

# SHARIAH RULINGS ON REFERRING TO THE CIVIL LAW IN RESOLVING ISLAMIC FINANCE CASES

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## Shariah scholars overview in referring to civil law as an argument for Shariah cases

Shariah prescribes all the cases which is related to the Islamic finance must be conformed with Shariah principles. Dalil in al-Qur'an and as-Sunnah has mentioned clearly that all Muslims cannot refer other laws unless it is an Islamic law.

Prof Saleh Abdullah al-Leihdan in his presentations on the Eighth Conference on Shariah Council of AAOIFI said that Shariah Committees of the Islamic Financial Institutions has concluded that:

1. Parts of Islamic scholars are of view that it is permissible to refer to the civil law as long as the conditions of the disputed cases are in the restricted situations, whereby, referring to the civil laws is considered as *hajiyah*. According to the Islamic Legal Maxims, the ruling in Islamic contracts is usually permissible unless they are being mixed with prohibited elements i.e. *riba*, *gharar* (uncertainty) and *maisir* (gambling activities).

In the judgment process and procedure, normally clauses in the business contracts will be translated based on civil law common practice. The judgment procedure is obtained based on the terms and conditions which are applied and mutually consented in the contracts and then the proceedings would refer on that matter. Hence, based on this case, if the terms and clauses stipulated are not contravened to the Shariah principles, the verdict through civil court is applicable due to the same objectives with Shariah.

2. Other Islamic scholars opine that the responsibility to resolve the Islamic Finance issues is a *hajiyah* to seek the solutions. However, referring the issues to the civil laws are permissible but it should be proceed in the limited scope of judgment. In other words, the trial of these issues at the civil courts should not taken and mixed with all kinds of civil law principles which are contrary to the Shariah requirements. Hence, the Islamic Financial Institutions have to segregate and filter all of their issues which are relevant and significant to refer to the civil law.

3. Another Islamic Scholars view is that all of the Islamic finance issues should not be carried over to the civil court. Based on their argument, Islamic Finance is part of religious affairs, thus, the cases must be judged by the Shariah court only.

International Fiqh Academy OIC 9<sup>th</sup> Conference at U.A.E which was held from the 1<sup>st</sup>-6<sup>th</sup> April 1996 was discussed on the matter of judgment basis based on Shariah point of view. The Conference concluded if there is not any Shariah court, it is hereby permissible to refer the Islamic finance cases to the civil court in obtaining the solutions.

Fiqh Academy on its 17<sup>th</sup> Conference which was held on the 24<sup>th</sup>-28<sup>th</sup> June 2006 in Jordan stated in their rulings, whereby based on Shariah principles that there are no objections for the Muslim to involve in public activities, politics and economy in general as long as it does not infringe to the Shariah principles. In this situation, Shariah always legally allows all Muslims to join the public activities as long as they do not bring a negative image to Islam.

According to Prof. Dr. Ajel Jasem al-Nashmi who presented the topic about “International Law as a Reference from Shariah Perspective” in AAOIFI Conference, concluded that:

- a. Referring the International civil laws as a judicial reference for Islamic case is not permissible. It is mostly inclined to *Haram* whereby it intentionally denies the Shariah law. Therefore, this situation is also included all cases related to the Islamic Finance.
- b. However, certain case which faces the difficulty to resolve would be tolerable to refer to the International civil laws as a judicial reference as far as the case is considered as *dharurah* or *hajah*. In spite of the permissibility, the judgment is restricted to the situation when it is really considered necessary because of *dharurah* or *hajah*.

### Malaysian Current Practice in Resolving The Disputed Cases of Islamic Banking and Finance

First and foremost, to understand the process and procedure in proceedings for Islamic banking and finance cases at high court, we have to comprehend the overview of banking and finance legal framework in Malaysia.

Malaysia is a unique country that applies dual judiciaries systems which are known as Civil Law and Syariah Law. In brief, jurisdiction of Civil Law is listed in Federal Constitutions. Based on the contents of the Federal Constitutions, Commercial laws become part and parcel

of the constitutional components which allocates jurisdiction of banking and finance under Civil Law. Therefore, Islamic banking and finance case shall be carried over at the civil court according to its common statutes and procedure.

In spite of Islamic banking and finance cases going to the civil court, reference of the judgment shall take into considerations of Shariah Advisory Councils (SAC) of BNM Opinions. This issue has been clearly embodied in Section 56 (1) Central Bank of Malaysia Bill 2009 which is affirmed hereby:

“Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be, shall:

- (a) take into consideration any published rulings of the Shariah; or
- (b) refer such question to the Shariah Advisory Council for its ruling.”

In section 56, it is clearly mentioned that all the disputed cases in Islamic banking and finance which are on trial to any court should get Shariah opinion through the Shariah decisions from SAC's of BNM necessarily. Significant of this section, Shariah rules is the primary reference in conducting all the cases with regards to the Islamic banking and finance at the courts. As far as this section is concerned, all the facts and findings are argued in judgments must be in line with Shariah requirements.