



The Making of Islamic Law and How Does Islamic Law Relate to Contemporary Islamic Finance

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THE JURISPRUDENTIAL ASPECT OF ISLAMIC LAW

- Islamic law originated from **Revelation** (*wahy*) and developed through **reasoning**(*ijtihad*)
- Essentially, Islamic law has a Divine origin in terms of primary sources of law which provide guiding principles and maxims but the detailed prescription of the law is left to the jurists, muftis (jurist-consults) and judges to interpret, refine and apply



- Islamic law was neither a case law nor a statute law; it is best described as **divine law** but developed by Islamic law specialists

THE JURISPRUDENTIAL ASPECT OF ISLAMIC LAW

- In the making of Islamic law, both case law and statute law approaches were used but from **historical perspective**, it has been relatively biased towards **principle-based law** (which is more close to case law orientation) but lacking the culture of law report and doctrine of *stare decisis*.

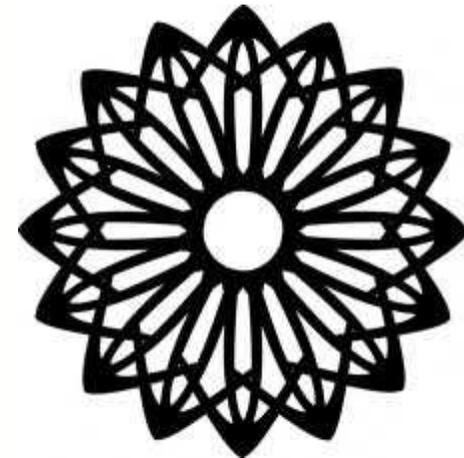


Examples:

- Liabilities and damages for water pollution (the case in North Africa)
- Restricted and Unrestricted Mudarabah (profit and loss sharing)
- Wa'd (undertaking)

PRACTICAL ASPECTS OF ISLAMIC LAW MAKING IN MODERN WORLD

- Guided by leading principles of Islamic law, the office of the respective Religious and/or Awqaf department/council will **make a preference of one of the classical juristic views** of the classical scholars e.g. zakat on shares, redemption of the right of divorce by a wife, etc.
- In some jurisdictions, some aspects of law **have been codified** and the law making would then be governed by the prescription in the statute.
- If the case is unprecedented, the council may deliberate the case and may decide based on one of legal techniques of interpretation in Islamic law such as **analogy, juristic preference (istihsan), public good and equity consideration (maslahah), blocking the means to a bad consequence (sadd al-dharai')** or opening the means to good consequence (**fath al-dharai'**), customary practice (**'urf**) etc.



PRACTICAL ASPECTS OF ISLAMIC LAW MAKING IN MODERN WORLD



- For all intents and purposes, all the above exercises shall be governed by the general principles of Shariah which are provided in both the **Qur'an** and the **Sunnah** (Traditions) of the Prophet Muhammad PBUH
- To a considerable extent, the same process applies to contemporary **Shariah Supervisory Board of Islamic Financial Institutions/Funds**.



THE APPLICATION OF ISLAMIC LAW IN CONTEMPORARY ISLAMIC FINANCE



- Some of the Shariah principles/laws have been developed into **Shariah Standards of AAOIFI**
- These Shariah standards are either **binding or persuasive** in relevant jurisdictions, as the case may be
- As in other industries, the practices and new products in Islamic finance are ahead of standards and sometimes of regulations. Thus, a broad governing principle must be incorporated either at the **regulator level** or at **individual Islamic financial institutions and funds or both**
- The above refers to the **ijtihad** of the members of the Shariah Supervisory Board. To render this exercise transparent and tangible, the fatwa/ resolution issued by this Board must **be well written and explained** for the benefit of all stakeholders



THE APPLICATION OF ISLAMIC LAW IN CONTEMPORARY ISLAMIC FINANCE



- In some documentations of some Islamic financial products, there is mention about the **duty of the Shariah Supervisory Board of the investors/counterparties** to make their stand on Shariah compliance aspect of the products/funds (Shariah compliance disclosure)



THANK YOU

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