

An Application of The Islamic Methodology in The Enactment of Commercial Laws and Policy Formulation

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Summary:

Public policies are subject to the general strategies and agendas of the state and the enactment of law is subject to the superior laws. This paper will clarify in a practical way how the strategies and agenda of an Islamic state and the superior law (the primary sources of Sharia law) affect the mechanism of enacting laws and creating policies in an Islamic government. Especially, in the field of commercial law.

Keywords: *Commercial law, enactment of law, Islamic law, Government, politics. Policy formulation.*

1. Introduction

This paper presents some of the fixed general agendas derived from the primary sources of Sharia, especially, in Commercial law. Then, It presents some of the general provisions stipulated in the primary sources of Sharia, which regulate a set of provisions and serve the grand agendas. The paper, finally, will submit a set of provisions that are not directly mentioned in the primary sources and are subject to the secondary sources, along with how lawmakers deal with them. Under this step, we will try to demonstrate how the lawmaker can use the analogy source (Qiyās), the extended analogy (Maṣlaḥah Mursalah), the

presumption of Continuity (Istishāb), and so on in this process.

It is a practical illustration of how to align the dominance of Sharia with the consideration of the interests of the people, which the policymaker should follow through a legitimate methodology. The focus of this paper should, therefore, be on Sharia's ability to remain stable, resilient, flexible, and consistent.

2. The main Agendas and Rules of Transactions:

One of the most prominent branches of commercial law is sale and transaction provisions, which the Islamic jurists have covered in the jurisprudence books. Through Ibn Taymiyyah's reading of the texts of the Qur'ān and the Sunnah, he highlighted the main agenda of transactions,¹ including:

2.1 The Default Rule

The default rule in Sharia is that both parties have freedom of contract, the *pacta sunt servanda* principle, and the freedom of placing any condition they agree on, unless provided otherwise.² This conforms with what has been mentioned that “the original rule for all things, except in worship matters, is permissibility unless prohibited by

¹ Majmū Fatwas of Ibn Taymiyyah: 29/126

² Id.

Sacred texts". Kathīr bin 'Amr bin 'Awf Al-Muzanī narrated from his father, from his grandfather, that the Messenger of Allāh said: "Reconciliation is allowed among the Muslims, except for reconciliation that makes the lawful unlawful, or the unlawful lawful. And the Muslims will be held to their conditions, except the conditions that make the lawful unlawful, or the unlawful lawful."³

2.2 The Limitation of The Default Rule

Although the default rule is permissibility, Sharia limits this rule by placing a set of restrictions, such as each transaction by its nature that leads to conflict and dispute because of its nature is prohibited for that reason.

2.3 The Prohibition:

Transactions that often lead to the division between members of the community are prohibited. Not because of the nature of the goods, but for the sake of maintaining social solidarity and preventing social conflict, such as sale over the sale of another. Ibn 'Umar narrated that the Messenger of Allāh said, "A person should not enter into a transaction when his (Muslim) brother has already negotiated, nor should he make a proposal of marriage when that of his brother is pending, except with the permission of the latter."⁴

2.4 The Unapparent Wisdom of Prohibition:

Whatever Sharia prohibits in terms of transactions without an apparent reason or wisdom, the main purpose of its prohibition is compliance, whether you know the legal cause or the wisdom of the prohibition or not, such as the prohibition of selling swine and idols.

3. The Exception:

The main agenda of different transactions have many exceptions and need detailed texts showing their features.

These texts come in service for the major provisions. I will mention very briefly some forbidden forms of trade, which demonstrate the previously mentioned main agenda of transactions in Sharia, and how lawmakers can derive and apply rules from them. Among them are the following:

- Preventing transactions that lead to a clear injustice
- Preventing transactions containing unusual uncertainty and ambiguity
- Preventing transactions of deception
- Preventing transactions that relate to gambling
- Preventing transactions that have no benefit
- Preventing interest transactions
- Preventing the sale of what the seller does not possess at the time of the transaction

³ Jāmi` at-Tirmidhī 1352. Translated by: <https://sunnah.com/Tirmidhī/15/32>

⁴ Al-Bukhārī and Muslim. Translated by: <https://sunnah.com/muslim/21/12>

- Preventing the sale of what the seller cannot hand over to the purchaser
- Preventing business monopolies

Under these general provisions are many restrictions and precautions that the jurists mention, which they deduced through Sharia texts – some of which are explicit and some of which they deduced from the process of *ijtihad*. Lawmakers must pay attention to the exceptions to each rule, whether the exception is provided in the revealed texts or the exception is rationally deduced. *Bai Salam*, for instance, is a transaction in which the full payment is made in advance for a described good that will be delivered to the purchaser at a future specified date. It was clarified that Sharia prohibits selling a good that does not exist or is not possessed by the seller at the time of making the agreement. *Bai Salam* is an exception to this rule, but it comes with many conditions. Such conditions work to prevent a potential dispute from happening. These conditions include: The goods purchased must be fully and accurately described at the time of the agreement, leaving no room for a potential dispute upon the nature of the commodity. So, parties must describe the quantity and the quality and determine the date of delivery. Every item that cannot be described or may differ in size, quality, or quality cannot be a commodity of a *Bai Salam* transaction. For

example, the parties agreed on selling 20 kg of apples from a defined tree which will be delivered next year. It is unknown whether the defined tree will produce the required quantity, the quality of the apples may not be good, and so on. On the other hand, if the parties agreed on delivering 10 cars that will be manufactured next year for a specific amount, a specific quality, and all the information needed is discussed, leaving no ambiguity for a dispute, that would be a valid contract. The exception to the rule of possession of goods during the conclusion of the contract is provided in a *hadith* directly. So, lawmakers must be aware of such a rule and exception for all provisions during the enactment of law.⁵

Some exceptions arise because the provision is restricted by a specific reason or a specific time. If the time changes or the legal cause of the provision is no longer there, then the provision changes. Therefore, lawmakers must pay attention to the changes that occur that may affect the original provision. A simple example that illustrates this idea: jurists prohibit selling insects since they are useless and there is no benefit in selling such things.⁶ This was their custom. Today, some insects have become useful in the pharmaceutical industry and in scientific research and others. Therefore, the provision changed, and so lawmakers cannot enact a law that prevents selling insects based on the

⁵ Al-Mughnī: 4/ 208. Ibn Ḥazm. Al-Muhalla. Dar Al-Fikr – Beirut: 8/39

⁶ Al-Mughnī: 4/127

causation the ancient scholars provided. Lawmakers have to modernize the jurisprudence to be compatible with the changes, as long as the legal causes of the provisions are no longer the same. The Sharia also includes in the role of the policymaker the power to find permissible alternatives to non-permissible transactions, such as a murābaḥa transaction as an alternative to interest in finance. A murābaḥa transaction is when a bank purchases goods in order to sell them to a customer who cannot purchase such goods directly because of his financial difficulties. Then the bank will sell the commodity, based on an advance agreement, to the customer for the cost plus profit. The payment is mostly set up as installments. For instance, a factory needs to buy \$80,000 worth of equipment. If the factory does not have enough money to do so, then they will approach the bank and purchase the equipment from them at \$80,000 plus a profit they agree upon in advance. In contrast, it is prohibited for the factory to accept a loan with interest in order to purchase the equipment (as money is not a commodity).⁷

It is also within the role of policymakers to place some restrictions on what is permissible in Sharia for the sake of public interest (ta`qīd al-mubāḥ), such as placing special processes and rules for merchant transactions and the individuals' transactions. Such a distinction is

permissible in Sharia as long as those restrictions do not change the provisions of Sharia. Instead, they deal within the permissibility area. One of the roles of policymakers is to draft a law based on an opinion that has a strong argument if it serves the public interest, even if it is not the preponderant opinion in the Islamic school. Some scholars rely on this opinion⁸; for example, the Hanafi opinion is that a promise to buy is enforceable. Based on the view of the majority of scholars, a contract will be enforceable by the agreement of both parties, not just by the promise of the buyer, although contracts do not become binding by a mere promise. But in contemporary times, many financial transactions have become complicated and linked to each other. Some of the huge funds made by banks are based on a mere promise by the customer. Some contemporary scholars argue that the opinion that the fulfillment of the promise is binding must be applied since the failure to fulfill the promise may affect not only the bank but perhaps the whole economy. In this regard, reliance on such an opinion has become necessary for the conduct of banking transactions.

- Those who enact laws also have the right to enact monopoly laws and to intervene and fix the price of essential goods for people if necessary. Many jurists prohibit the state from interfering and restricting

⁷ Sairally, Beebee Salma. Murabahah financing: Some controversial issues. *Review of Islamic Economics* 2002: 73-86.

⁸ Majmū` Fatwas of Ibn Taymiyyah: 14/ 471

commercial activity by setting fixing prices based on what Anas bin Mālik narrated: "Prices rose during the time of the Messenger of Allāh, and they said: 'O Messenger of Allāh, prices have risen, so fix the prices for us.' He said: 'Indeed Allāh is the Muṣawwir (the Fashioner), the Qābiḍ (Restrainer), the Bāsiṭ (the Expander), the Razzāq (Provider). And I am hopeful that I meet my Lord and none of you are seeking (recompense from) me for an injustice involving blood or wealth.'"⁹ This means that prices must take their course through supply and demand, abundance of resources, and other economic factors. The state shall not oppress traders by imposing fixed prices that may affect them. Nevertheless, Ibn Taymiyyah believes that the prohibited pricing intended in the above ḥadīth refers to unnecessary interference. The state does not interfere by changing the ordinary increase and decrease in prices; rather, it only interferes with the necessary measure in order to protect people from general harm.¹⁰

4. Conclusion:

In general, the role of lawmakers in commercial law is to lay down all procedures that facilitate commercial deals and prevent transactions that harm the general

economy. Thus, we have understood that Sharia has set general rules for sale and transactions that legislators must consider when enacting laws. Otherwise, it is subject to the principle of "presumption of continuity" (permissibility), in which the legislature has full freedom to dispose based on the requirements of the public interest. By providing these previous examples, we now comprehend the general space left for legal authority to act in formulating public policies.

References

- [1] Majmū Fatwas of Ibn Taymiyyah: 29/126
- [2] Id.
- [3] Jāmi` at-Tirmidhī 1352. Translated by: <https://sunnah.com/Tirmidhī/15/32>
- [4] Al-Bukhārī and Muslim. Translated by: <https://sunnah.com/muslim/21/12>
- [5] Al-Mughnī: 4/ 208. Ibn Ḥazm. Al-Muhalla. Dar Al-Fikr – Beirut: 8/39
- [6] Al-Mughnī: 4/127
- [7] Sairally, Beebee Salma. Murabahah financing: Some controversial issues. *Review of Islamic Economics* 2002: 73-86.
- [8] Majmū` Fatwas of Ibn Taymiyyah: 14/ 471
- [9] Jāmi` at-Tirmidhī 1314
<https://sunnah.com/Tirmidhī/14/117>
- [10]¹ Ibn Qayyim al-Jawziyya. Al-Ṭurūk Al-Ḥukmiyyah fī Al-Siāsa Al-Shar`iyyah- Dar alaam Alfawayid: 2/660. Majmū` Fatwas of Ibn Taymiyyah: 28/93

⁹ Jāmi` at-Tirmidhī 1314
<https://sunnah.com/Tirmidhī/14/117>

¹⁰ Ibn Qayyim al-Jawziyya. Al-Ṭurūk Al-Ḥukmiyyah fī Al-Siāsa Al-Shar`iyyah- Dar alaam Alfawayid: 2/660. Majmū` Fatwas of Ibn Taymiyyah: 28/93



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