

FINANCIAL SECTOR SEMINAR SERIES FOR JUDGES
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SOME OBSERVATIONS ON THE ROLE OF JUDGES IN SETTLEMENT OF
DISPUTES IN ISLAMIC FINANCE CASES, SAC, ORDER 42 RULE 12A ROC 2012
AND IBRA'

By
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When I was approached to speak at this Seminar, I told the organizers that I would not be presenting a paper and that I would not take more than 15 minutes to highlight a few points and give the extra time to Dr. Daud Bakar. The reasons are, first, I do not think there is anything for you to learn from me, even if you are willing to. Secondly, whatever I have to say and want to say on the subjects I have said so in my papers, lectures and articles, all of which have been published. If you have any difficulty tracing the publications, just visit my website. All are there. On the other hand, this is one of the rare opportunities for you to learn from the man who is recognised worldwide as the authority on Islamic Banking, Islamic finance and takaful (which I will refer to as "Islamic finance"). If you have any doubt on any Shari'ah issue relating to Islamic finance, please take the opportunity to ask him.

On my part, first, I would like you to look at the bigger picture, i.e. Malaysia's position in relation to Islamic finance. Many countries in the world, including those that otherwise have no affiliation to Islam, are striving to become "the hub for Islamic finance", not out of piety but because of money. We have all the reasons, all the ingredients to be the leader and indeed, in some aspects, we are already leading. Let us not be "an *ummah* of lost opportunity", to quote Sheikh Nizam Mohammed Saleh Yaquby, a well-known *Shari'ah* scholar in Islamic finance.

Judges have a part to play. Indeed, they should seize this opportunity to make their contribution, not only to Islamic finance, not only for Malaysia, but also in the development of *Shari'ah*, particularly *mu'amalat*, and its application globally. Many people may not realize it. But, what is happening in the last 40 years had never happened in the history of the *Shari'ah*. For detailed discussion, please visit my website.

There is one specific area where Judges are directly involved: settlement of disputes. In this respect too, we should look beyond our border. Why should the parties who want the *Shari'ah* to be applied in the settlement of their disputes choose British or New York Courts which not only have no expertise in, but clearly will not or are unable to do so due to legal constraints? Why don't we step in and offer Malaysian courts instead? We have the infrastructure, the expertise and the ability to do so. All that Judges have to do is to familiarize themselves with the structure of the products so that they know what they are dealing with. The remedies prayed before them are the same common law or statutory remedies applicable in conventional finance which they are familiar with. They don't have to worry about the complicated Shari'ah issues which they are not expert in, as those issues will be ascertained by the Shariah Advisory Council. All that they have to do is to apply those rulings to the facts of the case found by them in the same way as they apply the *Sijil Faraid* in

cases of distribution of estates. (In fact the *Sijil Faraid* goes further than the ruling of the SAC. The *Sijil Faraid* determines who the beneficiaries are, the asset that constitutes the estate and the exact portion each beneficiary should get, in the case before the court.)

In Islamic finance cases, a big load has been taken off the Judges shoulders. Let the experts in the respective fields do what they are experts in. You are experts in your field, confine to it.

Actually, as judges we only see the tip of the Islamic banking products and the tip of the *Shari'ah* issues. That is so in other areas of law too. For example, as Judges, how many sections of the Companies Act, the National Land Code, the Local Government Act or the Income Tax Act that we read in the course of our duties? In fact there are many laws that we don't read at all because no cases arise from them. Similarly, how many types of Islamic banking and Islamic finance products that we come across? Again and again, it is BBA and may be a few *ijarah*. The types of *Shari'ah* issues raised are very limited too. Most of the lawyers who argue may not know much either. And Judges have the last say, as least in their courts. We might end up thinking that we have seen all or even know all when in reality we don't even know how much we don't know.

The first thing I learned as a member of the SAC was I realised how much I did not know. Now, after more than ten years, I still have difficulty in understanding the structures of a product like *sukuk*. Of course I am speaking about myself. You may not have the same problem. But, until today I am the only person who can speak from experience on this point, because I am the only one, so far, who has been a Judge and a member of the SAC.

Regarding reference of *Shari'ah* issues by court to the SAC, personally, I am happy to see that it is working quite well. I would like you to take note how careful the SAC is in answering the questions posed by the court in order to confine itself to stating the *Shari'ah* issue alone. I have written and said what I think need be said. I hope you could find time to read some of them.

On late payment charge, similarly, I have written and spoken about it. I don't think Judges should worry whether it is in compliance with the *Shari'ah* or not. That issue had been taken care of by the SAC. If I were you, all I would do is to see whether late payment charge is prayed for or not in the pleading as provided by the rule. If it is prayed, all I will say is "Order in terms". Let the counsel and the Registrar sort out the wording of the order and the calculation thereof.

Regarding *ibra'*, again I have written an article which is under publication by the Law Review but which I have uploaded on my website since 19th March 2013 and after three months 230 people have accessed it. Some of you could be among them. I am of the view that the High Court Judges who had been concerned about what they saw as "unfairness" or "inequitable effect" of Islamic banking on customers and had been described as having "shallow knowledge" of Islamic banking have been vindicated when Bank Negara issued the Guidelines on *ibra'*. The Guidelines clearly require the banks to state the particulars about *ibra'* that the banks are required to give, similar to what some High Court Judges had done. Please read the Guidelines.

These Guidelines are binding on the banks. Lawyers and Judges should see that they are complied with. Indeed those judges may now look at the development as their contribution to the development of the application of *ibra'* in Islamic banking, the development of the *Shari'ah* and the development of Islamic banking itself, in the 21st century.

It is important to remember that we are at a stage of developing Islamic finance to a level that had never been done before. We can't expect it to be perfect. We will improve as we go along.

As Judges, you have a role to play. You see the tail end of the product and its implementation. You are in a position to observe and point out any area where improvement should and could be made. You have contributed to the development of *ibra'* in Islamic finance by indirectly influencing the Authorities to do what you yourselves could not do. Many more could follow. As civil court Judges, you could be proud of your contribution in the development of *Shari'ah*.

Lastly, in case you don't realize it, let me remind you that the reference of *Shari'ah* issues by the court to the SAC, the rule on late payment charge and the Guidelines on *ibra'* are Malaysia's own innovations. We are the first to do so. In the case of the rule on late payment charge and the Guidelines on *ibra'*, we are the only country in the world, so far, to do so. Let history be the judge whether we have done the right thing or not.

Thank you.

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