Islamic Economic Studies
Vol. 21, No.2, November, 2013 DOI No. 10.12816/0001561

Sharīʿāh Maxims Modern Applications in Islamic Finance

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Sharīʿah Academy, International Islamic University, Islamabad, 2nd edition, 2012. ix+271 pp.

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Sharīʿah Maxims Modern Applications in Islamic Finance by Muhammad Tahir Mansoori is a second updated and revised edition of his previous work published under the same title in 2007. The author is presently Director General of Sharīʿah Academy, International Islamic University, Islamabad, Pakistan. In producing this work the author has banked on his experience of teaching courses on legal maxims in the field of Islamic banking and finance. He has also gained practical experience of Islamic banking as being Sharīʿah Advisor to a leading banking institution in Pakistan, and a member of the Task Force on Islamic Banking, State Bank of Pakistan.

The book begins with a preface in which the author tell us that the book is meant to be used as a text book for the students of M Sc. (Islamic Banking and Finance) programs. He has selected in the book those maxims which are relevant to the commercial law of Islam and more specifically, to the field of Islamic banking and finance. In the preface he also points out importance of Sharīʿah maxims for Muslim jurists, muftis, and judges in finding rules in new incidences, exercise of *ijtihād* and decision making as they 'convey the spirit, wisdom, logic and philosophy of Islamic law.' They also serve as an 'interpretative aid with the help of which Sharīʿah rules can be interpreted.' However, he does not mention anywhere what improvements and additions he has made in the second addition, something which a reader may like to know. The Preface is followed by a valuable Foreword which was written by (late) Dr. Mahmood Ahmad Ghazi for the first edition of the book.

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The book has two parts. The first part deals with five major maxims with their applications to Islamic business transactions and banking. The second part discusses some important themes of Islamic commercial law, such as contractual stipulation, status of promise, disposition of others' property, concept of liability and trust, *gharar*, *ribā*, and sale and agency. An attempt has been made to trace the origins of respective maxims.

The first chapter is devoted to introduction of Sharīʿah maxims. It deals with the nature and functions of *qawāʿid fiqhiyyah*, their application and legal status, differences between principles of jurisprudence and Sharīʿah maxims. He also differentiates between *qawāʿid fiqhiyyah* and *ḍawābit fiqhiyyah*. The former "represents a general rule, or principle and covers a large number of *fiqhi aḥkām* relating to a particular theme" pp.1-2, while *ḍawābit* (plural of *ḍabitah* = rule) are "the controlling rules, and abstractions of rules, of *fiqh* on specific themes" p. 3. At the end it surveys the historical development of Sharīʿah maxims and major works on the subject in various schools of jurisprudence as well as works by modern scholars. However, development portion is confined to Hanafi School only.

There is very close relation between Sharīʿah maxims and Sharīʿah objectives (*maqāṣid* Sharīʿah). Although a brief discussion has come about Sharīʿah objectives while discussing necessities pp. 95-100, the book could have been enriched by adding a separate chapter on *maqāṣid* Sharīʿah and its relation with Sharīʿah maxims.

Chapter two is on "Intention and motivating cause of contract" that plays 'a pivotal role in determination of its legal status'. It is based on a *ḥadīth*: 1) "Verily, the acts are judged by the intention." Three maxims are derived from this: "Basis of all acts is objective thereof (*al-umūr bi-maqāṣidiha*), 2) "In contracts, effect is given to the objectives and meanings not to the words and phrases", and 3) "Every legal artifice whereby nullification of a right, or affirmation of a wrong, is devised is unlawful". The author fully explains these maxims and demonstrates their applications in the field of banking and finance. In the light of these rules correct positions of controversial contracts like *bayʿ al-inah*, *bayʿ al-wafa*, *tawarruq*, commodity *murābaḥah*, and sale and lease back *ṣukūk* can be determined. This provides a context to deal with the stands of various schools of jurisprudence towards the legal devices and stratagems (*ḥiyal*). In this connection, the author discusses Hanafi, Maliki and Hanbali positions only and missed to give the Shafi'i stand. At the end, the author rightly observed that "there are certain legal devices which do not frustrate the purpose and spirit of Islamic law." Such devices can be accepted as they are way out of certain difficulties if they are not in conflict with

the Sharīʿah objectives. The author thinks that 'legal devices in Islamic banks predominantly belong to this category' p. 56.

Chapter three deals with the concept of elimination of detriment. The maxims relevant to this are: "Harm and retaliation by harm is not allowed" p. 65, "Harm has to be redressed" p.77, "Repelling evil supersedes securing benefits" p. 90, and "harm cannot compensate harm" p. 92. The author gives meaning and applications of these maxims. For example, laws related to inhibition, pre-emption, continuation of crop sharing contract till harvesting, liability of craftsmen, and penalty for default in *murābaḥah* and *ijārah* financing come under "No harm should be caused and none should be suffered" (*la ḍarar wa lā ḍirar*). Similarly, option of defect (*khiyār al-ʿayb*), option of fraudulent lesion (*khiyār al-ghabn*) and various rules to achieve them come under the maxim "harm has to be redressed." Thus, Sharīʿah maxims help not only in finding rule where there is no rule in new incidence, but they also help understand wisdom and objectives behind various Sharīʿah rules.

Chapter four discusses rules of relaxation in Islamic law. In this connection the author notes two main maxims: "Hardship begets ease" and "Necessities relax prohibitions". He presents some modern *fiqh* rulings based on these principles, such as 'verdict of Islamic Fiqh Academy of India on permissibility of insurance for Indian Muslims', and 'verdict of European Fiqh Council about mortgage financing for purchase of houses'. He rightly cautions that these rules are not absolute or unrestricted and presents certain counter rules which define and restrict the scope of relaxation based on necessity and hardship. A closely related maxim is "A *hājah* (need) whether of private or public nature, is treated like *darurah* (necessity)". It is this rule which worked behind permission of *bayʿal-salam*, *istiṣnāʿ*, *bayʿ al-wafa*, *ijārah*, etc. pp. 106-7. In the *fiqh* literature, there is no demarcation when a *hājah* will be considered as *ḍarūrah* (necessity). Jurists generally leave it to the person or institution facing the situation (*mubtala bihi*). But this leaves scope to misuse or abuse this maxim. Perhaps, because of this feeling the author at the end of the chapter suggests that "in order to avoid the abuse of *hājah*, in legislation, it seems appropriate that a competent body of Muslim scholars, instead of few scholars, should frame concessionary laws, based on *hājah* ascertaining its necessity and magnitude" p. 117.

In every society customs and common practices among the people have been given a place in legislation, and judges have recourse to such customs if no clear law exists in such matters. Islam has also recognized such customs, called *ʿurf*, as a source of law in Sharīʿah. Chapter five examines 'status and authority of customs

in Islamic law'. The author gives a number of Sharīʿah maxims based on ʿ*urf*. Using this maxim the jurists have decided issues concerning ʿ*arbūn* sale, penalties on various economic offences, cash *waqf*, compensation for vacating occupation (*badl al-khulūww*), and forms of possession (*qabḍ*) in modern commercial practices. It may be stressed that not every custom is effective in juridical decision making. It should be a common practice and widely accepted, and it should not be contradictory to the injunctions of Sharīʿah. If a ʿ*urf* is changed, the rule based on such a ʿ*urf* will be modified according to the existing ʿ*urf*. In this connection, however, the author's following statement is confusing and may create misconception: "In the classical Islamic law, if two parties exchanged one *mudd* of wheat with two *mudd* of wheat, they were said to have committed *ribā'l-faḍl*. But today wheat is calculated through weight, so *ribā-al- faḍl* will take place *only* when, say, 5 kg is exchanged with 8 kg" (emphasis added) p. 120. Does he mean, if a person exchanges today 5 *mudd* wheat with 8 *mudd*, there will be no *ribā'l- faḍl*? Or conversely, if in old days 5 *ratl* wheat was exchanged with 8 *ratl*, was there no *ribā'l- faḍl*?? In fact the difference of quantity is prohibited and *ribā'l- faḍl* will occur whether it is done through measure, weight or estimation so for wheat is considered as *mal ribāwi*. It is the causation (ʿ*illah*) that may be a subject of discussion in the light of present custom of wheat being a commodity exchanged through weight.

Chapter six deals with the Sharīʿah maxim related to certainty versus doubt and presumption of continuity. According to this maxim "Certainty is not dispelled by doubt" 'a rule of law, or thing, established with certainty continues to remain so, and the doubt, as to change in the position, does not affect the established position' p. 139. The author presents several examples of the application of this maxim.

There are many maxims based on the rule of presumption of continuity such as: "The original rule for all things is permissibility"; "Freedom from liability is the fundamental principle"; "No weight is given to mere supposition"; "No argument is admitted against supposition based upon evidence"; and "No statement is attributed to a man who keeps silence, but silence is tantamount to a statement where there is necessity for speech" pp. 140-50. The author substantiates these maxims with Sharīʿah evidences and shows their applications in economic life.

Chapter seven is on 'legal status of contractual stipulations' which are "inserted in the contract by mutual consent, to modify and change the effect which the Sharīʿah accords to a contract, and to impose some extra liability on a party, with a view to give some extra advantage to the other party" p. 151. This has been a controversial issue among the jurists. The author presents the viewpoints of main

schools of jurisprudence about such ancillary conditions. A number of maxims has been developed to reflect the authentic position on contractual stipulations, such as: "Every condition that violates definitive principles of Sharīʿah is void"; 'The principle in contracts and stipulations is permissibility"; "Condition has to be abided by as far as possible"; and "A contract contingent upon condition will take effect only when the condition is fulfilled". The author has fully explained the meanings and applications of these maxims.

Chapter eight discusses 'status of promise in Islamic law'. Under this the author states that "the prominent viewpoints in classical law are that simple promises are not legally enforceable." However, a promise that is made in the form of a guarantee is unanimously enforceable. While discussing the Sharīʿah stand on promise (*waʿd*) he quote verses of the Qur'ān which are about covenant (*ʿahd*) p. 161. There is clear difference between *waʿd* and *ʿahd*. The only maxim noted in this chapter is "Promises that entail guarantee are binding". This maxim has been applied "to every promise in which the promisee incurs some risk, and liability, and performs the act demanded in the promise" p. 164.

Chapter nine is regarding maxims on disposition of others' property. Under this the author notes rules like: No person may deal with the property of another, without latter's permission; any order given to dispose off the property of another is void; no one may take the property of another, except with a legal cause; and authority in respect of people's affairs should be exercised for their welfare only, p. 172. These rules have been enacted because protection of property, earned through lawful means, is one of the objectives of Sharīʿah and the Qur'ān and *sunnah* have forbidden to devour others' property through wrong means. The author has clearly noted when interference in one's property is permissible and justified.

Chapter ten traces maxims that differentiate liability (*ḍamān*) versus trust (*amānah*). If a person holds an object in fiduciary capacity, it is called *amānah*. But if he holds it as guarantor, it is called *ḍamān*. The two have different rules in case of any loss or damage to the object. The maxim is: "Trustee is not liable to guarantee the trust". Deposits, capitals of *muḍārabah* and *mushārkah*, *ariyah*, etc. are considered as *amānah*. The holders of these objects cannot be held liable for any injury to them, if he has exercised due care and diligence, and the loss or injury occurs without his negligence or fault. On the other hand, if an object is held in custody by a person to own it, like buyer or usurper, borrower of money, etc. and something happens to the object, then he will held liable to it. Again, agency and personal guarantee cannot be combined because such an arrangement in respect of an investment turns the transaction into an interest based loan, when the capital and

the proceeds of the investment are guaranteed, pp. 179-80. In this regard the maxim is: "Entitlement to profit depends upon liability for loss".

Chapter eleven deals with the Sharīʿah maxim on *gharar*. The author gives various definition of *gharar* by past and present scholars. But he is not explicit which definition he prefers. However, he concludes that "*gharar* contains characteristics such as risk, hazard, speculation, uncertain outcome and unknown future benefits. A contract involving *gharar* causes undue benefits, and enrichment, for a party, at the cost of other party" p. 189. The author notes various *aḥādīth* from which prohibition of *gharar* is derived. According to him, "a close examination of *aḥādīth* on *gharar*, reveals that four types of risks and uncertainty are involved in the *gharar* transaction." They are gambling and speculation, uncertain outcome, unknown future benefits, and inexactitude. Maxims related to *gharar* are as follows: To sell what one does not have, is unlawful. A *gharar*, when found in the principal object of contract, renders it invalid. *Gharar* invalidates commutative contracts, not gratuitous contracts. A trifling *gharar*, which is not related to a principal object, is permissible. He explains these maxims with relevant examples. It is true that most of Muslim scholars are against conventional insurance as it involves *gharar* and they suggest *takāful* as substitute. Here the author goes into unnecessary details of various models of *takāful*, such as *waqf* model, *muḍārabah* model, *wakālah* model, etc. 202-06.

Chapter twelve is concerned with a very important topic of Islamic economics and finance – Sharīʿah maxim of *ribā*. At the outset the author gives various definitions of *ribā* and mixes up *ribā'l*-Qur'ān (the conventional interest) with *ribā'l-ḥadīth* (prohibition of barter exchange of specific commodities with unequal quantity and/or time of delivery, termed as *ribā'l-faḍl* and *ribā'l-nasiah* respectively). In a work on maxims, the two types of *ribā* should have been distinguished clearly. *Ribā* or interest has been known since ancient days: charging extra amount on loans in lieu of time given for use. Also known as *ribā'l-qurūḍ* (interest on loans) or *ribā'l-duyun* (interest on debts). *Ribā'l-ḥadīth* is also called *ribā'l-buyūʿ* (interest in exchange or trading as it takes the form of barter exchange). *Ribā'l*-Qur'ān is prohibited purposely while *ribā'l-ḥadīth*, for many scholars, is prohibited as a precautionary measure so that it may not become a means of taking actual interest. Obviously the prohibition of the latter is less severe than that of the former.

The author notes two main maxims with respect to *ribā*: "Every loan that entails benefit is *ribā*", and "If a *ribā* bearing counter value is exchanged for similar counter value, equality and immediate possession are obligatory, and if it is

exchanged for different species, immediate possession alone, is obligatory. When effective causes are different, none of these obligations arise" p. 210. Clearly the second maxim is specific to *ribā'l-ḥadīth*.

The last chapter discusses maxims on sale and agency which "belong to a number of topics , such as contractual capacity of contracting parties, lawfulness of subject matter, void, irregular and suspended sales, nature and scope of agency, and include many other issues of sale and agency". The author notes here more than a dozen of maxims. Indeed, some of them are so important that they deserve separate chapter.

At the end the book contains a very useful annexure: Sharīʿah maxims of *al-Majallah* - English translation with Arabic text. This helps the reader to go through the relevant maxims at a glance.

It may be noted that there is very strong relation between Sharīʿah maxims and behavioral *fiqh* (*al-muʿāmalāt*). Economics and finance being behavioral science, knowledge of Sharīʿah maxim is essential for Islamic economics and finance. It helps the students and decision makers develop insights in new economic matters and reach correct conclusions.

As a whole, the book is well documented but no reference is given to the opinion of Vogel and Samuel p.165. On p.197, he quotes various scholars on *gharar* without references. Similarly, references have not been provided for *aḥādīth* quoted on pp. 206, 213, 215, etc.

The bibliography part of the book needs many improvements. It does not follow consistently a standard method of listing the books and articles. In some cases full bibliographical details are missing. Hasanuzzamn's work "The Economic Relevance of The Sharīʿah Maxims" is published by Scientific Publishing Center, King Abdulaziz University, Jeddah, 1997, but it is listed as a publication of Islamic Development Bank. In addition, there are many typographical errors, for instance: *Faqhiyyah* [*fiqhiyyah*] p.viii; twelve [twelfth] century p. 11; *istismar* [*istithmār*] p.21; Ibn Tamiyyah [Ibn Taymiyyah] p. 31n; *al-dara'i'* [*al-dharaʿi'*] pp. 64, 59; Salam *Salam* [repetition] p.109; *La Dina laman [li-man] La 'Ahadall hu [la 'ahda la-hu]* p. 161; Ibn Juzy [Ibn Juzayy] p. 162n; *ghabn i-fahish* p. 119 and *Qarḍ-e-Ḥasan* p. 204 [Persian/Urdu style]; *rub-ul-mal* [*Rabb al-māl*]; al-Muhaddab [al-Muhadhdhab] p.211n; 'attab Ibn Asid ['Attab Ibn Usayd] p. 214; Moulana p.55 and Mowlana p. 214 [Mawlana]; *'Ilah* [*ʿIllah*] p. 216; Haidth [*ḥadīth*] and *rabwi*

[*ribāwi*] p. 222; maximums [maxims] p. 227, etc. It is hoped that the author will take care of these oversights in the next edition.

The present book is, perhaps, the first text book on Sharīʿah maxims with modern application in Islamic finance. The author's simple language and his lucid style are highly suitable for this purpose. Tahir Mansoori and Sharīʿah Academy have done a good job in producing this book and making it as much easy and interesting for the students to master a subject that is a new and a tough subject.