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ISSUES AND CHALLENGES PERTAINING TO THE ROLE OF SHARIAH ADVISORY COUNCIL IN UPHOLDING SHARIAH PRINCIPLES IN ISLAMIC BANKING AND FINANCE

By
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There are two aspects to the work of the Shariah Advisory Council (SAC). First, the approval of products. Secondly, the determination of Shariah issues arising from cases in court and before the arbitrators relating to Islamic banking, Islamic finance and *takaful.* (I will be referring to them jointly as "Islamic finance"). Regarding the approval of products, at the beginning, when there was only one Islamic Bank, it was the Shari'ah Committee of the bank that approved them.

In 1997, when more Islamic banks and *takaful* companies were established, it was decided that it would be better to have a SAC at the national level to approve new products to ensure uniformity and to avoid inconsistency in the rulings on a similar matter, besides making available the best expertise for the job. We do not want a Shariah Committee of one company to say BBA is Shari'ah-compliant while another says no. That would create confusion. So, while every Islamic Financial Institution (IFI) is required to have its own Shariah Committee, the SAC at the Bank Negara Malaysia and the Securities Commission Malaysia were given the final say in matters within their respective jurisdictions.

I have been a member of the SAC of Bank Negara Malaysia for eight years and a member of the SAC of the Securities Commission for six years, learning on the job from scratch. The very first thing I realised was how much I did not know. Based on my experience, in my view, the present locations of the SACs are the best that we can have. I have given my reasons in my 12th. Prof Ahmad Ibrahim Memorial Lecture. Hopefully, quite soon, the two SACs could be merged into one.

Bank Negara Malaysia, as usual, was thinking ahead. Bank Negara Malaysia was worried about Shariah issues that might arise in cases before the courts. At first, they thought that perhaps the solution was to establish a Mu'amalat Court. In 2003, the Governor of BNM wrote to Tun Mohamed Dzaiddin, the then Chief Justice, suggesting the establishment of a Mu'amalat Court. Tun Dzaiddin asked me, then a Judge of the Court of Appeal, to comment on the proposal. I made a study of the issue and wrote a paper and came up with the proposal that Shariah issues arising in the courts be referred to the SAC of Bank Negara Malaysia for decision. I am not going to repeat the arguments and the grounds on which I came to that conclusion. The paper is also available on my website.

That proposal was accepted. The law was amended to cater for it. Let me tell you, that in that paper I proposed that the rulings be made binding on the Courts.

However, the Attorney General did not agree and the law did not contain the binding provision.

In 2006, Dato' Abdul Wahab Patail came out with his judgments in Affin Bank Bhd v Zulkifli bin Abdullah (2006) 3 MLJ 67 and other related cases. Later, I was informed by an offier of Bank Negara Malaysia that the Attorney General had changed his mind about the binding effect of the ruling of the SAC. The law was accordingly amended to what it is now.

By that time, beyond anybody's expectation, Islamic finance grew by leaps and bounds. Islamic finance became a big business. Being a Shariah Advisor to IFIs became a lucrative profession. By that time, we started to hear other Government Departments, both at the National and State levels, becoming interested in the subject and beginning to make a claim that they were the rightful authority over the determination of Shariah issues. Lawyers, trying to find a defence for their clients hoping to avoid payment of their debts to IFIs started to put up a defence that, not only the transaction is not Shari'ah-compliant, but the SAC is also unconstitutional.

There is a great irony in this. To me, a Muslim party who puts up such a defence is like a person who walks into a restaurant, went through the menu, ordered the food, ate it but when the bill came he refused to pay claiming that the food was not halal. He should have checked before he even ordered it. If he had any doubt he should have walked out. Nobody was forcing him to eat in that restaurant. It is surprising that if he had any doubt that he could even swallow the food!

We now come to the non-Muslim party. Shariah is not relevant to him. He has the conventional system open for him. Yet he chooses to transact according to the Islamic system, certainly not out of fear of committing a sin. Why should he be heard to complain about the product or the transaction not being Shariah-compliant? Why does he want to be "Islamic" when he has to repay his debt? To him and to the Muslim party mentioned earlier I would like to ask: Is it Shariah-compliant not to pay their debt?

While we are bickering amongst ourselves, the world is admiring what we have done and some have even followed our example. A lot have been written about the advantages of what we have done. Again I am not going to repeat it. Some of them could be found in my papers, speeches and lectures all of which could be found on my website.

Now, let us look at the Constitutional issue. I am not arguing the case for or against constitutionality. I am merely pointing out the bigger picture which many people seem to overlook. First, we must remember that Malaysia is not a part of England and it is no longer a British Colony (by whatever name). We have a written Constitution which England does not. Not only Dr Mahathir declared Malaysia to be an Islamic country but the whole world look upon Malaysia not only as an Islamic State but as a model modern Islamic State. England is not. England is a member of European Union, bound by certain conventions. Malaysia is not unless some people want Malaysia to be bound by whatever convention binding on England.

So, if we have any constitutional issue, we should look at our Constitution first, not the judgments of the Law Lords or the judgments of the Supreme Court of India. Indian Judges would likewise look at their own Constitution, not ours, much less at the judgments of our court. English Judges have no written Constitution to look at, so they look at their own judgments, not ours.

Nowhere does our Constitution say that the power to decide Shariah issues vests in the civil courts. Indeed, the Constitution clearly enumerates that Shariah matters in List II of Schedule Nine are State matters, which means that the forum for determining Islamic law regarding those matters are either the State Fatwa Committee or the Shariah Court. Based on that alone, the civil courts cannot claim to be the sole authority for the determination of Shariah issues under the guise that "Shariah" is "law".

Then look at the amended wording of Article 121 and read my judgment in Latifah Bte. Mat Zin v Rosmawati Bte Sharibun & Anor (2007) 4 AMR 621. (It is also available on my website). I am not quoting it here. Then look at para. 4(k) of List I, Ninth Schedule. I have mentioned this point in Latifah as well as in my papers which you can also find on my website, indeed, on record, as early as 2002.

Then comes the policy consideration. I am asking this question to Muslims: Do you want Shariah issues to be determined by people who are not only not experts in Shariah but also by non-Muslims? This is our religious law, the religious law for those "who believe"!

Islamic banking was introduced to provide an alternative to Muslims who fear committing a sin in their financial transactions. We are strict about the products: they must be Shariah-compliant, they must be certified by the Shariah Committee of the IFI and the SAC. Yet, when it comes to the final determination of the issue, we want to leave it to amateurs and non-Muslims. I offer no apology for saying that I will not accept a non-Muslim to determine what is *halal* and what is *haram* for Muslims in this country. So, as I have said before and I repeat now, whatever happens, I will not regret for making the suggestion that I had made.

All of us should be looking at the bigger picture and across our own State borders. We should be looking at ways to make Malaysia the hub for Islamic finance, Malaysian law as the law of choice and Malaysian Court and Arbitrators as the forum for settlement of disputes and how we can contribute. Why should English law be the law of choice? Why should US law be the law of choice? (On this issue, please read, amongst others, my 12th Emeritus Prof Ahmad Ibrahim Memorial Lecture titled "Malaysia as an Islamic finance hub: Malaysia law as the law of reference and Malaysian courts as the forum for settlement of disputes", "Enforceability of Islamic financial transactions in secular jurisdictions: Malaysia law as the law of reference and Malaysian courts as the forum for settlement of disputes" and recently, "The need for Shariah-compliant law of choice for Islamic finance transactions," again all are available on my website.

What can we contribute towards making Malaysia the hub for Islamic finance? That is the question that we should ask ourselves.

On 5 December 2005, in my keynote address at the Majlis Pelancaran dan Forum Komuniti Syariah, Jabatan Peguam Negara, I said:

"I hope that this Community will function as a technical secretariat, researching existing laws, comparing them with the Shariah principles, adopt what is suitable, harmonise civil (common) law and Islamic law where possible, the ones more easily acceptable to the public to be given priority. Let policy decisions be made by the Government."[i]

At that time I was talking about harmonisation of Shariah and common law generally, not referring particularly to laws applicable to Islamic finance. I do not know whether you have done any such thing. Anyway, now that Bank Negara Malaysia has established the Law Harmonising Committee for Islamic Finance, you can work with us.

You have a Shariah Division. I am sure you have a combination of Shariah trained officers besides common law trained officers. Just pick up one law which is applicable to Islamic finance, go through it, pick up the non-Shariah-compliant provisions, determine the Shariah position, put up a draft amendment to the law and, sitting in the Attorney General's Chambers, you have all the facilities to see that it becomes law.

Or, having identified the non-Shariah-compliant provisions and the tentative Shariah position, send it to LHC. We will proceed from there. Let us do something substantive. One provision harmonised is better than ten seminars.

Please read the Manual Rujukan Mahkamah dan Penimbang Tara Kepada Majlis Penasihat Syariah Bank Negara Malaysia. Please pay special attention to the provisions regarding the function of the SAC, the kind of questions that it would and would not answer and the provisions regarding the right to be heard.[ii]

The SAC emphasised this in its answer to the first reference made by the court in the case of Mohd Alias Bin Ibrahim Lwn. RHB Islamic Berhad Guaman Sivil 22A-74-2010, thus:

"In answering the questions referred by the court, SAC takes into consideration that the function of the SAC is only to state the Shariah principle on an issue. SAC does not have the jurisdiction to make findings of facts or to apply the principles (rulings) to the facts of the case and make a decision, whether on an issue or on the case because that is within the jurisdiction of the court to do. For example, if the SAC were to answer Question no. (1) as referred by the court, the SAC would have to:

1. *Study the said certificate and make a finding of facts on it;*
2. *Determine the Shariah principle on bai' 'inah;*
3. *Apply the Shariah principle to the facts as found by the SAC;*
4. *Make a decision on the issue which my even decide the whole case.*

Para. 1,3 and 4 do not fall under the jurisdiction of SAC. SAC will only give its answer in respect of para. 2.

SAC will analyse Shariah issues contained in each question as referred and state the Shariah principle thereon. The court should apply the Shariah principle as stated by the SAC to the facts of the case in deciding the said issue."[iii]

As far as this Chambers is concerned, the issue of constitutionality is settled. It had decided that the provisions were constitutional when advising the Government whether or not to make the law requiring Shariah issues arising in Islamic finance, to the SAC. You should defend it. It was your advice.

The issue as to which would be a better forum the decide Shariah issues relating to Islamic finance both prior to the issuance of a product or at the time of settlement of dispute should have been thought of at the time when Bank Negara Malaysia was looking for an answer to the problem, or even earlier. Not now, when the system has already been in place and is working, when the Courts are now referring Shariah issues to the SAC, when the world is praising us and some have even adopted our model. I wish you will have the opportunity to see some of the papers presented to the SAC for approval of a product. Then you will know how complex the subject is. It is not something that one person, whether a common law Judge, a Shariah Judge or an *ulama* alone, may decide. It needs a combination of expertise.

While SAC is not perfect, I think it is the best forum for the job now. If you have a better suggestion or any suggestion to improve it, please tell us. We can always improve it. But, don't destroy something unless you are sure that you have something better to replace it. In this world, if we know more, we will criticise less.

We should be looking forward: how to contribute to make Malaysia the holistic hub for Islamic finance, how to contribute to make Malaysian law the law of choice and Malaysian courts the forum for settlement of disputes. That is what we should be focussing on.

Thank you.

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NOTES

[i] My own translation. Original text in Malay is as follows:
Saya harap Komuniti ini akan berfungsi sebagai satu jawatankuasa teknikal, menyelidik undang-undang yang sedia ada, membandingkannya dengan undang-undang Islam, menyerap mana yang baik, mengharmonikan undang-undang sivil dan Islam di mana yang boleh, yang lebih mudah diterima umum diutamakan. Biarlah soal dasar diputuskan oleh Kerajaan.

[ii] Since it is too long, I am sending it separately to the Secretariat of this Seminar.

[iii] My own translation. Oringinal text in Malays is as follows:
"Dalam menawab soalan-soalan yang dikemukakan oleh mahkamah, MPS mengambil ingatan bahawa tugas MPS hanyalah untuk menytakan hukum Syarak mengenai isu-isu yang dikemukakan. MPS tidak mempunyai bidangkuasa bagi membuat penemuan fakta (finding of facts) atau memakai (apply) sesuatu hukum itu kepada fakta kes dan membuat keputusan, sama ada mengenai sesuatu isu atau bagi kes tersebut kerana ia terletak dalam bidangkuasa mahkamah. Sebagai misalan, jika MPS hendak menjawab persoalan (1) seperti yang dikemukakan, maka ia memerlukan MPS:

1. *Mengkaji sijil berkenaan dan membuat penemuan fakta mengenainya;*
2. *Menentukan hukum mengenai bai' 'inah;*
3. *Memakai hukum itu kepada fakta yang ditemui oleh MPS (apply the Shariah principle to the facts as found by the MPS); dan*
4. *Membuat keputusan terhadap isu itu yang mungkin akan memutuskan kes tersebut (Make a decision on the issue which my even decide the whole case).*

Butiran 1, 3 dan 4 bukanlah terletak di bawah bidangkuasa MPS. MPS hanya akan memutuskan mengenai butiran 2.
MPS akan menganalisa isu-isu Syariah yang terkandung di dalam setiap soalan sepertimana dikemukakan dan menyatakan hokum Syarak mengenainya. Mahkamah hendaklah menguna pakai hukum yang dinyatakan oleh MPS kepada fakta kes berkenaan di dalam membuat keputusan mengenai isu tersebut."