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Overcoming Doubt in the Industry through Islamic Legal Maxims

Introduction

Al-qawa'id al-fiqhiyyah or Legal Maxims are general rules of Fiqh, which can be applied to various cases under common rulings. They are often resorted to in applications of Shari'ah in Islamic finance. Among the number of maxims that exist, scholars have classified five to be the major maxims that cover all the areas of Islamic law. In this ever-evolving industry, the role of these maxims are becoming more important than before as they shed light on new issues that may not be directly addressed in the Quran and the Sunnah. Contemporary jurists have thus resorted to the use of these maxims in the application of Shari'ah in the Islamic finance industry.

Doubtful Matters - "Certainty is Not Overcome by Doubt"

The Maxim al-yaqin la yazalu bi al-shakk, which translates as "certainty is not overcome by doubt", is considered one of the most important out of the five popular maxims because it discusses the principle regarding doubtful matters, particularly in matters pertaining to Islamic law. According to Imam al-Suyuti, this maxim covers about seventy-five per cent of fiqh. It infers that a fact established by law or proven with evidence will remain so until there is another certainty that removes it. Any doubt that occurs when certainty prevails will have no authority to remove the certainty. Likewise, if something has not been established with certainty, it will remain so until proven otherwise. This is because doubt, which comes later, is weaker than certainty on which it is founded. Doubt, therefore, cannot contradict or resist certainty.

There are several verses from the Quran and the Sunnah which support this maxim. The Quran states, "And most of them follow nothing but conjecture (al-zhann), but conjecture can be of no value at all against the truth." (Yunus: 36). This verse speaks about the state of doubt in which the unbelievers are in. Surely the doubt that they are in will not prevail over truth or certainty. In addition, those who follow al-zhann or doubt will never be successful and what they follow will never lead them to the right path. It is obvious that certainties are stronger than doubt as it is the original matter and doubt normally comes after certainty. So, the primary matter will prevail over the secondary matter and it is more reliable.

Implementation of the Maxim in Islamic Finance

The general Shari'ah legal maxim is that a particular activity is permissible unless there is a clear prohibition against it, "الأصل في العقود الإباحة". This is reflected in the law of financial transactions; Shari'ah-compliant financial services emphasize the ethical, social, and religious dimensions of financial transactions i.e., enhancement of equity and fairness for the general good of the society. The maxim in our discussion, establishes the fact of that certainty is not overcome by doubt. So, in implementing this rule in Islamic finance, we notice the great significance of this rule in the event of controversy on rights and obligations of contending parties in the absence of 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 debt will not be rejected on the basis of presumption to the contrary. In the case of a loan contract, a person shall consider that he or she is still indebted to the lender in the event where he or she is unable to provide the evidence of payment. This is due to the fact that the outstanding amount of loan will remain valid and certain as stipulated under the contract and will only be reduced by actual payments. Thus, any doubt will not overcome the certainty upon which the loan was established.

A broader application of the maxim is applicable when used with sub-rules. For 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. Based on the sub-rule, *al-aslu fi al-sifaat al-‘aridhaat al-‘adam*, which means that the presumptive rule is that transitory attributes do not exist provides that in case that the working partner declares a certain amount of profit, no more will be presumed unless the contrary is proved to be a fact. Thus, in case of loss in business, a partner cannot allege willful neglect and require the other partner to indemnify him for the loss unless he proves the contrary. If he cannot prove his claim, then the other partner will not be personally held liable for the loss or to indemnify him. Any doubt affecting his position of freedom from liability will be untenable. No arbitrary judgment of the contender would be acceptable. This is based on another sub-rule, *al-aslu baraa‘ah al-dhimmah* – freedom from liability is the pre-existing and therefore prevailing state.

Similarly, in the event that an Islamic bank is audited by the income tax authorities and provides documentation for its claims of income and exemptions, the authorities cannot claim that it owes more taxes unless it is proven that its documentation is forged or that it made a mistake in calculating its tax exemptions or tax amount.

This maxim is used extensively in contemporary resolutions by most, if not all, authorities of Fiqh today. Nevertheless, being a major maxim, it has a number of corollaries including: *la ‘ibrah li al-tawahhum* – “Unlikely possibilities are given no consideration”; *al-aslu baqaa ma kana ‘ala ma kana* “The basic rule is that a thing remains in its original state”; and *al-aslu ‘idhafah al-hadith ‘ila aqrab waqtihi* – “The presumption is that a development of legal significance is only of recent occurrence.” Therefore, the maxim should be applied in view of circumstance and its corollaries, which will certainly attest to the relative principle inferred by the maxim.

For more in-depth reading on Islamic legal maxims related to Islamic finance, kindly see Mohamad Akram Laldin, et al., “Islamic Legal Maxims & Their Application in Islamic Finance” (2013) published by International Shariah Research Academy for Islamic finance (ISRA).