

Conference Paper

Enhancing the Statutory Roles of the Shariah Advisory Council of Bank Negara Malaysia through Technological Advancement: A Way Forward

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Abstract.

The Central Bank Act of 2009 established the Shariah Advisory Council of Bank Negara Malaysia as the exclusive and highest authority responsible for issuing resolutions on Shariah matters pertaining to Islamic finance. An in-depth analysis of the Shariah Advisory Council's legal standing is provided in this article. The Shariah Advisory Council's legal obligations will also be clarified. To determine where the Shariah Advisory Council fits within the context of Malaysian law, quantitative analysis of content is employed with reference to parliamentary acts, directives, as well as judicial rulings through court cases. The investigation discovered that the use of digital technologies can strengthen the Shariah Advisory Council's mandated duties. As a result, it is suggested that internal policies and processes, plans for empowering Shariah resolutions, and public reference bodies be established.

Keywords: Islamic finance, Shariah advisory council, Shariah authority

1. INTRODUCTION

Rapid advancements have led to tremendous expansion and increased complexity in the fields of muamalat affairs and Islamic finance [1]. Shariah governance is a crucial tool in the Islamic financial system for correcting mistakes brought about by Islamic financial transactions that are against Shariah principles and for ensuring the sustainability of Shariah rules' application [2]. Thus, in compliance with the terms of the Central Bank Act 2009, the Shariah Advisory Council of Bank Negara Malaysia was constituted as the

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unique and highest authority in Malaysia. As a result, the Shariah Advisory Council has the power to decide Islamic law in matters of Shariah pertaining to Islamic banking. In order to resolve the issue of conflicting Shariah viewpoints among the Shariah committees established by Islamic banks, the government established the Shariah Advisory Council, which promoted harmonisation in the industry [3]. In order to ensure coordination and Shariah compliance for each financial product in Islamic banking institutions, it is one of the essential elements of the Islamic governance system for the Islamic banking system in Malaysia [4]. The Shariah Advisory Council must be able to adapt to the digital age in order to fulfil its legal obligations by using technology as a reference facilitation mechanism.

2. METHODOLOGY

This study employs a descriptive analysis qualitative study method that involves data retrieval from a library. This strategy was chosen since it is the most effective way to get literature highlights on legislative texts like acts of Parliament, regulations, and judgements from court-decided cases.

3. RESULTS AND DISCUSSIONS

3.1. Shariah Advisory Council: The sole authority of Islamic Finance Shariah

The Federal Government of Malaysia stated on July 5, 1982, that the country will establish an Islamic Bank for the first time in its history in order to comply with the requirements of Islamic law and protect the interests and welfare of Muslims living in the nation. Since then, Malaysia's Islamic banking system has grown significantly. To permit and regulate Islamic banking and financial operations at Bank Islam in the nation, the Islamic Bank Act 1983 was passed and put into effect on April 7, 1983 [5]. Soon after, section 124 was added to the Banking and Financial Institutions Act 1989, enabling the use of the Islamic banking system in conventional banks. This resulted from a significant demand and positive customer feedback, particularly from non-Muslims [6]. 24 banking institutions in all have been granted licences by Bank Negara to conduct business in Malaysia as of 2021 [7]. Even if the Islamic banking system is fully operational, there will still be a fight to enforce Islamic law. This is due to the system's constant need for improvement. There are many new financial options available. All of these goods must

be clearly based on maqasid syariah and free of any components that violate Syarak. Being a legal organisation, banks that use Islamic principles in financial transactions are obligated to follow the taklifi rule just like a Muslim individual would do so.

The Shariah Advisory Council at the national level was founded on August 2, 1996 [4] in order to ensure Shariah compliance in the overall operations and activities of Islamic banking institutions and to standardise Islamic banking products. Within the Bank Negara Malaysia administrative structure, a Shariah Advisory Council has been established with the goal of adjusting and setting guidelines for Shariah-related problems that arise in Islamic banking operations.

The Shariah Advisory Council's legal position is currently going through numerous different phases as a result of various changes that have occurred in the area of Islamic banking law. As of 2023, the Central Bank Act of 2009, the Islamic Financial Services Act of 2013, and the Financial Services Act of 2013 govern Malaysia's current state of Islamic banking regulation. Since the Central Bank Act of 2009 was passed and put into effect, the Shariah Advisory Council has assumed the role of being the highest authority [8]. As a result, according to Judge Dato' Asmabi's ruling in the case of *CIMB Bank Bhd v. LCL Corp Bhd & Anor* [2015] 8 MLJ 832, the Shariah Advisory Council has up until this point been recognised as the legal authority and the primary reference body, including in courts and arbitrators, for Shariah issues arising in cases relating to Islamic banking in the nation. Section 16B of the Central Bank Act of 1958 established and granted legal legitimacy to the Shariah Advisory Council. Later, the Central Bank Act 2009 was passed in its place, repealing the earlier law.

3.2. Shariah Advisory Council in the Central Bank Act 2009

The Shariah Advisory Council has been given the authority to ensure Shariah compliance in Islamic banking products under the Central Bank Act of 2009. The Shariah Advisory Council, the highest Shariah authority, was established by Bank Negara Malaysia under Section 51 of the Central Bank Act 2009 with the goal of preserving Islamic law in the context of Islamic banking activities. According to the ruling in the matter of *CIMB Bank Bhd v. LCL Corp Bhd & Anor* [2015] 8 MLJ 832, paragraph 83, the Shariah Advisory Council's authority has really increased and been upgraded as a result of performing its statutory duties. The provisions of paragraph 4(k) and paragraph 7(j) of List 1- Federal List of the Ninth Schedule of the Federal Constitution, which give Parliament the authority to legislate, are followed by this modification. In other words, the Central Bank Act 2009 that Parliament passed gives Bank Negara the authority to create a Shariah Advisory

Council. In sections 51 to 58, it deals with the Shariah Advisory Council and, among other things, gives it full authority to carry out its legal obligations as a body whose job it is to maintain the country's Islamic banking system in accordance with Syarak's requirements and guiding principles.

Section 51 describes the establishment of a Shariah Advisory Council in Bank Negara Malaysia while Section 52 of the Central Bank Act 2009, on the other hand, stipulates the role of the Shariah Advisory Council. Thus, through the provisions of this law, the Shariah Advisory Council is given the statutory role as the sole authority to make recommendations on Shariah issues for the Islamic banking system in Malaysia. In addition, through the amendments, the position of the Shariah Advisory Council is strengthened by law. Sections 56 and 57 of the Central Bank Act 2009 state:

56. (1) Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be, shall—

(a) take into consideration any published rulings of the Syariah Advisory Council;
OR

(b) refer such question to the Syariah Advisory Council for its ruling.

(2) Any request for advice or a ruling of the Syariah Advisory Council under this Act or any other law shall be submitted to the secretariat.

57. Any ruling made by the Syariah Advisory Council pursuant to a reference made under this Part shall be binding on the Islamic financial institutions under section 55 and the court or arbitrator making a reference under section 56.

To convey a different connotation in this new provision, the term “may” has been changed and substituted with the word “shall.” Both parts have used the term “shall.” Therefore, before interpreting the requirements of Sections 56 and 57, it is important to first study the retention of the word “shall” to determine what it implies as well as the impact and effect of the usage of the word “may.”

Any Act of Parliament may contain a required or illustrative meaning for the word “shall.” However, unless there are other words relating to the word “shall” in the act which may cause the court to make a different interpretation (golden rule) from its original meaning of mandatory, that is, with reference to the actual will of the legislator who requires that the provision mean choice rather than non-mandatory [9], the original use of the word “shall” is to explicitly indicate the mandatory nature. The Federal Court's ruling in the case of *Pow Hing & others v. Registrar of Titles Malacca* [1981] 1MLJ 155 provides the classic guidance to determining the meaning of the word “shall.” The

court in this case cited Lord Penzance in the *Howard v. Hodington* decision and stated that:

“I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.”

Therefore, referring to the judgment in this stated case, the issue of whether the word ‘shall’ carry a mandatory meaning or simply as a guide (directory), should be determined by method:

1) Looking at the understanding as required by the legislators. Therefore, the actual intention of the legislature should be considered to interpret a phrase enshrined in any provision of written law.

2) The context of the words used to form sentences in the provisions of the act of Parliament. Therefore, every word that is in any provision of written law should not be interpreted without reference to the overall context of a provision.

Therefore, the term “shall” in Sections 56 and 57 of the Central Bank Act 2009 should be understood as obligatory, as this was the genuine objective of the legislature when it changed the word “may” to “shall” in the minister’s address [10]. Therefore, under Section 56, the court is required to refer to the Shariah Advisory Council’s most recent resolution or, in the absence of one, to the Shariah Advisory Council for consideration in the formulation of a new resolution if an issue relating to Islamic law arises in a case involving Islamic banking. The Court is then required to incorporate the decision made based on the Shariah Advisory Council’s resolution into the matter being heard.

The Central Bank Act of 2009’s section 56 provisions allow the court to decide the issue in each Islamic banking dispute that is being heard. Any Shariah-related matters will be sent to a higher qualified party, the Shariah Advisory Council, which will then issue an Islamic law resolution for the Shariah-related issue. The Court of Appeal’s ruling in *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor* [2009] 6 MLJ 839 and Judge Suriadi’s decision in *Arab-Malaysian Merchant Bank Bhd v. Silver Concept Sdn Bhd* [2005] 5 MLJ 210 support Section 56:

Not every presiding judge is a Muslim, and even if they are, they might not be prepared to handle issues that take academics years to understand.

As a result, judges in civil courts are exempt from having to determine whether a situation complies with Islamic law or not since that decision must be made by an

expert in Islamic jurisprudence. This is consistent with the Shariah Advisory Council's formation to ensure that no components outside of Islam are used in the country's Islamic banking operations. Additionally, the Court of Appeal believes that through this case, the court should presume that the Shariah Advisory Council, which operates under the supervision of Bank Negara Malaysia, has fulfilled its legal obligation to ensure that Islamic banks operate in accordance with Islamic law (see paragraph 35 of the case of *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor* [2009] 6 MLJ 839). Additionally, there is no claim that the formed Shariah Advisory Council has neglected to fulfil its legal obligations. Therefore, any judge presiding over cases involving Islamic banking should be careful to consult the Shariah Advisory Council's decisions made under Bank Negara Malaysia before making any pronouncements on issues relating to Islamic law.

Thus, it is concluded that the powers and roles of the Shariah Advisory Council have been expanded to 3 functions;

- i) Advising Central Bank
- ii) Approving Islamic banking products, and;
- iii) Ensure the ruling for Shariah issues arising in cases tried in court.

However, the authority of the Shariah Advisory Council in ensuring the uniformity of Islamic banking services offered in the industry continues to be strengthened the Islamic Financial Services Act 2013, which was gazetted on 22 March 2013 and came into effect on 30 June 2013. According to Section 28 (1) of the Islamic Financial Services Act 2013 (Act 759), compliance with any decision made by the Shariah Advisory Council in relation to any goal and the management, business, affairs, or activities of Islamic banking institutions are directly deemed to be in compliance with the Shariah. According to Section 28(3)(4) of the Islamic Financial Services Act 2013 (Act 759), any acts that are not in accordance with Shariah shall be reported right away to the Shariah Advisory Council so that appropriate preventive measures can be taken. As a result, by adding new legal requirements for adhering to Shariah, along with the punishment of monetary fines and jail for any non-compliance, this Act has further enhanced the role of the Shariah Advisory Council.

According to section 29 of the Islamic Financial Services Act of 2013, the Shariah Advisory Council has the authority to advise Bank Negara on topics pertaining to Shariah [11]. According to the clause, all Islamic financial institutions must adhere to the Shariah standards established by Bank Negara in accordance with the recommendations of the Shariah Advisory Council. In fact, we have included a comprehensive penalty clause in sections 28(5) and 29(6) that provides for up to 8 years in prison, a fine up to 25 million

Ringgit, or both if Islamic banking institutions fail to adhere to the standards set by the Shariah Advisory Council and Bank Negara.

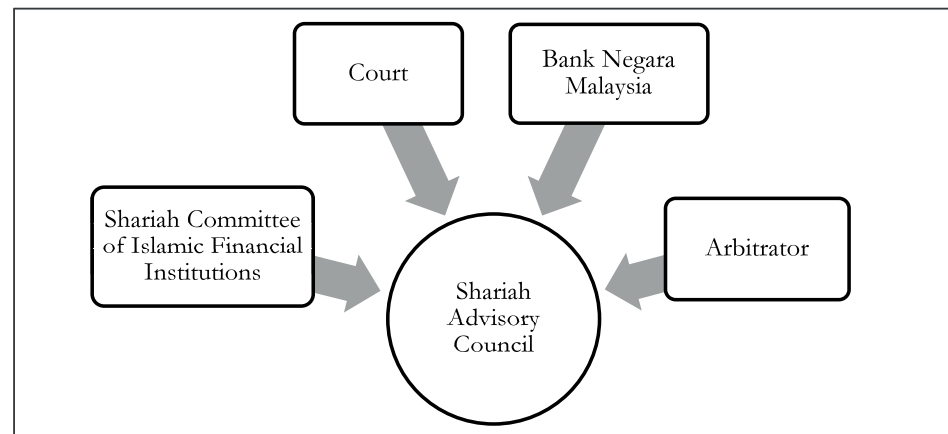
In addition, Section 30(1) of the Islamic Financial Services Act 2013 requires all Islamic financial institutions to set up a Shariah Committee in order to make sure that their operations, affairs, and activities adhere to Shariah at the level of Islamic banking institutions. According to Section 58 of the Central Bank Act 2009, if the Shariah Advisory Council and the Shariah committee reach different conclusions, the Shariah Advisory Council's decision will take precedence.

Thus, the implementation of the Islamic Financial Services Act 2013 is a good step, particularly for the Shariah Advisory Council in Malaysia's Islamic banking sector. The Shariah Advisory Council, Malaysia's top Shariah body, has provisions in this Act that not only retain but also increase its authority. The Federal Court, the highest court in Malaysia, recently ruled that the Shariah Advisory Council of Bank Negara Malaysia's determination of Islamic law carries legal force and should not be equated with a judicial decision in the significant case of *JRI Resources Sdn. Bhd. v. Kuwait Finance House (Malaysia) Berhad* [2019] MLJU 275 [12]. In conclusion, the Shariah Advisory Council's status as an authoritative authority with the highest jurisdiction in deciding issues pertaining to Islamic banking and finance has been strengthened and recognised as a result of this case [13]. Due to its competence, knowledge, and significant experience in the Islamic financial system, the Shariah Advisory Council is the body best suited to rule on matters of Shariah in comparison to civil courts.

Reference to the Shariah Advisory Council

The Shariah Advisory Council was established to be the only authority in the field of Islamic banking to implement Islamic law (Section 51(1) of the Islamic Financial Services Act 2013 (Act 759)). Thus, the Shariah Advisory Council serves as a reference point for any Shariah issues in Islamic banking. Therefore, the council is given the responsibility to assess a Shariah issue raised to it and to decide (Section 52(1) of the Central Bank Act 2009 (Act 701)).

The above illustration demonstrates that the Shariah Advisory Council has been given the authority to advise and refer Bank Negara Malaysia and Islamic banking institutions on any Shariah-related matters pertaining to the Islamic banking business as specified in the Islamic Financial Services Act 2013 by section 52(1)(b)(c) of the Central Bank Act of 2009. According to Section 28(2) of the Islamic Financial Services Act 2013, adhering to any decisions made by the Shariah Advisory Council about any specific objectives as well as the conduct of Islamic banking operations, businesses, or affairs is deemed to be Shariah compliance [14]. According to Section 52(1)(d) of the Central Bank Act 2009



Source: Authors

Figure 1: Reference to the Shariah Advisory Council.

(Act 701), Bank Negara has the authority to determine additional roles (in addition to those that are already available) based on the circumstances from time to time. As a result, the role of the Shariah Advisory Council is not restricted to what is stipulated in the Central Bank Act 2009 alone.

Refer to Part B on “Referenceable Shariah Matters,” Reference Manual of Islamic Financial Institutions to the Shariah Advisory Council, for a list of topics on which Islamic financial institutions may submit references for the Shariah Advisory Council’s consideration. The Islamic Financial Services Act of 2013 requires Islamic banking institutions to directly contact their Shariah committee and inform Bank Negara when they become aware that they are conducting any business, affairs, or activities in a way that does not comply with Shariah. This is done in order to ensure Shariah compliance. According to Section 28(2)(3)(4) of the Islamic Financial Services Act 2013 (Act 759), Bank Negara may carry out an evaluation as it deems necessary to determine whether the Islamic banking institution has addressed the Islamic State’s noncompliance.

In addition, for the level of enforcement and dispute resolution for cases involving Islamic banking products, in any proceedings, courts and arbitrators are obliged to make reference to the Shariah Advisory Council, i.e., whether:

a) Consider any decision of the Shariah Advisory Council which has been published (Section 56(1)(a) of the Central Bank Act 2009 (Act 701)). This is for the circumstances where there is an existing Shariah resolution to continue to be applied in the current case.

b) If there is not yet any Shariah resolution on the question of Shariah arising in a case, the court or arbitrator should refer the question of Shariah to the Shariah Advisory Council for its decision (Section 56(1)(b) of the Central Bank Act 2009 (Act 701)).

Therefore, in reference to section 57 of the Central Bank Act 2009, in carrying out the statutory role, every decision of the Shariah Advisory Council as the provisions of the act which mandates reference thereto, is deemed to be binding on banking institutions including courts or arbitrators.

In relation to the statutory role of the Shariah Advisory Council, each service provided; among others, advisory and reference services by Islamic banking institutions may incur fees or charges if appropriate in the opinion of Bank Negara (Section 93 of the Central Bank Act 2009 (Act 701)). However, such fees and charges shall not be imposed on the courts or arbitrators who refer to the Shariah Advisory Council (Section 69(2) of the Central Bank Act 2009 (Act 701)).

4. CONCLUSION AND RECOMMENDATION

Improvements to the Islamic banking governance system in the country are always needed and expected [15]. This is to make the Islamic banking industry a competitive sector that can meet banking needs and become a great alternative to conventional banking especially for Muslims. The main improvement is on the governance aspect of Shariah. This aspect is the mainstay that will ensure that Islamic banking is always in line with Islamic law in all aspects including operations.

Therefore, it is proposed to improve the structure of the Shariah governance system for the Shariah Advisory Council especially for the following:

- a) Establish internal guidelines and procedures;
- b) Empowerment of Shariah resolutions'
- c) Public reference authority

4.1. Establishing Internal Guidelines and Procedures

Through the study, this study found two manual procedures; namely the Islamic Financial Institution Reference Manual to the Shariah Advisory Council and the Court and Arbitrator Reference Manual to the Shariah Advisory Council provided by Bank Negara as a guide for Islamic banking institutions, courts, and arbitrators to make reference on Shariah questions for Islamic banking to the Shariah Advisory Council. In addition

to this manual, it is also proposed that two internal procedures be held by the Shariah Advisory Council based on the provisions of section 51(2) of the Central Bank Act 2009:

a) Procedures on processes carried out at the internal level of the Shariah Advisory Council to issue a Shariah resolution should be established.

b) Guidelines on the mechanism or methodology of istinbat used to decide a Shariah issue should be drafted. In this guideline, a list of dalils, opinions of Islamic scholars and fiqh rules to be applied should also be listed. For this purpose, the Guidelines for the Determination of Fatwa of the Indonesian Council of Scholars No. U-596/MUI/X/1997 may be used as a reference.

In the opinion of the researchers, both procedures are significant to be established in the system of Shariah governance for Islamic banking because:

a) It can be referred by the court to see the backup of the evidence and methods of fiqh that apply in deciding a Shariah resolution.

b) To facilitate the members of the Shariah Advisory Council in carrying out their responsibilities.

c) As a reference basis and facilitates new Shariah Advisory Council members who will be appointed in the future.

d) Disclose the principles of transparency and accountability in carrying out its statutory role.

e) To produce confidence to all parties, especially the stakeholders of the Islamic banking system.

4.2. Empowerment Shariah Resolution

Shariah resolution is another important subject in the Islamic banking Shariah governance system in the country. Therefore, the improvement of Shariah resolutions that can be proposed is:

a) Since Shariah resolutions have been recognized by Malaysian law as a secondary source of Islamic jurisprudence, it is proposed that the standard content of each Shariah resolution issued should be set and improved through the preparation of specific templates and formats. This is because, the status quo shows that most Shariah resolutions that have been issued, only place the views of Islamic scholars and sects without backing up arguments about how and why such views are presented. Each applicable evidence should be cited by including the original text and a complete mat to provide an explanation and avoid misunderstandings.

b) The resolution of Shariah must be documented in a structured manner. The Shariah Advisory Council's website online can be used to list the entire Shariah resolution issued together with the index in a single register. For this purpose, it is better if each Shariah resolution is given an official reference number. This is to facilitate access for interested parties to search. In addition, if there are changes or additions to any Shariah resolution, the updating process is easy to do. Thus, the status of Shariah resolution as the second source of Shariah law for the Islamic banking sector in the country can be preserved.

4.3. Public Reference Authority

The Shariah Advisory Council is also proposed to expand its jurisdiction to become a public reference authority, which can be used as the main reference for any questions related to muamalat and Islamic finance. Online technology systems can be used for this purpose. The use of online technology as an Islamic financial Shariah advisor offers several benefits to consumers. Here are some suggestions of such importance:

i) High accessibility

With the use of online technology, Islamic financial Shariah advisors can be accessed easily and instantly. Users can get advice and guidance from an advisor without having to be physically present or make an appointment.

ii) Lower cost

Using a financial Shariah advisor online may be more economical than getting services from an adviser traditionally. The low operating costs of online platforms can reduce the fees charged to consumers, making Islamic financial advice more affordable and available to more people.

iii) Convenience and comfort

With online technology, users can get Islamic financial advice from the comfort of their own home. They do not need to go to the meeting place or adjust their schedule to meet with an adviser. This reduces inconvenience and provides a more convenient and flexible experience.

iv) Increased access to information

By using online technology, users can gain access to sources of information related to Islamic finance. A good platform can provide articles, reference resources, and educational hardware that helps users understand the principles of Islamic finance in depth. This gives them a better awareness of halal financial products and services and adheres to Shariah principles.

In Malaysia, the aspect of Shariah compliance in the Shariah governance was given priority when the Central Bank Act 2009 was enacted. Apart from the acts of Parliament, the Shariah governance system is also supported by the publication of Bank Negara manuals. This is in accordance with the requirements of section 28 of the Islamic Financial Services Act 2013. The statutory role and legal position of the Shariah Advisory Council are intertwined. From the Malaysian legal framework, various legislative reforms for Islamic banking laws have been carried out by the federal legislative power, namely Parliament. The reform is carried out either through the amendment of the provisions of the Act of Parliament or the repeal of the old act and replacing it with a new act. Therefore, the change in the legal context has directly affected the legal position of the Shariah Advisory Council including its statutory role. The Central Bank Act 2009 has recognized the Shariah Advisory Council as the highest and sole authority for the preservation of Islamic law in the Islamic banking system. Improvements to the Islamic banking governance system in the country are always needed to make the Islamic banking industry a competitive sector that can meet banking needs and become a leading alternative to conventional banking especially for Muslims. The main improvements were on aspects of Shariah governance including the establishment of internal guidelines and procedures, the empowerment of Shariah resolutions and public reference authorities. Current technology should be leveraged in particular making easy access to the Shariah Advisory Council.

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