finance have been mounted with criticisms that are assumingly based on lack of incorporating the maqasid (goals and objectives) of Shari`ah and failure to extrapolate all sources available for 'dynamising' the Islamic legal theory and practice. The Shari`ah maxims is one of the sciences which aphoristically subsume all the spectrums in which the purpose of Shari`ah is promoted. There are five basic legal maxims on which the tenet of Shari`ah is based. Some are of general application, while others apply to a particular area of Islamic Jurisprudence including fiqh al-mu`amalaat (the jurisprudence of financial transactions). One such maxim which is reflected in this notion is a particular activity is permissible unless there is a clear prohibition against it. The study is aimed inter-alia to address how the application of Shari`ah maxims to financial transactions can be explored to respond to criticisms mounted about modern Islamic finance practices.

I. Introduction

The theory of Islamic finance is an old notion though today's form of Islamic finance is a very young discipline. From a modern perspective, Islamic finance refers to financial market transactions, operations and services that comply with Islamic ethics and principles. The Islamic laws on financial transactions are part of the branch of the

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Shari`ah known as *fiqh al-mu`amalaat*,¹ which constitutes an important branch of law dealing with issues related to all kinds of financial transactions.²

One of the underlying characteristics of Islamic financial system is that it is based on keeping in view of certain social objectives for the benefit of society as a whole.³ Like other religions the socio-economic justice is central to the Islamic way of life. While the conventional financial system mainly focuses on the economic and financial features of transactions, the Islamic system lays the same importance on the ethical, social, religious, economic and financial market dimensions. That is to boost economic and social justice for the good of society in its entirety.⁴ For example; Islam imposes a compulsory financial commitment called *zakah*: this is a wealth obligation to be taken from the well-to-do and given to the underprivileged. One of the purposes of *zakah* described in the Qur'an is that the wealth does not become an object to circulate only among the rich people.⁵ In this context, financial markets should operate to enable both an increase in wealth and economic growth, and also its equitable distribution.

The following remarks made by Imam Al-Ghazali in this regard are worthy of mention:

The very objective of the Shari`ah is to promote the well-being of the people, which lies in safeguarding their faith (*din*), their self (*nafs*), their intellect (*`aql*), their posterity (*nasl*), and their wealth (*mal*). Whatever ensures the safeguard of these five serves public interest and is desirable and whatever hurts them is against public interest and its removal is desirable.⁶

1 Literally, *fiqh* means "knowledge", "understanding" and "comprehension"; and *mu`amalat* means "civil transactions".

2 *Fiqh al-mu`amalaat* includes in addition to financial transactions the following: endowments; laws of inheritance; marriage, divorce, child care; foods and drinks; Penal punishments; warfare and peace and judicial matters (including witnesses and forms of evidence).

3 Iqbal, Zamir. 1997. "Islamic Financial Systems", *Finance & Development*, June, vol. 34, No. 2, International Monetary Fund. The World Bank Website, available at: <http://www.worldbank.org/fandd/english/0697/articles/0140697.htm>, (accessed June 30, 2005).

4 *Ibid.*

5 The Qur'an, 59:7

6 Al-Ghazali, Abu Hamid as quoted in M. Umer Chapra. 2000. *The Future of Economics: An Islamic Perspective*, p.118, UK: The Islamic Foundation. See also M. Hashim Kamali. 1998. "Maqasid Al-Shariah: The Objectives of Islamic Law", Newsletter of the Association of Muslim Lawyers and the Islamic Foundation's Legal Studies Unit, vol.3, issue 1, April-June. pp.13-19.

Given this, the Islamic system of financial management can in effect only be fully appreciated in the context of Islamic concepts relating to the role of community and individual, wealth distribution, the concept of money, social and economic justice, and poverty alleviation.⁷

The legal maxims of Islamic Jurisprudence (*al-Qawa'id al-Fiqhiyyah*) which are treated by many scholars as the *maqasid* literature, are statements of principles that are derived from the detailed reading of the rules of *fiqh* (Islamic jurisprudence) on various themes. These detailed expositions enabled the jurists, at a later stage of development, to reduce them into abstract statements of principles.

The actual wordings of the maxims are occasionally taken from the Qur'an and/or *Sunnah* but are more often the work of leading *fuqaha'* (Islamic jurists) that have subsequently been refined by others throughout the ages.⁸ The legal maxims are designed to facilitate a better understanding of the Shari`ah and their development in a general sense is parallel with that of the *fiqh* itself. These were developed mainly during the era of imitation (*taqlid*), as they are in the nature of extraction (*takhrij*) of guidelines from the detailed literature of *fiqh* that were contributed during the first three centuries of Islamic scholarship.⁹

The most comprehensive and broadly based of all maxims are known as "*al-Qawa'id al-Fiqhiyyah al-'Asliyyah*" (the normative legal maxims), and they apply to the entire range of Islamic jurisprudence without any specification. All Schools of Islamic jurisprudence are generally in agreement over them. The early Islamic scholars have singled out about five of these to say that they grasp between them the essence of the Shari`ah as a whole, and the rest are simply an elaboration of these. This is in contrast, however, with the view of Shihab al-Din al-Qarafī who held that a judicial decision is reversible if it violates a generally accepted maxim.¹⁰

Given the above short introduction, this study is aimed to investigate the research problem in following few sections. Following a very brief introduction to Shari`ah maxims in section 1, section 2 provides a review of previous literature on the subject. Section 3 examines the primary sources of Shari`ah maxims and their application with special reference to main Schools of Islamic theoretical jurisprudence. Section 4 sheds light on the application of financial transactions in Islamic legal system. In this connection, the Shari`ah maxims for financial

⁷ See Zamir Iqbal, *supra* note 3.

⁸ Kamali, M. Hashim, *supra* note 6.

⁹ *Ibid.*

¹⁰ *Ibid.*

transactions are elaborately dealt with. Section 5 concludes the study with the summary and analytical findings of the research.

II. Shari`Ah Maxims: The Review of Literature

While the study is an attempt to address how the application of the Shari`ah maxims to financial transactions can be explored the present section seeks to review the previously published research works carried out by the classical jurists and contemporary scholars on Shari`ah maxims.

Historically, the Hanafi were the main people who concentrated in authoring on the subject of *al-Qawa'id al-Fiqhiyah*. An early Iraqi jurist, Sufyan ibn Tahir ad-Dabbas, compiled 17 universal principles dealing with Shari`ah maxims. Thereafter, Imam Abul Hassan Al-Karkhi, a contemporary of Ad-Dabbas added a number of *Qawi'd* in his book *al-Usul* in addition to the ones compiled by Ad-Dabbas. Al-Karkhi's *al-Usul* was not very highly refined as it included statements that were expressive of an idea but not necessarily in the eloquent style that is typically associated with maxims. Besides, the Hanafi jurist Abu Zayd Ad-Dabbusi authored '*Ta'sis an-Nadhr*' where he included 86 legal maxims. Later, another Hanafi jurist Ibn Najim authored his book on Shari`ah maxims titled '*al-Ashbah wa al-Nadhahir*'.

After the Hanafis, the Shafi'is, then the Hanbalis, and following them the Malikis - as al-Zarqa has noted - added their contributions to the literature on Shari`ah maxims. The leading Shafi'i scholar, `Izz ad-Din `Abd as-Salam's *Qawa'id al-Ahkam fi masalih al-'Anam* is noted as one of the salient contributions to this field, as is `Abd ar-Rahman ibn Rajab al-Hanbali's work *al-Qawa'id*. Both have been highly acclaimed. Yet in terms of conciseness and style, the *Mejelle* collection, written in the 1869s, represents the most advanced stage in the compilation of legal maxims. The Ottoman *Mejelle* (also transliterated *Mecelle*, *Majalla*, *Medjelle*, or *Meğelle*) of 1876, which is a codified version, in about 1,850 articles and legal maxims, of the Hanafi law of civil transactions is a general work of reference that is widely accepted in the courts of Shari`ah throughout the Muslim world. An English translation of this work is provided by CR Tyser, DG Demetriades, and HI Effendi is *The Mejelle: Being the English Translation of Majallah el-Ahkam el-Adliya And A Complete Code of Islamic Civil Law*.¹¹ In recent decades, the *Mejelle* has gained fresh attention as seen in the

¹¹ The most widely available summary of Islamic legal maxims in the English language is the *Majallat Al-Ahkam Al-Adliyah* and the *Majallat Al-Ahkam Al-Shar'iyyah*. The former treatise is a summary of certain principles of the *Shari`ah* as applied by the Hanafi School of Islamic jurisprudence in the former Ottoman Empire and countries that were formerly

codification of the new Civil Code of the United Arab Emirates in 1985. Equally many research works have been undertaken to examine the provisions contained in the *Mejelle*. Though intended to be a code of law, the judges of the *Mejelle* period were not strictly obliged to adhere to all provisions documented in it. They were left free to form their own opinions as a result of the study of the Hanafi Law books, and this compilation was used as a guide and a useful book of reference. And therein lies its principal value even today. Another notable work compiled by Subhi Mahmassani is *Falsafat at-Tashri` Fil-Islam: The Philosophy of Jurisprudence in Islam* (Farhat I. Ziadeh trans.), which provides concise and reliable information on the sources, Schools, and legal maxims of Islamic law and draws interesting comparisons with Roman law. Another feature of this book is that it provides a useful bibliography of Arabic works on the subject.

The earliest collections of maxims included the five leading maxims such as: 1) "Harm must be eliminated" (*Ad-dararu yuzal*), 2) "Acts are judged by the intention behind them" (*Al-umuru bi-maqasidiha*), 3) "Certainty is not overruled by doubt" (*Al-yaqinu la yazulu bish-shakk*), 4) "Hardship begets facility" (*Al-mashaqqatu tujlab at-taysir*), 5) "Custom is the basis of judgement" (*Al-`adatu muhakkamatun*). Many scholars from various Schools added to these over time and the total number of legal maxims (including that of *dawabit*)¹² eventually exceeded twelve hundred.

A useful bibliography of English and Arabic works on Shari`ah maxims can be found in contemporary scholar Mohammad Hashim Kamali's *Principles of Islamic Jurisprudence*. This book also provides an extensive treatment of the sources of Islamic legal maxim and theory. In his scholarly essay on *Qawa'id al-Fiqh: The Legal Maxims*, Kamali provides a brief introduction and explanation to the background history of legal maxims. It also makes a comparative study of the similarities and differences of the legal maxims with *dawabit* (abstractions of the rules of Islamic Jurisprudence), *al-nazariyyah al-fiqhiyyah* (the general theories of *fiqh*) and *furuq* (the distinctions and contrasts), and the substantive themes with which

part thereof. It was officially adopted in the Ottoman Empire. While the latter the *Majallat Al-Ahkam Al-Shar'iyyah* is a summary of certain principles of the Shari`ah as applied by the Hanbali School of Islamic jurisprudence.

¹² Plural of *dabit*, which literally means controlling rules. *Dawabit* are different from *qawa'id* (legal maxims) in their scope as *dawabit* control the particulars of a single theme or chapter of *fiqh*. *Dawabit* are thus confined to individual topics such as cleanliness (*taharah*), maintenance (*nafaqh*), paternity and fosterage (*ar-rida'a*), and as such do not apply to other subjects. An example of a *dawabit* with reference to cleanliness is: "when the water reaches two feet, it does not carry dirt".

they are concerned.¹³ Besides, the contemporary Egyptian scholar Sheikh Yusuf al-Qaradawi's *Madkhal li-Dirasat al-Shari`ah al-Islamiyyah* (An entry to the study of Shari`ah) provides a concise introduction to the Shari`ah maxims and it contains many of the author's own responses to contemporary juristic issues.

III. Sources and Application of Shari`Ah Maxims Vis-À-Vis the Schools of Islamic Theoretical Jurisprudence

3.1 The Sources of Shari`ah Maxims

The rules and norms of Shari`ah maxims derive from the Shari`ah as the Shari`ah encompasses the whole body of ethical and legal rules contained in the discipline of *fiqh* or Islamic jurisprudence. Therefore, it is impossible to adequately treat Shari`ah-based financial transactions without viewing this institution in the context of Islam as an entire socio-economic system and, consequently, relating it to Islamic Law.

As discussed earlier in this study that the Shari`ah maxims are derived mainly from two sources of Shari`ah, namely the Qur'an and the *Sunnah*. The Qur'an which is considered as the first and foremost source of Shari`ah maxims constitutes messages that Allah revealed to Prophet Muhammad (pbuh) through the Angel Gabriel to relay for the guidance of mankind.¹⁴ These messages are universal, eternal and fundamental. The *Sunnah* or *Hadith*, the second foundation of Shari`ah maxims, is next in importance to the Qur'an. The sayings and practice of Prophet Muhammad (pbuh) known as *Hadith*, or as *Sunnah* of the Prophet, have been handed down from generation to generation and have become the rules of faith and practice of Muslims. The *Sunnah* signifies the customs, habit or usage, and behaviour of the Prophet under a variety of circumstances.

3.1.1 The Qur'an as a Source of Shari`ah Maxims

The Qur'an is the main source of reference for establishing the fundamental principles and laws of Islam covering basically every aspect of the religion. It provides the basis for a practical code of conduct for everyday living as far as social etiquette and behaviour and human relations are concerned. It also contains the framework for matters of faith.

¹³ Kamali, M. Hashim. n.d. *Qawa'id Al-Fiqh: The Legal Maxims*. The Association of Muslim Lawyers (UK). available at: http://www.sunnah.org/fiqh/usul/Kamali_Qawaid_al-Fiqh.pdf

¹⁴ Al-Qur'an, 53:3-4

In spite of the fact that the Qur'an is not regarded as a legal document, a small portion of its text deals with legal matters. The legal injunctions of the Qur'an were mainly revealed in accordance with the need arose for lawmaking on administrative and legislative issues when the Prophet established a government in Madinah. The contents of the Qur'an cannot be classified according to topics rather its various topics appear in unanticipated places and in no specific thematic order. This fact has led many thinkers to conclude that the Qur'an is an inseparable whole, thus its legal segments should not be interpreted in isolation from its ethical teachings.¹⁵

Out of 350 verses of the Qur'an pertaining to the legal matters, around 140 relate to theoretical and practical obligations such as faith and devotion to Allah, ritual prayer, charity, fasting, pilgrimage, and so on. Another 70 verses are dedicated to marriage, divorce, paternity, child guardianship, inheritance etc. The set of laws concerning commercial and or financial transactions comprise the subject matter of another 70 verses, and above 10 of economic affairs. While close to 30 verses relate to crimes and punishment, another 30 discuss the issues concerning justice and fairness, equality and impartiality, facts and evidence, roles and responsibilities of citizens, and consultation in administrative affairs. It is possible to draw a legal verdict from the parables and historical passages of the Qur'an. Some of the previous decrees of the Qur'an were also abrogated and replaced because of the latest circumstances, although the jurists have disagreements regarding the scope and precise introduction of this abrogation.

3.1.2 The Sunnah as a Source of Shari`ah Maxims

The *Sunnah* is the teaching and exemplary conduct of the Prophet Muhammad (pbuh), including his sayings, acts, and implicit approval of the conduct of his companions and some of the customs of Arabian society. The *Sunnah* corroborated the rulings of the Qur'an; explained some of the injunctions, laws and practical matters which are briefly reported in the Qur'an; and gave some rulings regarding matters not unequivocally stated in the Qur'an.¹⁶

The Prophet Muhammad's verdict on what is legally recognized and what is not, strikes an equal balance with the Qur'an. The sayings of the Prophet, as the Qur'an indicates, are inspired by Allah,¹⁷ and submission to them is every believer's obligation.¹⁸ Therefore, the Prophet's sayings were setting standards for those who

¹⁵ Ahmad, Abu Umar Faruq Ahmad. 2003. *Islamic Banking in Bangladesh*. An unpublished Master's Thesis. University of Western Sydney.

¹⁶ Kamali, M. Hashim, *Supra* note 6.

¹⁷ Al-Qur'an: 53:3.

¹⁸ Al-Qur'an, 4:80; 59:7.

truly heard them. However, successive Muslim generations who received the Prophet's words through different sources had to establish their accuracy before acknowledging them as setting standards.

There are some *Sunnah* of the Prophet that are based on a particular culture and tradition, and this type of *Sunnah* is not considered as legislation for Muslims. This refers to his preference in food, ways of talking, looking and walking, and the colour and type of his dress, etc. This type of *Sunnah* is known as non-legislative *Sunnah* and it is not a part of the religion, meaning Muslims are not obliged to follow it.

However, the *Sunnah* and the Qur'an interrelate in many ways. With regards to its relation with the Qur'an, the *Sunnah* may:

1. Merely endorse the Qur'an;
2. Illuminates components of the Qur'an having different meanings;
3. Detail common rulings of the Qur'an;
4. Contain verdicts about which the Qur'an did not speak. In these cases, it is not only an explanation and supplement to the Qur'an, but it represents an independent source of the Shari'ah.

3.2 The Application of Islamic Law and the Schools of Islamic Theoretical Jurisprudence

Islamic law as it is seen in its modern form did not exist in the time of Prophet Muhammad (PBUH); it came into existence during the first century of Islam and was gradually developed by the Muslim jurists. After the Prophet's migration to Medina when he was called upon to decide disputes in his own community, he continued to act as an arbitrator.¹⁹ During his lifetime, legal problems and cases that occurred were decided without any debate by resorting to *him* who relied on his inspired interpretation of the Divine revelation, or on his personal opinion confirmed later on or corrected by revelation.²⁰ The first successors of Prophet Muhammad (PBUH) - the Caliphs of Medina acted a great extent in their function as supreme rulers and administrators, as the lawgivers of the Islamic community. Nevertheless, the objective of this administrative legislation was not to modify the existing customary law beyond what the Qur'an had done; rather to organise the newly conquered territories and to assure the viability of the enormously expanded Islamic state.

19 Schacht, Joseph. 1970. "Law and Justice", *The Cambridge Encyclopaedia of Islam*, New York: Fordham University Website, available at: <http://www.fordham.edu/halsall/med/schact/.html>, (accessed January 5, 2006).

20 Faruqi, Ismail R. and Lois Lamy. 1986. *The Cultural Atlas of Islam*, New York: MacMillan Publishing Company. p.279

Afterwards, the Prophet's companions had to infer and deduce legal prescriptions by projecting known information from the first codes of Islamic understanding of life and reality.²¹ Including four Caliphs of Islam namely Abu Bark, `Muar, `Othman and `Ali as well as the Prophet's wife Aisha nearly thirty companions had expertise in matters related to Islamic legal doctrines.²² `Muar, `Ali and `Aisha played a significant role in the advancement of Islamic legal system, since the two early Schools of Islamic law derived their legal doctrines from the verdicts of these distinguished companions among other legal experts.²³

A century after the demise of the Prophet, there had been a vacuum in the field of Islamic law because of death of all his companions. There evolved some Islamic jurists²⁴ and scholars who set out to canonise the *Sunnah* in order to systemise the development of Islamic law. Towards the end of the first century of Islam, Imam Abu Hanifa in Kufa and Imam Malik in Medina founded religio-legal thoughts, named after them as the Hanafi and the Maliki Schools. In the following century, the two other great Schools were founded - the Shafi`i School of Imam Al-Shafi`i in Egypt and the Hanbali School of Imam Ahmad b. Hanbal in Baghdad. These Islamic Schools were developed during the course of the 8th century AD in the large centres of Islamic learning.²⁵ The differences between the four famous Jurists Abu Hanifa, Shafi`i, Malik and Ahmad b. Hanbal derive from their differences on principles. They differ in dogmatics and the interpretation of Qur'an regulations, i.e. the practical rules in the life of the individual.²⁶ Each Muslim belongs to one or another School of thought and adheres to the regulations of his faith in accordance with individual regulations of his particular School of thought. The above mentioned Schools share most of their rulings, but differ on the particular *hadiths* they accept as authentic.

Among the above mentioned four main Schools of Islamic Jurisprudence the Hanafi are considered the most liberal, although from a financier's perspective, this may not always be the case. Whereas the Hanbalis are generally considered as the most conservative Malikis are generally considered moderately liberal. Shafi`is are generally considered relatively conservative though in finance they can be rather

21 Hasan, Ahmad. 1970. *The Early Development of Islamic Jurisprudence*, Islamabad: Islamic Research Institute. p.7.

22 *Ibid.*

23 *Ibid.*

24 Islamic jurists are the Islamic legal scholars who can give authoritative legal opinions, verdicts or judgements sought.

25 See Jany Janos. 2005. "The Four Sources of Law in Zoroastrian and Islamic Jurisprudence", *Islamic Law and Society*, vol.12, No.3. pp.291-299.

26 *Ibid.*

liberal. For example, in accordance with the Hanafi and Hanbali Schools, *Mudaraba*²⁷ can be restricted to a fixed term, after which it will be separated, while the Shafi`i and Maliki Schools do not allow for this. Or in the case of a *Bai` al-Salam*, the Hanafi School considers that in order for the *Salam* to be valid, the underlying commodity must be available in the market at the time the contract is signed. While according to the three other Schools, it is only necessary that it should be available at the time of delivery. Hanafi and Shafi`i do not allow the sale of the usufruct of an asset, while Hanbali and Maliki, which consider usufruct as a property, allow to selling it. Shafi`i allows debt re-sale, which is not allowed by Hanafi and Hanbali, and only under very strict conditions it is allowed by the Maliki School.²⁸

Other than what has been prescribed in the above all of the scholars and their Schools are either not comprehensive in the sense that they do not contain all aspects of the Shari`ah or their rulings have not been preserved intact in a reliable form. That is why the majority of the Muslim community belongs to any of these four Islamic Schools of law, and if a layman adopts any one of these Schools in the matter of interpretation of the Shari`ah, his obligation of following the Shari`ah is discharged. Furthermore, most scholars from medieval times until modern times aligned themselves with one of the four major Schools of Islamic jurisprudence. However, in modern times many scholars do not believe it necessary to belong to any single School of Islamic jurisprudence.²⁹

3.2.1 The Sunni and Shi`a Juristic Schools of Islamic Law

Generally, there are two main Islamic Schools of law - the Sunni and the Shiite.³⁰ They are broadly similar, because they are derived from the same sacred sources.

27 *Mudaraba* is profit-sharing for trade financing. In *Mudaraba* the *rabb al-mal*, or sleeping partner entrusts money to the *mudarib* or managing trustee. The *mudarib* is to use the funds in an agreed manner and then return to the *rabb al-mal* the principal and a pre-agreed share of the profits, over an agreed period of time. The *mudarib* is not allowed to guarantee either the capital or the profits.

28 See Jany Janos, *supra* note 23.

29 See Frank E. Vogel and Samuel L. Hayes, III. 1998. *Islamic Law and Finance: Religion, Risk and Return*, The Hague: Kluwer Law International, pp.71-95.

30 The Shiites refer to the followers of the descendents of the Prophet in general and of Ali – his cousin and son-in-law, in particular. Given this, a Shi`a is seen primarily as a Muslim who recognises the leadership of the caliphate to rest with Ali and his descendants. Some Sunni scholars are known to have considered the Shiites as non-Muslims mainly fuelled by the possible misunderstandings about concepts. However, renowned Al-Azhar theological School in Egypt - one of the main centres of Sunni scholarship in the world, announced on July 6, 1959 that “The is a School of thought that is religiously correct to

However, some Schools take a strict or literal approach to the texts while others allow for purposive or contextual interpretation. Given this, the difference between the Sunni and Shi`a Schools is not greater than the difference among the different Sunni Schools themselves.

The Sunni institution of Islamic thought represents around 85-90% percent of all Muslims at present, while the Shi`a belief encompasses the rest of the Muslim world.³¹ The diverse characteristic features of two institutions in essence drawn from different approaches to authority. The Sunni discipline believes, based on explicit provisions of the Qur'an and the *Sunnah*, that Muslims are to be governed by '*Ijma`*' through an elected head of state, in accordance with democratic norms. The Shi`a institution, however, believes that the Muslims' leader, whom they refer to as the *Imam*, must be a descendant of the Prophet Muhammad (PBUH). The Shi`a concept is the basis for an inherited chain of command in the convention.

The Shiites believe in the fundamental principles of Islam as they are stated in the Qur'an and the teachings of the Prophet. They also believe in all the rules whose inclusion in Islam is self-evident and whose recognition is required for being a Muslim and the denial of which excludes the person from Islam.³² The most important of all differences between the two relates to the interpretation of the Qur'an. The Sunni jurisprudence is based on a literal meaning of the Qur'an whereas Shiites look more to its spirit. In other words, Shi`a jurisprudence is based on *ta'awil*³³ or esoteric interpretations of the Qur'an which goes beyond its literal meaning rather only the implicit, whose ultimate meaning is known only to Allah and can not be comprehended directly through human thought alone.³⁴ The Sunni and Shi`a Schools evolved as a consequence of political division on the succession of the Prophet after his death, which gave rise to philosophical differences between them. Each of these Schools has different sources of jurisprudence that have resulted in a

follow in worship as are other Sunni Schools of thought'. The verdict is available online at: <http://i5.photobucket.com/albums/y152/Biryani/azher.jpg>

31 Bassiouni, Cherif M. 1988. *Introduction to Islam*, Chicago: Rand McNally.

32 Jawad Chirri, Muhammad. n.d. *The Shi'ites Under Attack*, Michigan: The Islamic Center of America.

33 An interpretation of the Qur'an which includes attribution of spiritual meanings to the text by the interpreter. In this respect, its method is different from *tafsir* or the conventional exegesis of the Qur'an which do not usually contradict the conventional interpretations. Instead, they discuss the inner levels of meaning of the Qur'an.

34 Riches, John and Miceli Christian. 2002. "Trusts and Sharia Law", *The Tact Review*, issue No. 20, July, The Association of Corporate Trustees Website, available at: <http://www.trustees.org.uk/review-index/Sharia-Law-Trusts-and-Sharia-law.php> (accessed April 2, 2005).

non-uniform jurisprudence, although the key elements of Islamic law, guided by the teachings of the Qur'an and *Sunnah*, are the same throughout the Schools.³⁵

The Shari'ah has influenced the legal systems of modern Muslim countries to differing extents. For example, Bangladesh which has a predominantly Hanafi Sunni population, has a secular legal system based on British model.³⁶ Conversely, the family laws and criminal laws of most Arab countries are based largely on the Shari'ah.³⁷ Many of these laws and legal systems do not follow exactly the teachings of any specific School of law. However, in court, the regulations of the respective School of thought of the country are applied. In some areas, legislation may have access to the traditions of different Schools or they amend the rules of the traditional Shari'ah.³⁸

There are essentially two components to Islamic law: the *'ibadaat* or devotional matters;³⁹ and the *mu'amalaat* or civil transactions.⁴⁰ The Schools of law do not differ to a large extent in devotional matters though juristic differences among these Schools arise by and large in the area of the civil transactions. The first component

35 Islamic jurisprudence is not a fixed body of rulings that are divinely revealed in the Qur'an and *Sunnah* rather an ever-changing body of human rulings. There are numerous examples in jurisprudence of transactions that were forbidden and then rendered permissible based on juristic preference (*istihsan*), even though juristic decision by analogical reasoning (*Qiyas*) would render them forbidden. Most of the differences in opinion between Imam Abu Hanifa, his two companions ('Abu Yusuf and Muhammad), and Zufar, rest on the introduction of such innovations based on juristic preference.

36 The fundamental source of law in Bangladesh is the Constitution of the People's Republic of Bangladesh, 1972 as amended from time to time by the elected Parliament conforming to the tenets of the Constitution. Bangladesh does not have any 'Shariah Law' as such. Rather certain provisions are codified into legislation, such as the Muslim Family Law Ordinance and provisions of the Sharia'h are not unchangeable but subject to reinterpretation based on the needs of the time.

37 Uhlman, Kristine. 2004. "Overview of Shari'a and Prevalent Customs in Islamic Societies - Divorce and Child Custody", *ExpertLaw*, January.

38 Gamal, Moursi Badr. 1978. *Islamic Law: Its Relation to Other Legal Systems*, 26 Amer. J. Comp. L. p.187.

39 The devotional matters are usually studied under the six main headings of cleanliness (*taharah*), ritual prayer (*salah*), fasting (*sawm*), the pilgrimage to Makkah (*hajj*), legal alms (*zakah*), and struggle (*jihad*).

40 The civil transactions are generally studied under the five headings of transactions involving exchange of values, equity and trust, matrimonial law, civil litigation, and administration of estates. Crimes and penalties (*uqubaat*) are often studied under a separate heading next to *'ibadaat* and *mu'amalaat*.

deals with purely religious matters while the second component contends with the same traditional legal matters as the common law and Roman law systems.⁴¹

3.2.2 *The Main Sunni Juristic Schools*

The main Sunni juristic Schools of Islamic law were established by four Muslim jurists of the ninth to eleventh centuries namely Imam Abu Hanifa (702-767 C.E.), Malik (717-801 C.E.), Al-Shafi`i (767-820 C.E.) and b. Hanbal (778-855 C.E.). These classical Schools, referred to respectively as the Hanafi, Maliki, Shafi`i and Hanbali, are followed by a number of Muslim countries either totally or partly. They are considered as generally accepted Sunni authority for Islamic jurisprudence.⁴² Albeit there are differences in interpretation of the Shari`ah among these authorities, they are all accepted as justifiable and well-founded. The founders of these various Schools systematised the collections of *hadith*, dividing them by subjects and interpreting their meanings as well as applying them to legal issues.⁴³

There are quite a few areas of considerable disagreement between the main Sunni Schools. The key concern is the interpretation of the Qur'an, especially which part is to be viewed as abrogated by later part, and to what extent the Qur'an and the Sunnah abrogate each other. There are also differences on the meaning and connotation of particular Qur'anic words. A second area of disagreement is around the acceptance and interpretation of *hadith*. There is wide variety of opinion on the authenticity of various *hadith*, especially those reported by a single narrator, and on their interpretation. A third major area of difference deals with the status accorded to rationalist doctrines in the various Schools. There was a great deal of disagreement between the Schools on the validity and scope of application of the methods of consensus '*Ijma*', *Qiyas*, *Ra'y*, and *Ijtihad*. There are additional areas of difference on subsidiary matters that are beyond the scope of this study.

The following is a brief discussion on all of these main Schools.

3.2.2.1 *The Hanafi School*

The Hanafi School of Islamic jurisprudence was founded by Nu`aman b. Thabit, known as Imam Abu Hanifa and became the School of law of the Caliph dynasty of Abbasids (750-1258 C.E.). It spread from Baghdad, the capital of the Abbasid dynasty, eastwards as far as India. The Hanafi School became the official School of law of the Ottoman Empire. Today, it can be found mainly on the Balkans, in the

41 See Gamal, M. Badr, *supra* note 36.

42 There are other Schools that have not been famous but accepted at their time. Such Schools are like Zahiri, Sufian al-Thawri, Sufi an b. `Uyaina, Laith b. Sa`aad – to name a few.

43 Ahmad, Abu Umar Faruq. 2009. *Theory and Practice of Modern Islamic Finance: The Case Analysis From Australia*. Florida: BrownWalker Press.

Caucasus, Afghanistan, Pakistan, Central Asia, India, China, Bangladesh, Turkey and the area of the Fertile Crescent.⁴⁴ In Austria, the Muslim community of the Hanafi School has officially been acknowledged by the state.⁴⁵

The Hanafi School recognises the four sources of jurisprudence as established by Muhammad b. Idris Ash-Shafi'i (known as Imam Al-Shafi'i), but adds two more sources: personal reasoning to solve a problem and the abandonment of one legal decision for another which is considered to be more appropriate or relevant with regards to society. The Hanafi School is the most liberal of all Schools of law. It is considered to have more reason and logic than the other Schools.

The Hanafi School accepts the Qur'an, *Sunnah*, *Qiyas*, and '*Ijma*' as the sources of the Shari'ah. However, it emphasises the use of *Qiyas*, and also adds *Ra'y* or personal opinion and the principle of selecting from several options the legal decision that would most ease *Istihsan* or unnecessary hardship. The Hanafi School is criticised by the other Schools for emphasising speculative opinion at the cost of hadith. It generally shows more respect for personal freedom and is milder in its treatment of non-Muslims and war captives. The most famous and authoritative textbook of Hanafi School are the *Zahir al-Riwayah* by Muhammad b. Hasan al-Shaybani, the *Al-Kafi [fi Furu' al-Hanafiyyah]* by Hakim Marwazi, the *Al-Mabsut* by Shams al-Din al-Sarakhsi, and the *Al-Hidayah*⁴⁶ by Burhan al-Din 'Ali al-Marghinani.⁴⁷

3.2.2.2 The Maliki School

The Maliki School of jurisprudence was founded by Abdullah Malik b. Anas, known as Imam Malik, a leading jurist from Medina. Malik b. Anas is said to have particularly regarded as important the old pre-form of legal School of Medina as the

44 Otterman, Sharon. 2005. "Islam: Governing Under Sharia", available on Council on Foreign Relations website at: <http://www.cfr.org/publication/8034/islam.html> (accessed March 14, 2009).

45 In 1988, the government amended the 'Law of Islam' to recognise all the Islamic theological schools in addition to the Hanafi School, which was covered by previous legislation. This led to increased rights and privileges for Austria's Muslims. See for details, Beshir Abdel-Fattah. 2004. "Muslims in Austria: The Early Recognition of Religious Rights", *The International Politics Journal*, available online at: <http://www.siyassa.org.eg/esiyassa/ahram/2004/4/1/FILE4.htm>

46 The English translation of Al-Hidayah is *The Hedaya: Commentary on the Islamic Laws*, 2 vol., (Charles Hamilton trans.), New Delhi: Kitab Bhavan, reprinted 1985.

47 The more famous ones are *al-Wafi fi al-Furu'* by Nasafi, *Bada'i al-Sana'i* by Kassani, *Hashiyah* of Ibn 'Abidin, *Radd al Muhtar 'ala ad-durr al Mukhtar* by Al-Hasafki. See for details, Patrick Sookhdeo. 2006. "Issues of Interpreting the Koran and Hadith", *Connections*, vol.5, No. 3. The USA: George C. Marshall European Center for Security Studies.

“city of the Messenger of Allah”⁴⁸ and the legal discourse of the local jurists. The Maliki School which emerged as a counter-current to the Hanafi Islamic School of law spread mainly to North Africa - Tunisia, Algeria and Morocco, Spain and to several areas in West Africa as well as Central Africa. His doctrine is recorded in the *Al-Muwatta’*. Today, the Maliki School may also be found in Egypt, Mauritania, Nigeria, West Africa, Kuwait and Bahrain.

The Maliki School is more conservative in its emphasis on *Sunnah*, though it adds the criterion of *Istislah* or public interest to the four main sources of the Shari`ah as a basis for its legal judgments. However, the scholars of *Usul al-Fiqh* are in agreement that *Istislah* is not a proof in respect of devotional matters (*Ibadaat*) and in respect of specific Shari`ah injunctions like shares of inheritance.⁴⁹ It also gives greater consideration to *’Urf* or regional customs than do the other Schools. The major treaties of Maliki School are *Al-Mudawwanah* by Asad al-Furat, which was later edited by Sahnun as *Al-Mudawwanah al-Kubra*, *Idah al- Masalik [’ala Qawa’id al-Imam Malik]* by Ahmad al Wansharisi, *Hashiyah [’ala Mukhtasar al-Khalil]* by Muhammad Al Kharshi, *Bidayat al-Mujtahid* by Ibn Rushd al-Andulusi.⁵⁰

3.2.2.3 The Shafi`i School

The Shafi`i School of Islamic jurisprudence was founded by Muhammad b. Idris, widely known as Imam Al-Shafi`i. Imam Al-Shafi`i was a pupil of Malik b. Anas and Imam Abu Yusuf, who was the student of Imam Abu Hanifa, and tried to reconcile the Maliki and the Hanafi Schools of law. However, from this attempt Shafi`i School of law evolved.

The Shafi`i School emphasises *Qiyas* and *’Ijma’* and utilises only the four roots of law in arriving at legal decisions. It rejects *Istihsan* and *Maslaha* as forms of interference with the Shari`ah. The School is more selective in its recognition of the *Sunnah*, which it viewed as the only valid interpretation of the Qur’an. Imam Al-

48 ‘The Messenger of Allah’ has been referred throughout this work to Prophet Muhammad (pbuh). The word ‘messenger’ (*Rasul*) is used interchangeably with the word ‘prophet’ (*Nabi*) in the Qur’an. The reason seems to be that the ‘prophet’ in Islam has two capacities: he receives information from Allah, and he imparts that message to mankind. He is called *Nabi* in the first capacity and *Rasul* in the second capacity, with one difference. The word *Rasul* has a wider significance, being applicable to every messenger in a literal sense; and the angels are called Divine Messengers (*Rusul*), because they are also bearers of the Divine messages when complying with His Will.

49 Ibraheem, Yahya. 2005. “Lessons In Usool And Fiqh”, available online at: <http://uiforum.uaeforum.org/showthread.php?t=2274>

50 See Patrick Sookhdeo, *supra* note 144.

Shafi'i put forward his teaching in his famous treatises *Al-Risalah* and *Kitab al-Umm* which contains seven volumes. Important Shafi'i manuals are Imam al-Nawawi's book *Minhaj al-Talibin*, which is a standard work in Egypt, Malaysia, and Indonesia; and Imam al-Suyuti's *Al-'Ashbah wa 'al-Naza'ir*.⁵¹

Imam Al-Shafi'i is said to have worked mainly in Baghdad and Cairo, his School of law therefore, spread particularly in those cities. Up until the arrival of the Shiite Fatimids Shafi'i jurisprudence was applied in Egypt. The Shafi'i School of law then spread to Syria, Khorasan and Bukhara. Today, it can be found mostly in Indonesia, East Africa, Southern Arabia, South East Asia, Yemen, Malaysia, Singapore, the Philippines, Somalia, Djibouti, Tanzania, Kenya and Uganda. The most distinguished feature of the Shafi'i School of Islamic jurisprudence is the fact that it recognises as sources of jurisprudence only the four sources as established by Imam Al-Shafi'i.⁵²

3.2.2.4 The Hanbali School

The Hanbali School of Islamic jurisprudence was founded by Ahmad b. Muhammad b. Hanbal. He is the author of an extensive encyclopaedia of *hadith* collection called *Al-Musnad*, which contains approximately 80,000 *hadiths*.⁵³ Ahmad b. Hanbal was a pupil of Imam Al-Shafi'i and became famous as the defender of the doctrine that the Qur'an was the non-created word of Allah. For this belief, he was imprisoned and persecuted by the Abbasid Caliph Al-Mamun who believed in the doctrine of the creation of the Qur'an. The Hanbali School of law constituted a counter-reaction to this doctrine.⁵⁴

The Hanbali School of law is the most literal and traditionalist among the other Schools, limiting the use of analogy and human reasoning, demanding that all legal decisions be based only on a literal interpretation of Qur'an and the *Sunnah* and rejecting tools of adaptation such as *Istihsan* and *Maslaha*. Hanbalis preferred weak *hadith* to strong analogy. According to some Hanbali legal scientists, *Ijma`* was only permissible between the Prophet's companions. The works of the thirteenth-century scholar Ibn-Taymiyah are extensively used by Hanbalis.

Up until the 18th century the Hanbali Islamic School does not appear to have had any significant geographical expansion. Then the Hanbali follower Muhammad b. Abdul

51 *Ibid.*

52 Schirmacher, Christine. 1994. "Islamic Jurisprudence and its Sources", available online at: http://www.steinigung.org/artikel/islamic_jurisprudence.htm

53 *Ibid.*

54 Haddad, G.F. 2000. "The Uncreatedness of the Divine Speech the Glorious Qur'an", Living Islam website, available at: http://www.livingislam.org/uncrq_e.html

Wahhab (1703-1792 C.E.) revived the Hanbali School. In doing so, he helped to establish the influence of this School of law in Africa, Egypt and India, but above all and in the long run on the Arabian Peninsula.⁵⁵ In the Hanbali School of law the analogical deduction (*Qiyas*) is to a large degree restricted. This School of law can today be found mainly in Saudi Arabia, Qatar and the United Arab Emirates.

The development of the legal body in all Schools of Islamic jurisprudence heavily relied on two principles: First is the condition that any formulation of the legal method at any time must be justifiable by referring to the Qur'an and the *Sunnah*. Second, followers of each School must remain loyal to their own practice, taking into consideration of the interpretive achievements of older masters. The law had to be acceptable by reference to the continuity and the established identity of the School. Scholars were to uncover their way back to the meaning of revelation only through tradition.

Islam as viewed by its scholars, does not oblige any of its followers to follow a particular School of law or jurisprudence but grants to every Muslim the right to adhere initially to any School which has been correctly transmitted and whose precepts are documented in specific books, and that the adherent of any of these Schools may shift to another one without there being any objection to his so doing.⁵⁶ Given this underlying principle Shaikh Mahmood Shaltoot, one of the Sunni world's most revered scholars and the then head of the renowned Al-Azhar University Theological School in Egypt states in his *fatwa* or religious verdict as under:

1. Islam does not require a Muslim to follow a particular *Madhhab* (School of thought). Rather, we say: every Muslim has the right to follow one of the Schools of thought which has been correctly narrated and its verdicts have been compiled in its books. And, everyone who is following such *Madhahib* [Schools of thought] can transfer to another School, and there shall be no crime on him for doing so.

55 Muhammad b. 'Abd al-Wahhab founded a radical reform movement based on the Hanbali School of thought and on Ibn Taymiyah's teachings. He rejected all innovations that occurred after the third Islamic century, and urged a return to the Qur'an and Sunnah in an attempt to understand and implement their fundamentals. He condemned Sufis and apostates for adopting superstitious innovations, and urged the renewal of abandoned original model of Islam - that only principles of the Qur'an and *Sunnah* were ultimately binding, and that decisions made by later medieval scholars lacked authority. See Patrick Sookhdeo, *supra* note 44.

56 Bagley, F. R. C. 1960. "The Azhar and Shiism", *England Muslim World*, vol.50. pp.122-29.

2. The Ja`fari Shi`i School of thought, which is also known as “al-al-Imamiyyah al-Ithna `Ashariyyah” (i.e. The Twelver Imami Shiites) is a School of thought that is religiously correct to follow in worship as are other Sunni Schools of thought. Muslims must know this, and ought to refrain from unjust prejudice to any particular School of thought, since the religion of Allah and His Divine Law (the Shari`ah) was never restricted to a particular School of thought. Their jurists (*Mujtahidun*) are accepted by Almighty Allah, and it is permissible to the “non-Mujtahid” to follow them and to accord with their teaching whether in worship (*Ibadat*) or transactions (*Mu`amalat*).⁵⁷

VI. The Implication of Shari`Ah Maxims on Modern Financial Transactions

In this section, the fundamental principles of the Shari`ah with regard to commercial and financial transactions are discussed. They are also considered as significant legal maxims of Islamic law. These maxims that are defined as “general rules which apply to all of their related particulars” are abstract statements of the rules and principles of Islamic legal system.⁵⁸ They stem from the detailed reading of the rules of Islamic jurisprudence on particular themes and issues developed by the jurists in the course of history. They differ from modern statutory rules which are concise and devoid of detail. They are expressive of the goals and objectives of the Shari`ah.⁵⁹

Regardless of the common trend in legal maxims to be inter-scholastic, juristic Schools of Islamic law are not agreed upon all of the maxims and there are some on which the Schools of thought are diverged. The Shi`i School has its own collections of legal maxims, but aside from some differences in style, the thematic arrangement in its collections is very much similar to those of their Sunni counterparts.⁶⁰

The contents of the maxims are occasionally extracted from the Qur`an or the *Sunnah* but the wordings of certain maxims are taken to greater refinement and

57 The above fatwa was announced on July 6, 1959 from Al-Azhar University, Cairo. It was also subsequently published in the Daily *Al-Sha`ab*, Egypt: July 7, 1959, and the Daily *Al-Kifah*, Lebanon: July 8, 1959. See also, Muhammad Jawad Chirri. 1986. *Inquiries about Islam*, Michigan: the Islamic Centre of America.

58 See Mahmassani, Subhi. 1961. *Falsafat at-Tashri' fil-Islam: The Philosophy of Jurisprudence in Islam* (Farhat I. Ziadeh trans.), Lieden: E.J. Brill. p. 151.

59 Abu Sulayman, Abd al-Wahhab. 1978. “An-Nazriyyah wal-Qawa`id fil-Fiqh al-Islami”, *Mujallah Jami`iyyah al-Malik `Abdal-`Aziz*, No.2, May. p.53.

60 *Ibid*.

perfection.⁶¹ Some legal maxims are of general application, whereas others might apply to a particular area of Islamic jurisprudence, such as devotional matters, civil transactions, contracts, litigation and court proceedings.⁶² However, due to the limited scope of the study it will discuss only the maxims related to the financial transactions. Before replicating and using these maxims to solve the problems related to contemporary financial transactions the following prerequisites may be relevant for their correct application.

1. The interpretation and application of the Islamic legal maxims may be made only by the Shari`ah scholars along the lines of need of time if the Qur'an, the *Sunnah* as well as the consensus of early jurists do not provide any ruling on that specific issue. For example, the legal opinion in regard to profit-sharing in a joint venture is that:

Profit is to be distributed according to the agreement but loss is to be borne in proportion to capital contribution.⁶³

In this ruling the ratio of the distribution of profit according to agreement can be reviewed in light of business conditions. It may be left to the partners to decide the ratios of profit-sharing. The liability of loss, however, has to be borne strictly in proportion of capital contribution since this rule enjoys the juristic consensus.

2. As mentioned earlier in this study that the rulings of the Shari`ah aim at doing well to human beings and removing harm. The Qur'an and the *Sunnah* should be the criteria of judgment with regard to those benefits and harms and they are not entirely left to the judgment of man. In cases where benefits and harms are not pointed out in these two primary sources of the Shari`ah human intellect guided by sound reasoning, experience, prevalent practice and sound judgment of scholars will judge the virtue or vice of any act. It is sound judgment based on in depth knowledge of the Shari`ah that will decide

⁶¹ The most comprehensive and broadly based of all maxims are the normative legal maxims, which apply to the entire range of Islamic law and jurisprudence without any specification. The Schools of Islamic thought are generally in agreement over them. Maxims such as "Harm must be eliminated" and "Acts are judged by the intention behind them" belong to this category of maxims. See for details M. Hashim kamali. n.d. *Qawa'id Al-Fiqh: The Legal Maxims of Islamic Law*, publication by Association of Muslim Lawyers, U.K.

⁶² *Ibid.*

⁶³ See M. Taqi Usmani. 1999. "The Concept of Musharakah and Its Application as an Islamic Method of Financing", *Arab Law Quarterly*, vol. 14, No. 3, pp. 210.

for instance, which forms of present day trades and activities should be prohibited and which should be allowed and protected by law.

3. The contingency of the state of affairs sometimes necessitates outlawing a legitimate act and allowing an illegal act in order to protect public interest. Among these two extreme situations, the latter is graver than the former. The preferable way is to preserve the indispensable illegality of the act even when it is unavoidable to have recourse to it under compulsion of circumstances government, for instance, may be bound to pay interest on credit purchases of military hardware. Despite this compulsion, however, it should not be disregarded that payment of interest is unlawful and that serious thought should be given to get rid of that situation as soon as practicable.

The general Shari`ah legal maxim is that a particular activity is permissible unless there is a clear prohibition against it. This is reflected in the law on financial transactions. The Shari`ah compliant financial services emphasise the ethical, social and religious dimensions of financial transactions to enhance equity and fairness for the general good of society. With the above prerequisites the maxims that seem to be relevant to the financial transactions may be briefly reproduced in the following.⁶⁴

4.2.1.1 Intentions and Acts

The first principle in this respect reads as following: “*Acts are judged by the intention behind them (Al-‘umuru bi-maqyadiha)*”. This principle is a rephrasing of the renowned *hadith* that states: “Acts are valued in accordance with their underlying intention” (*Innamal-‘a`amaalu bin-niyyaat*).⁶⁵ This is a comprehensive maxim that has implications that the scholars have discussed in various areas, including devotional matters, commercial transactions and crimes. The element of intent often plays a crucial role in differentiating, for example, a murder from erroneous killing, theft from inculpable appropriation of property, and the figurative words that a husband may utter to conclude the occurrence or otherwise of a divorce.

The rule embodied in this maxim although been applied by early jurists mostly on acts of rituals, it is equally applicable to other spheres of activity including financial transactions. It is actual acts and policies rather than proclamations that determine the intention. This is so because of a sub-rule which governs contractual obligations. This

64 Many of the Islamic legal maxims described in this study are based on the written sources available only in the Arabic language.

65 Bukhari and Muslim, cited in Al-Qaradawi, Yusuf. 1997. *The Lawful and the Prohibited in Islam (Al-Halal Wal Haram Fil Islam)*, Kamal El-Helbawy, M.Moinuddin Siddiqui and Syed Shukry (trans.), Indianapolis: American Trust Publications; 1st ed. p.178.

reads as follow. “*Contracts are to be understood in relation to their intention and substance, not by the words and phrases used (Al-`ibratu fil-`uqudi lil-maqasidi wal-ma`ani la lil-`alfazi wal-mabani)*”. For example, the *kafalah* implies coextensive liability while transfer of debt implies discharge of the principal debtor.⁶⁶ If a contract of transfer of debt is made with the condition to hold the principal debtor liable in case the transferee fails to discharge the debt, contract even though termed as a contract of transfer of debt will be treated as a contract of *kafalah*. Similar will be the treatment of a contract of *kafalah* in case the principal debtor is discharged after contract of *kafalah* is signed.

In case the banks declare their policy of financing customers on non-interest bases it would be necessary to do so and not merely continue the same practice and seeking to rationalise it in Islamic terms by changing the relevant nomenclature such as calling it “buy-back” or “mark-up”. Likewise, it will not be permissible for the banks to practice *Musharaka* and *Mudaraba* in such a way as to ensure a fixed rate of return⁶⁷ for the banks while the liability of bearing loss or an uncertain amount of remaining profit is transferred to the working partner.

4.2.1.2 The Doubt and Certainty

The basic rule that resolves the conflict between doubt and certainty is contained in the principle that reads: “*Certainty is not overruled by doubt (Al-yaqinu la yazulu bish-shakk)*”. This rule rejects the effect of doubt that disturbs the original position. This rule is of great significance in the event of controversy on rights and obligations of contending parties in the absence of a proof on either side. The benefit of doubt arising out of a controversial position can never go to a person on whom the onus of proof lies; thus the position of an indebted person even after his death will not be affected by doubt as to a probable discharge of debt. Likewise a claim as to the discharge of a debt will not be rejected on the basis of presumption to the contrary.

The rule, if read with its following sub-rules, provides a broader canvas of its application.

(a) “*As to incorporeal matters that do not prove themselves, the basic principle (presumption) is that they do not exist (Al-`aslu fis-sifatil-`aarida al-`adam)*”. For

⁶⁶ In *kafalah* a person joins another person in undertaking certain obligation. Consequently, both persons become jointly liable to meet any claim that may arise from this obligation.

⁶⁷ Rate of return is calculated by expressing the economic gain (usually profit) as a percentage of the capital to produce it. When Islamic banks are evaluating a project to decide whether to go ahead with it, they estimate the project’s expected rate of return and compare it with their cost of capital.

instance, a partner has no right to assume a minimum rate of profit earned by his business partner and claim his share in that profit as different from the amount stated to have been actually earned by the partner. The sub-rule provides that in case the working partner declares a certain amount of profit no more will be presumed unless the contrary is proved to be a fact.

(b) The above sub-rule is further strengthened by another sub-rule that says: “*No reliance (should be made) on mere imagination (la `ibrata lit-tawahhum)*”.

(c) Another rule is that of “*the norm (of the Shari`ah) is that of non-liability i.e. freedom from obligation (Al-`aslu bara`atudh-dhimmah)*”.

Given the above sub-rules, in case of loss in business a partner cannot allege wilful neglect and require the latter to indemnify him for the loss unless he proves the contrary. Failing this proof the partner will not be personally made liable to the loss or to indemnify the other partner. Any doubt affecting his position of freedom from liability will be untenable. No arbitrary judgment of the contender would be acceptable.

4.2.1.3 The Removal of Harm

This principle reads: “*Harm may neither be inflicted nor be reciprocated (la darara wa la dirar)*”. Essentially, the principle states that while engaging in the economic and business activities, a firm is prohibited from inflicting injury or causing grief to others.⁶⁸ This most important rule of the Shari`ah is based on a Prophetic Tradition which says: “There should be neither harming nor reciprocating harm”.⁶⁹ This guiding rule, reads with its sub-rule, “*wrong is to be undone (Ad-dararu yuzal)*” provides a guideline to regulate the entire financial system in such a way that prohibits harm imposition and discourages retaliation. Among the juristic arguments deriving from the above Prophetic Tradition is: if someone has caused damage to another party’s property, it is not permissible for the affected party to retaliate by damaging the property of the person. This is because such action is deemed to aggravate the damages without any benefits in return, hence it is harmful. The alternative is paying compensation to the same value of the damaged property so as to avoid further harm to the property of the owner.

The foregoing basic rule of the Shari`ah is treated as a pillar of Islamic law. The rule forms the basis of the laws of option, inhibition, return of defective merchandise, pre-emption, requital, compensation, indemnity etc. This also allows individuals to act unilaterally to protect themselves or others from harm. For example, in case the buyer

68 Abu Zahrah Muhammad. 1958. *Usul al-Fiqh*, Beirut: Darul Fikr Al-Arabi.

69 Cited in Al-Bugha, Mustafa and Muhyiddin Misto. 1998. *A Discussion on An-Nawawi’s 40 Hadith*, Kuala Lumpur: Prospecta Printers Sdn. Bhd. pp.346-366.

of perishable goods absents himself without taking possession of the purchased goods the seller, in order to protect himself and the buyer from loss, has a right to unilaterally revoke the contract of sale and sell the goods to some other party lest the commodity should perish.

The application of the above principle has the following prerequisites:

- a. *“Let the ancient rest on its age (Al-qadimu yutraku `ala qadimihi)”*. It is not permissible based on this to prevent the livestock from grazing in public pasture which has been in use since a long time. These rights have to be guaranteed unless their exercise is harmful to general interest. This is so because of the operation of another rule that reads: *“Harm is harm even though it be ancient”*.
- b. *“Unlawful things are to be prevented irrespective of benefit (Dar`ul mafasidi `awla min jalb al-manafi`i)”*. There may be situations in which an act might have certain benefits while it produces corruption and inequity. In such a case the Shari`ah would ban that act despite the benefits that it might apparently yield. Thus if an age-old canal is causing water logging and salinity; it should not be allowed to flow simply on account of previously held rights.

There may be situations in which a trade, technique or a policy is not unlawful but involves both benefit and harm; such situations are governed by the following subsidiary rules:

1. *“Harm is eliminated to the extent that is possible (Ad-dararu yudafa`u bi-qadril-`imkan)”*. A practical manifestation of this maxim is the validation of the option of defect (khiyar al-`ayb) in Islamic law, which is designed to protect the buyer against harm. Therefore, when a customer buys a car and then discovers that it is substantially defective, he has the option to revoke the contract. For there is a legal presumption under the Shari`ah that the buyer concluded the contract on condition that the object of sale was not defective.

The following further rules present the practical guidelines:

2. *“Harm is not eliminated by another harm (Ad-dararu la yuzalu bid-darar)”*. For instance, if a buyer gets a faulty article he is given the option to return the goods. But if the purchased article has developed similar fault while in possession of the purchaser he will lose his option to return the goods because, in order to protect himself from harm, he will also be harming the seller. This would amount to repelling harm by causing a similar harm.
3. *“A greater harm is eliminated by means of a lesser harm (Ad-darar al-`ashaddu yuzalu bid-darar al-`akhaff)”*. The rule says that in cases where the choice is between two harmful alternatives the one fraught with less harm may be chosen. For example, in case a customer loses his coin in a slot, his

coin may be allowed to go waste rather than to dismantle the machine which has much greater value than the coin. But in case a very expensive piece of jewellery is lost in a less expensive washing machine of a laundry its recovery, then, requires damage to the machine; the same will be effected to recover the piece of jewellery that is more expensive than the machine.

- c. The rule in the case of conflict between a particular harm and a general harm is that “a specific harm is tolerated in order to prevent a more general one (Yutahammal ad-darar al-khaas li-dafa` al-darar al`aam)”.

In addition, there is another rule which contains the same spirit but is laid down in different words. It reads as “*The lesser of two evils is to be chosen (Yukhtaru`ahwan al-shararain)*”. This rule of choosing lesser evil gives the government wide powers to impose restrictions and controls on traders and members of other professions, and to regulate ownership and consumption.

4.2.1.4 The Rules of Necessity

The first principle in this regard reads as: “*necessity justifies that which may be unlawful (Ad-daruratu tubihul-mahzurah)*”. It is on the basis of this rule that the jurists validate demolition of an intervening house to prevent the spread of fire to adjacent buildings, just as they validate dumping of the cargo of an overloaded ship to prevent the danger (or *darar*) to the life of its passengers.

The second principle on necessity declares: “*necessity is measured in accordance with its true proportions (Ad-daruratu tuqaddaru bi-qadriha)*”. Given this maxim of the Shari`ah, if the court orders the sale of assets of a negligent debtor to pay his creditors, it must begin with the sale of his movable goods if this would suffice to clear the debt, before selling his real property.⁷⁰

4.2.1.5 Offering and Obtaining

The ruling that governs offering and obtaining is ruled by the principle: “*What is haram to take is haram to give (ma hurrima`akhdhuhu hurrima`i`ata`uhu)*”. As a consequence of the above, another rule is that “*What is unlawful to do is unlawful to demand (ma haruma fi`luhu haruma talabuhu)*”. The rule along with its effect is applicable not only to financial transactions like taking of interest, but also for non-financial transactions like accepting professions that are not approved by the Shari`ah.

70 As-Sabuni, `Abd ar-Rahman. 1982. *Al-Madkhal al-Fiqhi wa Tarikh at-Tashri` al-Islami*, Cairo: Maktabah Wahbah. p. 89.

4.2.1.6 Benefit versus Liability

The relationship between the right to enjoy benefit from a property and the liability to incur loss due to proprietorship is governed by a number of rules that carry great significance in transactions of commercial nature. In cases where commercial nature is not involved the plain rule is that *“What is permissible in law cannot be a cause for liability (Al-jawazu insharayna fid-damaan)”*. In cases, however, where commercial considerations are involved the rule provides that *“No reward without risk (Al-ghurmu bil-ghunm)”*. That is to say that a person who obtains the benefit of a thing, takes upon himself also the loss from it.

The above general rule is based on the Prophet’s saying: *“In any benefit lies a liability (Al-kharaju bid-daman)”*. This means that any benefits (i.e. profit) derived from a transaction must be accompanied with the liability arising from a potential loss. Given this maxim, the yields of trees, animals, etc., belong to those who are responsible for their upkeep and maintenance.

Another principle that also has the same bearing is: *“The blessings of a thing are in proportion to the evils thereof and vice versa (Al-ni`matu bi-qadrin niqmah)”*. This principle implies that if the commodity is not yet possessed by the buyer, is lost; it is the seller but not the buyer who would have to bear the loss because the former enjoys possession. Likewise, renting out one’s house on the condition that the tenant would be liable to the value of the house if the same is damaged due to flood or earthquake is also a contravention of the rule because the owner who is earning its rent should also bear the loss.

4.2.1.7 The Role of Custom

The Shari`ah principle with regard to custom and usage says: *“Custom is a source of judicial decisions (Al`adatu muhkamah)”*. This means custom is to be taken as a judicial decision to establish a rule of law. Another maxim in this connection reads:

What is proven by custom is like that which is stipulated by the text (Al-ma`arufu `urfan kal-mashruti shartan).

Also,

The usage of people is a proof that must be acted upon (Isti`malun-nasi hujjatun yajibul-`amalu biha).

Nevertheless, the conditions that qualify custom and usage to have a decisive force are:

1. The custom and usage should be compliant with the rulings of the Shari`ah. For instance, the practice of giving and taking interest on loan has a common custom but it is forbidden and cannot be accepted.
2. The custom which is most widely prevalent and operative is to be relied upon. For example, food grain that was traded in the early Islamic period was

measured but it is now universally weighed, instead of being measured. Therefore, all calculations whether for trading or for purposes of payment will be made in terms of the prevalent units of weight.

3. Credence is to be given to that which is publicly and generally operative, and not to what is rare.

Subject to the conditions laid down above the main rule of custom and usage shall be made applicable. For example, in case a person authorises another to sell something on his behalf without laying down conditions as to sale price and unit of currency, the agent will be treated to be bound by conventional rules of charging a reasonable price and prevalent currency. Thus, in this and similar cases the detail understood by common usage would not need to be mentioned.

4.2.1.8 The Limitation

There are some contracts in Islamic banking and finance practice like that of *Bai` Salam* which may be adduced by some to support the existing practices of *Murabaha*, in which the sale takes place without possessing the goods actually being transferred and without the seller even having the capacity to deliver the goods. The legal maxim that determines the Shari`ah position of such contracts is contained in the rule “*What is proved to be opposed to analogy cannot form the basis of further analogy (ma thabata `ala khilafil-qiyasi fa ghairuhu `alaihi la yuqas)*”.

In other words, if a contract/transaction is legalised in non-compliance of the basic principles of the Shari`ah the legality of such contract/transaction shall not be adduced by way of analogy in support of a similar other contract. The contracts like *Mudaraba*, *Bai` Salam* etc., which cannot be otherwise justified on the basis of analogy were allowed by the Prophet. The legality of these transactions is of an exceptional character and hence it may not be cited as an evidence for supporting any other contracts.

V. Summary Conclusion

At the outset, a methodological approach to introduction of the sources of Islamic legal maxims as the branch of Shari`ah, main Schools of Islamic Jurisprudence and the application of the Shari`ah principles of financial transactions to Islamic finance was developed.

Given the above, the review and findings of the study that aimed at addressing how the application of Shari`ah maxims to financial transactions can be explored to respond to criticisms mounted about Islamic finance practice among the common readership, have been summarised as under:

1. The Shari`ah comprises the set of laws by which a Muslim society is controlled and governed, and it provides the means to find the way out of conflicts among the

members of society. There is no disagreement among Islamic legal scholars that the Qur'an is the basis of the Shari`ah and the *Sunnah* is complementary source to the Qur'an. The *Sunnah* makes possible to understand the contents of the Qur'an, but it may not be interpreted or applied in any way which is not in agreement with the Qur'an. With regard to the '*Ijma`*' - the third source of the Shari`ah, these are the rules developed due to debate and subsequent consensus among Islamic legal scholars and the community as a whole. When these three key sources of the Shari`ah fail to provide befitting guidance, they are supplemented by a method in which the jurist can draw analogies with the first three sources and that is known as *Qiyas*. The rest of the methods of the Shari`ah for developing judgments that have been categorised as supplementary sources, each of them allows increased use of judgment by the jurist. These latter sources allow for the development of the Shari`ah in more moderate jurisdictions, but are rejected in more conservative jurisdictions.

2. Consistent with Muslims' belief, the process of ruling based on the Qur'an and the *Sunnah* led them to discussion then to difference of opinion, academic debate, and ultimately to proper methodical thoughts. This development concluded in the achievement of four great jurists of Islamic law lived in the 8th and 9th centuries. The excellence of juristic skill, adherence to the *Sunnah*, and religious zeal which are attributed to these rationalise their position as the eponymous founders of the four major Schools of Islamic law - the Hanafi, Maliki, Shafi'i, and Hanbali. This, by a continuing process throughout the 10th century, came to be the focus of allegiance to a majority of Sunni Muslims. They recognised each other and acknowledged a number of minor Sunni Schools, and, sometimes, to the Shi'i School, which gradually evolved in parallel with that of the Sunnis for the most part.

3. The understanding of the objectives of Shari`ah is essential for the development of human being in all areas of life, particularly in the area of financial transactions. Accordingly, the Shari`ah has laid down a good foundation, as has been provided by the legal maxim: "*a particular activity is permissible unless there is a clear prohibition against it*". Based on this premise, as a general principle, practices of financial transactions are originally permissible in Islam unless there is an evidence of some prohibited elements involved in such activities, which would then effectively change the original ruling.

The study shows that the Islamic financial system has been closely attached to various forms of transactions available in Islamic legal theory in general and in Islamic legal maxims for financial transactions in particular. Also, the system has been working quite well since the Islamic finance practices come of the ages as it has been able to meet various needs of the parties concerned with Islamic financial transactions. However, current practices of Islamic finance might have been mounted with criticisms due to the fact they do not offer a fully-developed alternative model to

the conventional system. Also, largely due to competitive pressures, regulatory constraints, and customer expectations Islamic financial practices today often seek to replicate conventional ones in many ways. In doing so, they lose several of the benefits and strengths which would come from following the spirit of Islamic legal maxims more closely.

Given the above, the criticisms should encourage the Islamic finance industry to re-commit to the spirit of the Shari`ah maxims and incorporating the *maqasid* of Shari`ah it was created to serve. On the other hand, in the process of identifying the legality or compliance of financial instruments with Shari`ah, those Islamic Scholars involved with the Islamic finance industry must have the understanding of the conceptual and implementation aspects of the instruments are in use in financial transactions. This is in line with a Shari`ah maxim that states *a ruling is decided based on the understanding (of the issue at hand)*. It is thus suggested that a close collaboration be made between the practitioners of the industry and Shari`ah scholars who would collectively assess the Shari`ah-compliance aspect of any product and instrument of a financial transaction.

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