

**IF YOU DON'T TRUST JUDGES, LET THE SCHOLARS DECIDE: THE PRIMACY OF THE  
MALAYSIAN SHARIAH ADVISORY COUNCIL ON ISLAMIC FINANCE\*****HAKİMLERE GÜVENMİYORSANIZ AKADEMİSYENLER KARAR VERSİN: MALEZYA İSLAM  
HUKUKU DANIŞMA KONSEYİNİN İSLAM FİNANSINDAKİ ÜSTÜNLÜĞÜ****Prof. Dr. Farid Sufian SHUAIB\*\*****ABSTRACT**

*Malaysia adopts the principle of separation of powers where the function of the legislature is to enact laws, the executive to govern in accordance with the law and the court to decide disputes and to apply the law. It is an aberration when the law provides that a court of law has to revert to a body of scholars in determining what the law in deciding disputes between parties is. However, this occurs in Malaysia in the area of Islamic finance where the law establishes a Shariah Advisory Council consisting of scholar of Islamic finance under the auspices of the Malaysian Central Bank. The decision of the Shariah Advisory Council is final and binding upon any arbitration bodies and courts. This paper adopts a doctrinal analysis approach in examining this issue from the perspective of the constitution and the legal system, and seeks to reconcile this aberration with the reality of the practice of law and the practice of Islamic finance in Malaysia. The paper then examines alternative to this mechanism.*

**Keywords:** *Separation of powers, Islamic finance, constitution*

\* This paper was presented at the "III. International Symposium on Intellectual Property Law" held on 25 th May 2017.

\*\* Faculty of Laws International Islamic University Malaysia 53100 Jalan Gombak Kuala Lumpur Malaysia, (farid@iiu.edu.my)  
(Geliş Tarihi: 24.05.2017 / Kabul Tarihi:26.10.2017)

## INTRODUCTION

Malaysia aspires to be the hub of Islamic finance, which is considered to be one of the engine of growth of the country. Global Islamic financial assets are estimated at USD2 trillion and growing at 10-12 percent annually.<sup>1</sup> Islamic finance is regarded as a mainstream sector in the global financial system. In the race towards achieving this goal, Malaysia has encountered few obstacles, including the need to confront the differences of opinions regarding interpretation and implementation of Islamic finance. Aggrieved customers of the Islamic financial institutions who were brought to court in default of the payments sometime challenged the legality of the Islamic finance products itself. The courts seem to be more than ready to entertain such a question and to make determination involving Shariah questions. This is not welcome by certain sectors and consequently the Shariah Advisory Council was made the sole authority in ascertaining Shariah questions on Islamic finance. This paper looks at this issue to consider the background and the appropriateness of such strategy.

## MALAYSIA IN BRIEF

A brief introduction on Malaysia should be helpful in this discussion. Eleven of the thirteen states under Malaysia situated at the Malay Peninsula, which is bounded by Thailand in the north and by Singapore in the south. The remaining two states of Malaysia, namely Sabah and Sarawak are in the north-western part of the island of Borneo. Malaysia is a multi-religious and multi-ethnic society with the estimated number of population of 31.7 million in 2016. Muslims are the largest population at 61.3 percent of the population, followed by Buddhists (19.8%), Christians (9.2%), Hindus (6.3%) and Confucianists and Taoists (1.3%). On the ethnic grouping, indigenous ethnic groups (including the Malay) constitute 67.3 percent, Chinese at 24.5 percent, Indians at 7.3 percent and others at 0.9 percent. Malaysia is quite a young population, but transitioning towards an aging population with those below the age of 15 years old at 27.6 percent, 15-64 years old at 67.3 percent. In this Muslim majority country that Islamic finance has a strong foothold and aim to be the leader at the international level.

## SEPARATION OF POWERS

This paper looks at the dispute resolution in the operation of Islamic finance from the constitutional perspective and would not delve into the substantive questions on Islamic finance itself. Malaysia subscribes to the political doctrine of separation of powers under which the government is divided into three organs, namely the legislature, the executive and the judiciary. The Federal Constitution establishes these 3 distinct organs of government and embodies it with 3 distinct powers.<sup>2</sup> A division of the government into 3 different branches enable the exercise of checks and balances between these 3 organs of government and reducing the risk of abuse of powers by one body through concentration of powers in one person or one organ.<sup>3</sup>

The implementation of the separation of powers, however is not absolute and is of varying degrees.<sup>4</sup> The Westminster style of government, for instance, as practice in England, has a high degree of overlap of membership between the legislature and the executive. The head of the executive, namely the Prime Minister and the members of the administration, namely the cabinet, must be from members of the legislature. In Malaysia the Prime Minister is appointed by the King from members of the House of Representative who in his opinion command the confidence of the majority of the House. The Prime Minister then chooses members of his cabinet from members of the legislature.

Although the membership of the legislature and the executive overlaps and not much of independence of the legislature could be hoped from the executive, the judiciary is a branch whose peculiarity and independence are strongly guarded. The Malaysian constitution protects the independence of the judiciary by providing a security of tenure and shielding judges from unwarranted and undue attack from other branches of government. For instance a judge may only be removed by a recommendation from a tribunal consisting of his peers and the Parliament could not discuss the conduct of a judge without passing a motion to debate it.<sup>5</sup>

<sup>1</sup> A figure from the World Bank obtained from <http://www.worldbank.org/en/topic/financialsector/brief/islamic-finance> accessed on 21/5/2017.

<sup>2</sup> Articles 38, 40, 121 of the Federal Constitution.

<sup>3</sup> Baron de Montesquieu, *The Spirit of Laws*, (Thomas Nugent, Trans.). Kitchener: Batoche Books, 2001.

<sup>4</sup> *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1, FC.

<sup>5</sup> Articles 125 and 127 of the Federal Constitution.

In another context, the judiciary is vested with the judicial power, namely the power to hear and to decide dispute. This power is jealously guarded by the judiciary to ensure that decisions over disputing parties are made by a competent and independent body. To this end, the judiciary is conferred with the power to punish for contempt of court against parties who fail to abide by its order.<sup>6</sup>

### LEGAL FRAMEWORK OF ISLAMIC BANKING AND FINANCE

In Malaysia, the Central Bank that was created in 1959 has the responsibility to manage the money and credit system.<sup>7</sup> The Central Bank is the “apex of the monetary and banking structure” of Malaysia which is entrusted among others “to promote monetary stability and a sound financial structure”.<sup>8</sup> In dispensing its function, the Central Bank is conferred with legal powers under, *inter alia*, the Central Bank of Malaysia Act 2009, the Financial Services Act 2013 (FSA), the Islamic Financial Services Act 2013 (IFSA). FSA clearly provides the Central Bank with powers to supervise and regulate institutions involve in deposit-taking and to those involve in providing finance and credit.

Islamic banking and finance is quite unique where the influence of religion is pivotal for its development and its acceptance by consumers. This is in contrast with conventional finance, which does not concern itself with religious requirements. Thus, consumers have to be convinced that the Islamic banking and finance business is run in accordance with Shariah for them to participate. Among the fundamental features of Islamic finance are the prohibitions of usury or interest, uncertainty and speculation or gambling. Thus, it is important that a proper legal regime is put in place for the industry to develop properly. The specific legal regime for Islamic banking and finance was provided for under the repealed Islamic Banking Act 1983 which came into effect on 7<sup>th</sup> April 1983. This Act was replaced by the Islamic Financial Services Act in 2013.<sup>9</sup> Nevertheless, one has to be mindful of the general su-

pervisory and regulatory regime under the Financial Services Act 2013 in discussing even Islamic banking. Thus, Islamic banking has to conform to both the Islamic Financial Services Act 2013 (IFSA) and the Financial Services Act 2013 (FSA) where relevant. For conventional banks, it could offer Islamic banking products through Islamic banking windows under the Interest-free Banking Scheme once approved by the Central Bank.<sup>10</sup> Such banks also have to conform to the relevant regulations under IFSA.

As could be seen from the history of Islamic banking and finance, the basic thrust of the Islamic banking business is that the business must be conducted in accordance with Shariah. IFSA reiterates this point in its definition of Islamic banking business as the business of “accepting Islamic deposits on current account, deposit account, savings account or other similar account...provision of finance...and other business”. IFSA further defines “Islamic deposit” to be “a sum of money accepted or paid in accordance with Shariah”.<sup>11</sup> Although commercial transactions could be said to exist from the time of the Prophet Mohammad more than one and a half century ago and thus provides adequate principles and instruments to be used in existing financial transactions, it is still at its infancy in the modern financial world. Thus, there are many Shariah-compliant issues that need to be resolved by the industry and this sometime has proven to be problematic.<sup>12</sup>

In the years after laying out the foundation of Islamic banking and finance under various legislations, several cases have shown the uncertainties about certain aspects of Islamic banking. Among the questions raised are core to the business of Islamic finance such as the legitimacy of some of the Islamic banking products, and the amount an Islamic bank can claim from a client who failed to make timely repayment. These cases raised doubts as to the validity of Islamic financial transactions and created uncertainty on the long standing Islamic financial products and practices. In *Affin Bank Bhd*, the Court questioned the practice of demanding the full amount under the financial product of *al-Bai Bithaman Ajil* (sale by deferred payment) inclusive

6 Article 126 of the Federal Constitution.

7 Section 3 of the Central Bank of Malaysia Act 2009 which refers to the Central Bank of Malaysia 1958.

8 Bank Negara Malaysia, Money and Banking in Malaysia, Bank Negara Malaysia: Kuala Lumpur: 1994, at 83.

9 For a description under the previous legislations, see, *Halsbury's Laws of Malaysia*, Vol. 14, Kuala Lumpur: Malayan Law Journal Sdn Bhd, 2002, at 254-255.

10 Section 14 of the Islamic Banking and Financial Act 2013.

11 Section 2 of the Islamic Financial Services Act 2013.

12 See for instance Siti Faridah Abd Jabbar, “The Shari’a Supervisory Board: A Potential Problem in Islamic Finance” (2008) *Company Lawyer* 29.

of the profit margin for the unexpired tenure of the facility when the customer defaulted.<sup>13</sup> The judge commented that a borrower under a conventional loan “is far better off” than a customer of an Islamic financial product and reduced the amount that the bank could recover. The case in *Arab-Malaysian Finance Bhd* went even further by stating the obvious that since the law requires Islamic financial products must be free from elements that are contrary to Shariah, it is the duty of the courts to determine whether such facilities are Shariah-compliant.<sup>14</sup> The same judge as in the case of *Affin Bank Bhd* reiterated the observation that “if a conventional loan must be avoided because of the prohibition of [interest], surely the alternative must result in a consequence that is less burdensome than a default in the conventional loan with prohibited interest”. In this case the court ruled that the Islamic finance transaction is contrary to Shariah. However the appellate court reversed the decision and reiterated the validity of existing Islamic financial products and consequently managed to calm the player in the Islamic finance industry.<sup>15</sup>

The sustainability of Islamic finance was questioned because of the readiness of the civil courts to form a different opinion from Islamic bankers and Shariah advisory bodies which the court as the final arbiter of disputes is entitled to do. The solution adopted for this problem in the pursuit of sustaining Islamic finance industry is to strengthen the Shariah Advisory Council and to put it above the civil courts. The strengthening of Shariah Advisory Council in 2003 was cemented in 2009 with the enactment of the new Central Bank of Malaysia Act 2009.

These developments provide two layers of supervision in respect of the Shariah aspect of the banking business, namely the Shariah Advisory Committee and the Shariah Advisory Council.

### SHARIAH ADVISORY BODIES

Islamic financial institutions have to at all times comply with Shariah.<sup>16</sup> To ensure that Islamic banks conform to the Shariah requirement in its business, Islamic financial institutions have to comply

with the ruling of the Shariah advisory bodies. In this regard, there are two relevant Shariah advisory bodies, namely the Shariah Advisory Council at the Central Bank's level and the Shariah Advisory Committee at the individual financial institution's level. If the Islamic financial institutions are aware that its businesses are not in compliance with Shariah or the advice of the advisory bodies, the institutions have to immediately notify the Central Bank and to immediately cease carrying the activities.<sup>17</sup>

The main advisory body is the Shariah Advisory Council (SAC) established under the Central Bank of Malaysia Act 2009 which is the sole authority for the ascertainment of Islamic law in respect of Islamic financial services.<sup>18</sup> The function of the Shariah Advisory Council is to ascertain Islamic law on any financial matter, to advise the Central Bank on Islamic financial business, and to provide advice to Islamic financial institutions.<sup>19</sup> In furtherance of the general functions of the Shariah Advisory Council, the Central Bank has to consult the Council in matters that requires the ascertainment of Islamic law.<sup>20</sup> Furthermore, in relation to the present paper, the court or the arbitrator has to refer Shariah questions on Islamic financial business to the Council and its ruling is binding on the court or the arbitrator.<sup>21</sup>

The second Shariah advisory body is the Shariah Committee which is an internal body of the bank. The function of the committee is to advise the bank to ensure its business, affairs and activities comply with Shariah.<sup>22</sup> Members of the committee must have the qualification or the necessary knowledge, expertise or experience in Islamic jurisprudence or Islamic commercial law.<sup>23</sup> The financial institution itself should have an officer – “preferably a person with knowledge in Shariah” – to act as the secretariat to the Committee.

To ensure independence and to avoid conflict of interest there are restrictions imposed on members of the Shariah Committee. A member could not at the same time be a member of the Shariah Ad-

13 *Affin Bank Bhd v Zulkifli bin Abdullah* [2006] 3 MLJ 67.

14 *Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors* [2008] 5 MLJ 631.

15 *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839, CA.

16 Section 28(1) of the Islamic Financial Services Act 2013.

17 Section 28(3) of the Islamic Financial Services Act 2013.

18 Section 51 of the Central Bank of Malaysia Act 2009.

19 Section 52 of the Central Bank of Malaysia Act 2009.

20 Section 53 of the Central Bank of Malaysia Act 2009.

21 Sections 56 and 57 of the Central Bank of Malaysia Act 2009.

22 Section 30 of the Islamic Financial Services Act 2013.

23 Guidelines on the Governance of Shariah Committee for the Islamic Financial Institutions, 2005. BNM/RH/GL/012-1.

visory Council under the Central Bank. A person also cannot be a member of a Committee of more than one Islamic financial institution in the same industry. This means that a person cannot be a member of more than one Shariah Committee of Islamic banks or conventional financial institutions offering Islamic banking products. He could, on the other hand, be a member of a Committee in a financial institution in the Takaful industry or the fund management industry.

### DENYING THE COURTS AS THE FINAL ARBITER

The above description of the position of the Shariah Advisory Council is pertinent in juxtaposing it with the position of the courts. The cardinal functions of the judiciary are to interpret laws and to decide on legal questions. A court is an adjudicatory body that decides between parties who have conflicting rights and the court is the final authority in those matters.<sup>24</sup> The courts would not be willing to shackle its own hands and to demurely defer to another body, even to a body of experts.<sup>25</sup>

We could see the same perspective adopted by the courts in other jurisdiction such as in *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd* where the English courts are not keen to be bound by views of experts on Shariah or to be bound by Shariah in determining the validity of a working capital facility, although the agreement provides that the agreement is subject to “the Glorious Shariah”.<sup>26</sup>

In some circumstances, the power to decide rights and liabilities may be given to other bodies, for instance tribunals. Domestic tribunals for instance decide on disciplinary matters of employees; and the Consumer Claims Tribunal decides on complaints made by consumers against retailers or service providers. However, in all these instances, the courts still retain the supervisory power which

means the courts may change the decisions of the tribunals if the decisions are flawed.

Looking from the perspective of the judicial power, it would go against the accepted principles to confer to another body – namely the Shariah Advisory Council – the power to decide with finality the rights and liabilities albeit limited to the question of Islamic finance. The courts are not only effectively forbid from deciding issues on Islamic finance, but also are required to accept the decision of the Council.

However, the case law shows that the courts do not necessarily have any problem with this arrangement. The courts do not consider the function of the Shariah Advisory Council as making the determination of the dispute of the parties given that their duty is only to ascertain the applicable Islamic law principles.<sup>27</sup> It is up to the courts then to apply the ascertained Islamic law to the facts of the case. According to the courts, it is the courts that finally determine the case, not the council. Thus, the Shariah Advisory Council does not perform a judicial or quasi-judicial function and consequently there is no question of the Council usurping the function of the courts.

This approach taken by the courts is problematic since the function of the courts is not only to apply the law, but before that to ascertain the law. If there is no Shariah Advisory Council, it would fall upon the courts to ascertain what the applicable law is, and proceed to apply the ascertained law. In ascertaining the law, competing parties to the dispute will submit before the courts their own view of what is the law. The courts, after hearing submissions from competing parties will finally determine the law and this is fall under the judicial function of the court. If what the Council is expected to do is not judicial or quasi judicial function, the alternative left is to categorise its function as merely assisting the courts by providing expert opinions. However, this is again troublesome because firstly, expert opinions would generally not bound the courts and secondly, Islamic law being the law of Malaysia and thus not a foreign law, is not suppose to be proffered as expert opinions but should be propounded by the judges.<sup>28</sup>

24 See for instance *Majlis Amanah Rakyat v Bass bin Lai* [2009] 2 CLJ 433.

25 See for instance in medical negligence where the courts in Malaysia slowly but surely unshackling itself from the opinion of medical experts to be able to form its own opinion rather than always deferring to opinions of medical experts on medical issues. See Farid Sufian Shuaib & Ibrahim Lutfi Shuaib, “Does Doctor always Knows Best? The recent Trend in Medical Negligence” (2009) 5:1 *Biomedical Imaging and Intervention Journal* e12.

26 *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd* [2004] 1 WLR 1784. See also *The Investment Dar Company KSCC v Blom Development Bank SAL* [2009] EWHC 3545 (Ch).

27 *Tan Sri Abdul Khalid Ibrahim v Bank Islam (M) Bhd* [2013] 3 MLJ 269, CA; *Mohd Alias bin Ibrahim v RHB Bank Bhd & Anor* [2011] 3 MLJ 26.

28 *Ramah Binti Ta’at v Laton Binti Malim Sutan* (1927) 6 FMSLR 128.

## SUITABILITY OF THE SHARIAH ADVISORY COUNCIL AS DETERMINER OF FACTS AND LAWS

Another aspect which is problematic with having Shariah Advisory Council as the body to ascertain Shariah questions on Islamic financial business is its competency and suitability as determiner of facts and laws. The courts or bodies established to resolve dispute have developed procedures to ensure they could distil facts from a gamut of evidence tendered. The requirement of authenticated documents for instance, and the necessity of such documents to be disclosed to the opposite parties help the courts to determine authenticity of documents relied by the parties. In determining the relevant principles and how to apply it to the facts the courts also have procedures for submissions to be made by the parties before the courts. The courts give opportunities for opposing parties to argue the existence of the principles and how the principles should be applied.

The Shariah Advisory Council on the other hand is a body of experts whose main function is to ascertain Islamic law matters relating to Islamic banking and finance. It is a body of experts to ascertain legal principles to be applied in the Malaysian Islamic banking sector through robust discussions. Although the Shariah Advisory Council may determine its own procedure, what form of procedure is not readily available.<sup>29</sup> The rights and liabilities of the parties should be based on clear footing. Even if the Shariah Advisory Council only ascertains the law, not the facts, the ascertainment still requires robust deliberation involving disputing parties. The courts took another route in avoiding this conclusion by saying that the Shariah Advisory Council does not perform a judicial or quasi-judicial function, and thus there is no question for the Council to be the determiner of facts and laws.<sup>30</sup>

### WHY LET THE SCHOLARS DECIDE

The impetus in putting up the Shariah Advisory Council as the final authority in ascertainment of Islamic finance matters is to resolve the uncertainties created by various decisions of the courts. This anxiety over the uncertainties was first tampered by amending the law to give discretion to the courts to

refer Islamic finance matters to the Shariah Advisory Council and a ruling from the Council may be taken into consideration by the courts. The decisions of various cases put into doubt the validity of *al-Bai Bithaman Ajil* (sale by deferred payment) or the operation of such facility, an established Islamic banking product in Malaysia, further exacerbated the uncertainties in the Islamic financial industry.<sup>31</sup> The appellate court reversed the decision and observed that “judges in civil court should not take upon themselves to declare whether a matter is in accordance with the religion of Islam or otherwise”.<sup>32</sup>

To compound the problem, one of the reasons for the court to conclude that the Islamic finance facility of *al-Bai Bithaman Ajil* to be against “the religion of Islam” is because such facility is not accepted by *all* schools of law (*mazhab*) in Islam.<sup>33</sup> This is contrary to accepted principles on differences of opinions in Islam. The crassness of such reasoning probably led the leadership in the regulatory and policy bodies of Islamic finance to conclude that a drastic and urgent measure is required, which include elevation of the Shariah Advisory Council as the sole authority in Islamic finance. It is unfortunate that the usual course of correction of aberrant judgement namely the appeal process is not left to take its usual course.

Following the Court of Appeal’s decision in *Bank Islam Malaysia Bhd v Lim Kok Hoe*, the Central Bank of Malaysia Act 1958 was repealed and the Central Bank of Malaysia Act 2009 was put in place.<sup>34</sup> The discretion given to the courts to refer Islamic finance questions to the Council was changed to a mandatory reference and the effect of such a ruling was made binding on the courts.

Another reason why it is necessary to let the jurists ascertain the Shariah questions is the inclination of judges to use principles of common law and equity in deciding the issue.<sup>35</sup> Most of the judges are not trained under Shariah but were trained or exposed to English law. Thus, in case of doubt, the judges refer to unwritten principles they are famil-

29 See a reference to an approved procedure without details of the procedure in the report of the Shariah Advisory Council’s 172<sup>nd</sup> Meeting, [http://www.bnm.gov.my/index.php?ch=en\\_about&pg=en\\_sac\\_updates&ac=510](http://www.bnm.gov.my/index.php?ch=en_about&pg=en_sac_updates&ac=510).

30 *Affin Bank Bhd v Zulkfli bin Abdullah* [2006] 3 MLJ 67; *Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors* [2008] 5 MLJ 631.

31 *Affin Bank Bhd v Zulkfli bin Abdullah* [2006] 3 MLJ 67; *Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors* [2008] 5 MLJ 631; *Malayan Banking Bhd v Ya’kup bin Oje & Anor* [2007] 6 MLJ 389.

32 *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839, CA.

33 *Affin Bank Bhd v Zulkfli bin Abdullah* [2006] 3 MLJ 67.

34 *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839, CA.

35 Hakimah Yaacob, “The Central Bank of Malaysia Act 2009 (Act 701): Enhancing the Integrity and Role of the Shariah Advisory Council (SAC) in Islamic Finance”, Research Paper (No. 6/2010), International Shari’ah Research Academy for Islamic Finance (ISRA).

iar with, namely English common law and equity. In *Bank Kerjasama Rakyat Malaysia v Emcee Corporation* the court opined that since the matter of a charge over a land in an Islamic finance facility is brought before the court, the court will apply principles applicable under conventional banking facilities which include the principles of common law and equity.<sup>36</sup> This resulted in non-application of Shariah principles in ascertaining matters of Islamic finance.

Looking at the various reasoning as discussed above of why the courts are regarded as ill-equipped to deliver justice in Islamic finance, one could conclude that the underlying reason is competency or lack of competency of the courts to ascertain Shariah principles. The law has to provide for a council of jurists to ascertain Islamic law matters because of the anomaly between the competency of civil court judges and the status of Islamic law as the law of the land.<sup>37</sup> Although Islamic law is the applicable law in Malaysia, most of civil courts judges, either trained in Malaysia or abroad, lack the training on Islamic law. This anomaly was recognised by the courts much earlier as can be seen in *Ramah v Laton*.<sup>38</sup> Later courts also recognise the inadequacy of judges on Shariah knowledge.<sup>39</sup> Unfortunately not much has been done to correct the situation except a few for instance by providing an integrated curriculum of both civil law and Shariah in the law school as conducted by the law faculty of the International Islamic University Malaysia.

## CONCLUSION

The provisions under the new Central Bank of Malaysia Act 2009 put primacy on a council of jurists in the matter of Islamic finance. If this is the case, it creates jurisprudential and constitutional discordance in dispute resolution mechanism. However, the decision of the courts seems to say that such provisions do not take away the judicial power

of the courts as the Shariah Advisory Council merely ascertain and not determine Shariah questions. These distinctions and narrowing down of the function and power of the Council help evade the issue of usurpation of judicial power.

However, this band aid approach does not address the crux of the problem, namely the lack of competency of the judges in determining Shariah questions on Islamic finance disputes. The judges may be legally competent to decide on Islamic finance disputes which involve Shariah issues, but they lack the legitimacy to handle the same because of their lack of mastery of Shariah. The desire of Malaysia to be the leader in Islamic finance industry force her to take the short cut by using a body of experts to decide on Shariah questions whose decision bind the courts. Although such desperate mechanism may be understandable, it may hinder the ability of opposite parties to present their case on relevant Shariah questions before a court of law.

One should also be mindful that the criticisms of lack of fairness against the operation of Islamic finance when compared with conventional banking such as the absence of rebate for early settlement of the Islamic finance facility that were raised in the series of judgements by the High Court judges are effective in prompting changes. This can be seen subsequently by publication of research result conducted by a research institution affiliated to the Central Bank and by rulings by the Shariah Advisory Council.<sup>40</sup> Others regard this as vindication of the judicial criticisms against the operators of Islamic finance that need the prodding from outsiders to re-evaluate and to improve.<sup>41</sup> The dynamic processes between the courts, the policy makers and the legislatures are always in place in the legal system. The courts may apply the law, but at the same time express unhappiness or an agreement with the counsels regarding the perceived unfairness of the law and this may prompt policy or legal changes. This dynamic seems to be designed to be muted with the compulsory reference to the Shariah Advisory Council and the bindingness of its rulings.

36 *Bank Kerjasama Rakyat Malaysia v Emcee Corporation* [2003] 1 CLJ 625.

37 See *Ramah Binti Ta'at v Laton Binti Malim Sutan* (1927) 6 FMSLR 128; Zainur Zakaria, "The Determination of Questions of Islamic Law or Hukum Syarak by the Civil Court and the Admissibility of Expert Opinion" (1995) 24 INSAF 98. See also Farid Sufian Shuaib, Tajul Aris Ahmad Bustami, *Administration of Islamic Law in Malaysia: Texts and Material*, 2nd Ed., Petaling Jaya: LexisNexis, 2010, at 27-30.

38 *Ramah Binti Ta'at v Laton Binti Malim Sutan* (1927) 6 FMSLR 128.

39 In *Arab-Malaysian Merchant Bank Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 210 Justice Suriyadi observed that "in the event any litigation is commenced, it must be appreciated that not every presiding judge is a Muslim, and even if so, may not be sufficiently equipped to deal with the matters, which ulamaks [Islamic scholars] take years to comprehend". See also Ruzian Markom et al., "Adjudication of Islamic Banking and Finance Cases in the Civil Courts of Malaysia" (2013) 36 Eur J Law Econ 1.

40 See for instance Asyraf Wajdi Dusuki & Mohamed Fairouz Abdul Khir & Marjan Muhammad, *Implementasi Ibra' dalam Produk berasaskan Harga Tangguh dalam Sistem Perbankan Islam: Analisis dari Perspektif Operasi Perbankan dan Maqasid Syariah*, Research Paper (No: 16/2010), Kuala Lumpur: International Shari'ah Research Academy for Islamic Finance, 2010.

41 Abdul Hamid Mohamad, "Some Observations on the Role of Judges in Settlement of Disputes in Islamic Finance Cases, SAC, Order 42 Rule 12A ROC 2012 and Ibra'", in *Financial Sector Seminar Series for Judges*, organised by the Central Bank of Malaysia, 28-29 June 2013, Kuala Lumpur.

## BIBLIOGRAPHY

- Abd Jabbar, Siti Faridah (2008) "The Shari'a Supervisory Board: A Potential Problem in Islamic Finance" *Company Lawyer* 29.
- Bank Negara Malaysia (1994) *Money and Banking in Malaysia*, Bank Negara Malaysia: Kuala Lumpur.
- Dusuki, Asyraf Wajdi *et al.* (2010) *Implementasi Ibra' dalam Produk berasaskan Harga Tangguh dalam Sistem Perbankan Islam: Analisis dari Perspektif Operasi Perbankan dan Maqasid Syariah*, Research Paper (No: 16/2010), Kuala Lumpur: International Shari'ah Research Academy for Islamic Finance.
- Markom, Ruzian *et al.* (2013) "Adjudication of Islamic Banking and Finance Cases in the Civil Courts of Malaysia" 36 *Eur J Law Econ* 1.
- Mohamad, Abdul Hamid (2013) "Some Observations on the Role of Judges in Settlement of Disputes in Islamic Finance Cases, SAC, Order 42 Rule 12A ROC 2012 and Ibra'", in *Financial Sector Seminar Series for Judges*, organised by the Central Bank of Malaysia, 28-29 June 2013, Kuala Lumpur.
- Montesquieu, Baron (2001) *The Spirit of Laws*, (Thomas Nugent, Trans.). Kitchener: Batoche Book.
- Shuaib, Farid Sufian *et al.* (2010) *Administration of Islamic Law in Malaysia: Texts and Material*, 2nd Ed., Petaling Jaya: LexisNexis.
- Shuaib, Farid Sufian & Shuaib, Ibrahim Lutfi (2009) "Does Doctor always Knows Best? The recent Trend in Medical Negligence" 5:1 *Biomedical Imaging and Intervention Journal* e12.
- Yaacob, Hakimah (2010) "The Central Bank of Malaysia Act 2009 (Act 701): Enhancing the Integrity and Role of the Shariah Advisory Council (SAC) in Islamic Finance", Research Paper (No. 6/2010), International Shari'ah Research Academy for Islamic Finance (ISRA).
- Zakaria, Zainur (1995) "The Determination of Questions of Islamic law or Hukum Syarak by the Civil Court and the Admissibility of Expert Opinion" 24 *INSAF* 98.