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THE IDEAL LEGAL FRAMEWORK FOR ISLAMIC FINANCE
By
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A Shari'ah-compliant product is like a person who is born a Muslim. While that is a good start, it is even more important that he lives and dies as a good Muslim. We have taken great pains to produce Shari'ah-compliant products but we do little to ensure that the applicable laws, whether in documentation or settlement of disputes, are also Shari'ah-compliant. Instead, we resort to the laws of England and go to English courts for settlement of disputes knowing full well that the law is not fully Shari'ah-compliant; that the Court will not apply the Shari'ah even if the parties want it to and, even if the Judges want to, they are not well-versed in Shari'ah.

In so doing, we are just like a Muslim who takes the trouble to go and buy *halal* meat. Then he goes to a non-*halal* restaurant and asks the chef to cook the meat. The chef is an honest man. He says, "But my cooking is not *halal*. I add wine in my cooking". The Muslim says, "Never mind. I respect your honesty and integrity." That is how smart we are!

I am a practical person. I don't dream of an "ideal" legal framework for Islamic finance as if there is only one form of legal framework which is ready made, God sent, suitable everywhere and all the times that should and could be made applicable in all countries that offer Islamic finance. Indeed, I don't even take the easy solution that Muslims are fond of doing: "Apply the Shari'ah wholly, and everything will be fine because Shari'ah is God's law and God's law is perfect." To me that is pure rhetoric. Ask them to produce the draft of the laws to be used, nothing will happen. You may not like to hear it, but I am speaking from 30 years of experience of harmonisation of civil law and Shari'ah.

Besides, I also believe, that merely giving the brand name "Islam", "Islamic" or "Shari'ah" alone is not going to change anything. For that matter, faith does not ensure that everything will go well. It depends on how it is implemented. Remember that even Rasul Allah s.a.w. lost the battle of *Uhud*, not for lack of faith, but for the lack of discipline amongst the archers. In other words, you have to do the right the right way to get the right result. That is Sunnah Allah, as I understand it. (Correct me if I am wrong).

I am even realistic enough to admit that different countries offering Islamic finance have different legal framework, indeed different substantive and procedural laws, some are common law based, some are continental law based and some are Shari'ah based. To me the source does not matter so long as it is Shari'ah-compliant. After all, does it matter whether you eat rice, chapatti, kebab, bread or potato so long as it is halal? The benchmark is that whether the applicable laws are Shariah-compliant and adequate to cater for modern, cross-border legal requirement. To me, and I have said it many times, any law that is not un-Islamic is Islamic. The test is whether it is Shari'ah-compliant. So each country may use its existing laws as the base to harmonise with Shari'ah.

In 1980's when we were drafting the criminal and civil procedure laws, since no one could come up with a "pure Shari'ah" or "Shari'ah based" draft, we had to adopt the procedural laws then used in the civil courts as a basis to work on. Of course, you can criticise the law as NOT being Shari'ah-based, as Islamic finance products are often criticised. My response is: Could you please produce it. We will adopt it. Now the same common law-based Shari'ah-compliant procedural laws used in the Shari'ah courts are known as the "Shari'ah Criminal Procedure Enactments" or the "Shari'ah Civil Procedure Enactments."

Indeed, when the Law Harmonisation Committee went through the Rules of Court which is being used in the civil courts, only one provision was found to be NOT Shari'ah-compliant, that is, the provision regarding "interest after judgment". So, we made it Shari'ah-compliant by using the principles of *ta'wid* and *gharamah*. You may read the detail in my article titled "*Late Payment Charge On Judgment Debts Arising From Financial Transactions In Accordance With Shari'ah*" available on my website: www.tuanabdulhamid.my

So, in the case under discussion too, I think that the easier approach is to start with the existing laws applicable to Islamic finance in a particular country, spot the Shari'ah non-compliant provisions and substitute them with Shari'ah-compliant provisions. It may sound easy, but, from our experience, it is not so easy, especially to produce the Shari'ah-compliant provision to replace the one that is not. But, I think, that is the most practical way to do it. I am not in any way saying that there is no other way. If you have, by all means do it your way, so long as we arrive at the same destination.

Let me relate to you some of my own experience in the harmonising of Malaysian laws. By "harmonisation" I mean making existing Shari'ah non-compliant law Shari'ah-compliant and introducing the needed Shari'ah-compliant law where there is none.

I have mentioned about the making of civil and criminal procedural laws for use in the Shari'ah Courts. I have mentioned about in passing about the work being done by the law harmonisation Committee. In fact some work is being done by the Shari'ah Division of the Attorney General's Chambers and the Technical Committee on Shari'ah and Civil law under JAKIM.

All the committees adopt the same approach: what is not un-Islamic is Islamic. I can say so because not only that I know what they are doing, but also because I was a member of the Technical Committee under JAKIM and was even the Chairman of a similar Committee for the State of Penang in 1990's. The reason is, at least in Malaysia, there is no other or better way.

At this point of time, the draft amendments to the Hire and Purchase Act to introduce the Shari'ah-compliant provisions is almost ready. What we need is the political will. It is the lack of political will due to "fear of the unknown" that has caused a delay of two decades.

Leave the technical issues to the technical people. They know what to do. The policy makers need not worry or confuse themselves with technical problems. They need only decide the policy and take it through the relevant process. We are still not too late. If, hopefully, we could do it by next year, we would still be the first in the world to do it.

We encounter more serious problems with regard to land law, for example, how to harmonise the Torrens System of the National Land Code with *musharakah mutanaqisah* arrangement. As you know, in a *musharakah mutanaqisah* arrangement, the share of the customer increases and the share of the bank decreases correspondingly with every instalment paid. How do you reflect that in the title register? You can't be issuing a new title very month for the same piece of land.

Similarly, at the beginning, let us say that the bank's share is 90%. Suppose the bank were to take a charge, how could the bank take a charge of its own land (the 90%)? Again, the bank's share decreases as the instalments are paid, how do you reflect the monthly change in the charge? We have some ideas at the moment but we are still not clear about it. Any suggestion of the possible solution by anybody is most welcome.

But, having the right law along is not enough. Any law, even God's law, if not properly administered, may lead to injustice and unwanted results.

Needless to say, the legal and judicial system must also be conducive.

There is a need for a pool of Shari'ah scholars who, besides knowing the Shari'ah *mu'amalat*, traditional and contemporary, are also proficient in English as well as Arabic and exposed to the industry.

I am happy to see that Malaysia has produced a number of such scholars and continue to produce more. These new breed of *ulamas* are the product of Islamic Universities and also Western Universities. They are fluent in Arabic and English, often with degrees in law and Shari'ah and exposed to conventional and Islamic finance. They fly all over the world giving advice to banks, often in non-Muslim countries or attending Shari'ah Committee meetings or international conferences.

These scholars are required to advise the Islamic financial institutions in developing new products; to sit in Shari'ah Committees at the Islamic financial institutions or at national level, where there is such a body; to advise solicitors in the documentation and litigation and to assist the relevant authorities in formulating and drafting new Shari'ah-compliant laws. I hope a day will come, quite soon, when some of them will practise as lawyers or serve as arbitrators and judges.

Needless to say, we need judges with at least a working knowledge of Shari'ah and Islamic finance. In this respect let me first correct a common mistake. Most people who are neither judges nor lawyers involved in hearing or handling those cases seem to think in every Islamic banking case, there are Shari'ah issues to be argued and decided. So, the solution is for the cases to be heard by the Shari'ah Court. Here again, the assumption is that by transferring the jurisdiction to the Shari'ah

Court, everything will be fine. Why? Simply because it is an “Islamic Court” and the word “Islamic” or “Islam” solves all problems and cures all ills. That again is a fallacy.

Let us look at the hard facts in Malaysian contexts.

1. There is the jurisdictional issue. Banking and insurance are Federal matters (Item. 4(k) of List I (Federal List) of the Ninth Schedule of the Constitution and not a State matter within the jurisdiction of the Shari’ah Courts.
2. One party may not be a person “professing the religion of Islam.” Shari’ah Courts have no jurisdiction over them. When they are sued, they are unable to appear to defend themselves. When an order is made in default, they may just ignore the orders since the Shari’ah Court has no jurisdiction to make the orders against them. Do we want such things to happen? For that matter even bank Islam is not a “person professing the religion of Islam” That provision was drafted in the context of natural persons who are capable of professing the *shahadah*, perform the daily prayers, observe the fasting in the month of *Ramadan*, pay *zakah* and perform the *Haji*.
3. A host of other related laws, e.g. bankruptcy law, companies’ winding-up laws, land law are outside the jurisdiction of the Shari’ah Courts. What it means is that the judgment creditor, even if he manages to get a judgment, may not be able to resort to remedies under those laws.
4. Shari’ah judges may be conversant in Shari’ah. But, *fiqh mu’amalat* is a specialized area and they may not necessarily be conversant in the area. In any event, they are not conversant in the civil laws mentioned earlier.
5. The Shari’ah Courts are State courts. There are fourteen such courts, each independent of the other. At the apex, there are fourteen Shari’ah Courts of Appeals compared to one Federal Court in the civil court system. Consistency in the judgments, even on the same issue, may be quite difficult to achieve.
6. The geographical jurisdiction of the Shari’ah Court, being a State court, is limited to the State. That will give rise to issues of choice of the forum, service of the court’s process and execution of judgments.
7. Most corporate lawyers, not being Shari’ah lawyers would not be able to appear in the Shari’ah Courts.
8. The documents are in English, drafted by common law lawyers following common law precedents which Shari’ah Court judges are not familiar with them.

9. There will be problems of reciprocal enforcement of judgments of Shari'ah Courts, being State courts, in foreign countries. Existing law, the Reciprocal Enforcement of Judgments Act 1958 is only applicable to judgments of the civil courts.

So, in Malaysian context, the Shari'ah Court is not the answer. The answer lies in what we now have and have done which, in my view, is working quite well.

In Malaysia, judges need not be Shari'ah experts. All they need is just a working knowledge of Islamic finance. Of course, if they know more, it is better. They need not be experts in Shari'ah as they are required to refer Shari'ah issues, by law, to the Shari'ah Advisory Council.

Lawyers are involved, at least, from the time of the documentation, but it could be earlier. They have to ensure that the documents they draft not only reflect what the parties intend but also that they comply with the requirements of the law and the Shari'ah pertaining to the type of contract the parties enter into. When it comes to litigation, they will have to consider the right pleadings, whether any Shari'ah issues arise, whether and how to plead them, argue them, and in Malaysian context, help to draft the questions to be referred to the SAC, if the need arises. They don't have to be Shari'ah experts themselves as they have the Shari'ah advisers to help them. However, a working knowledge is necessary, the more they know the better.

While the work should be opened to both Muslim and non-Muslim lawyers, I would like to see Muslim lawyers taking the lead in this area. Islamic finance has a soul, the faith factor. It is part and parcel of Islam, the religion. Muslim lawyers, I believe, will have a greater reason to seek compliance with Shari'ah than non-Muslim lawyers who join in purely to make money. I think that Muslim lawyers would hesitate to put up the kind of defence as that put up the case of *Investment Dar Co KSCC v Blom Developments Bank Sal* (2009) EWHC 3545 (Ch).

Of course an efficient, clean and transparent Judiciary is a necessity. After all these are pure commercial cases and nothing more.

As far as the infrastructure, I think, Malaysian Courts are among the very best in the world. The environment is conducive too. (You may read more in my earlier papers available on my website.)

In conclusion, in my opinion, based on what we now have, the most practical (I won't use the word "ideal") legal framework for Islamic finance is the common-law based laws, procedural and substantive, harmonised with Shari'ah to make it Shari'ah-compliant. Similarly, the common law judicial system could best serve the present need. And, like it or not, the language is going to be predominantly English. That is the way I see Shari'ah developing and will continue to develop, going to the main stream and getting globalised in the 21st century. And, it is not because of piety but because of money. To me, it does not matter. The end result is the same.

Thank you.

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