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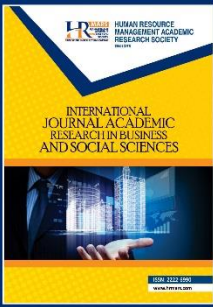
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The Model of *Istinbat* by the Shariah Advisory Council of Central Bank of Malaysia

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Abstract

The dynamism of muamalat affairs and Islamic finance has undergone rapid development, and that it becomes increasingly complex. The Islamic scholars recognize this development as in line with the changing times, in which, the objective of shariah is for the benefit of the human beings. Nevertheless, the nas of the Islamic law is limited while the developments is in advance, which very need the role of ijihad to play its function in dealing with the situation. Notwithstanding the facts, ijihad must be carried out on consistent methodology, so that the shariah resolutions are competitive and trustworthy. Unfortunately, problems occur when the Shariah Advisory Council (SAC) of the Central Bank, the highest governing body established by the law and has the authority in decision-making regarding Islamic finance in Malaysia, does not submit clear rules and procedures in the issuance of shariah resolutions. This has resulted the decision being challenged in court. Hence, this study is aimed at drawing up a specialized istinbat methodology in muamalat affairs and Islamic finance. This study has been done qualitatively by referring to manuscripts of usul al-fiqh, muamalat, Islamic finance, and statutes.

In the findings, the study discovers that there were products approved by the SAC which have been alleged as non-compliant to shariah. This happened because there is no strong legal framework outlined. Therefore, the study attempts to outline a model of istinbat methodology in Islamic banking issues which meets the shariah that can be used as a guideline by the SAC in issuing a resolution.

Keywords: Shariah Advisory Council, Central Bank, *Ijihad*, Shariah Resolution, *Istinbat*

Introduction

The Shariah Advisory Council (SAC) of Central Bank of Malaysia (BNM) is the highest governing body established by the law and the Council has the authority to decide on a binding resolution regarding Islamic finance in Malaysia. The first resolution that was made by the SAC had been issued on 8 July 1997. The resolution have legal effect which binds relevant parties, particularly institutions offering banking products and Islamic financing. The resolution is an important

reference to the court as it functions as an arbitrator in deciding cases related to Islamic finance in Malaysia.

The Shariah Advisory Council

The Shariah Advisory Council (SAC) was established under the Central Bank of Malaysia Act 2009 (Act 701), part VII, Islamic finance business. Section 51 allocates the establishment of Shariah Advisory Council, in which, clause 1 mentions that the Shariah Advisory Council is the authority in charge of determining the *hukm* of Islamic law by means the Islamic financial business. Section 52(1) further allocates the functions of the Shariah Advisory Council, that is, (a) determining the *hukm* of Islamic law on any financial matter and issuing the decision when referred to, in accordance with this Part; (b) advising the Bank on any *shariah* issues relating to Islamic financial business, bank activity or transaction; and (c) giving advise to any Islamic financial institution or any other person as allocated under any written law.

The authority of the SAC is also provided through the Islamic Financial Services Act 2013 (Act 759) which empowers the bank to determine the stand on *shariah* matters, where the bank may follow the decisions of the Shariah Advisory Council in respect of business, affairs or activities which require the determination of Islamic law *hukm*. However, this provision is in general without looking at the process and procedure which leads to the so-called '*Shariah-compliant*' decision (Berita Harian, 2015).

The full authority of the bank in determining the standard of *shariah* compliance may affect the selection of products approved by the BNM Shariah Advisory Council, whereby, the resolution may have tendency to bear the bank profit-gaining rather than the welfare of customers (Hussain et al., 2015). It is also stated by Hamid (2011) in the case of *Mohd Alias Ibrahim (2011)*, whereby, Judge Mohd Zawawi Salleh had touched on Section 51(2) of Act 701 stating that the SAC can determine its own procedures in carrying out its duty in determining the Islamic laws for purposes of the Islamic financial business. This freedom in determining the procedures in the Act is very general that it may be manipulated by the bank emphasizing on profitability rather than the public welfare. Therefore, a restriction of authority need to be outlined in this Act to ensure that the public welfare is secured.

It is therefore sensible for the SAC to outline the procedures in order to ensure transparency in the process of issuing the *hukm* of Islam and to avoid any negative perception of the credibility of the SAC (Hamid, 2011). The absence of procedure in the setting of *hukm* may cause dispute as in the case of *Mohd Alias Ibrahim v. RHB Bank Sdn. Bhd. and the other* [2011] 4 CLJ 654, in which, the latest Act A701 have been tested. In the case, the plaintiff has appealed to the High Court to decide that Section 56 and 57 of Act 701 are invalid because the sections contravened to Article 121(1) of the Federal Constitution which allocate that judicial power lies in the hands of judicial jurisdiction. The plaintiff argued that the existence of Section 56 and 57 of Act 701 has tied the court with the decision of the SAC, and that the SAC has taken over the jurisdiction of the court. The plaintiff had also seek for certainty whether (in the absence of specific provisions allowing the court to delegate its authority to other parties) there is a possibility that the court has been delegated by the SAC to determine the affairs of Islamic

financial business or alternatively, the court has relinquished its jurisdiction to decide to the SAC (Hamid, 2011).

It was believed that the dispute occurred because the plaintiff have not agree to the decision issued by the SAC. Notwithstanding the fact, the dispute can be avoided if the decision followed strictly to the methodology of *usul al-fiqh* which is reliable and trustworthy. Arif et al. (2012) claims that many of the SAC's decisions before the approved Act 701, had often been challenged in court. Consequently, court have no longer referred to the SAC in *shariah* issues due to the assumption that the SAC's decisions are weak and not reliable as in the case of *Affin Bank Bhd. v. Zulkifli Abdullah* [2006] 1 CLJ 438 and *Arab-Malaysian Merchant Bank Bhd. v. Silver Concept Sdn. Bhd.* [2008] 9 CLJ 522'.

In addition, the Acts of 701 and 759 above also show the broad jurisdiction was given to the Shariah Advisory Council in approving *muamalat* product (Hamid, 2011). This may result misrepresentation of the jurisdiction where certain product will be easily approved despite *shariah* issues if the former give more profit to the bank. For instance, the Shariah Advisory Council may claim that its resolution were based on *maslahah*, but the said *maslahah* obviously are leaning more towards the bank rather than public. This is based on a number of cases where only the benefits of the banks were maintained such as in the case of abandoned houses where the parties incurred as a result of the failure of developers are customers who have to pay the bank as financier (Dahlan et al., 2011; Aziz, 2013).

In this case, the Shariah Advisory Council appears to be free to choose whatever product to be approved based on the interest they perceive can be achieved. Thus, in resolving this issue, the concept of *istinbat* has to be appropriately arranged so that the process of legal resolution is in line with the goal of the Islamic law that is to achieve *maqasid al-syariah*.

The SAC Model of *Istinbat* Methodology

The *shariah* resolution is the result of *ijtihad* which are prepared in order to produce *hukm* under the science of *usul al-fiqh*. *Ijtihad* is understood as the work of a *mujtahid* who maximizes all of his mental and intellectual efforts to study and understand the *hukm* of Islamic law. It is an end result that results in a finding or decision which is later known as *fatwa* or *shariah* resolution (al-Ghazali, 1997). The *ijtihad* is possible even though the *mujtahid* only expert in particular aspects, such as Islamic finance (al-Zuhaili 2014).

During *ijtihad* process, al-Qaradawi (1988) encourages *mujtahid* to use the paramount methodology (*manhaj*) that they should be fair, favored the *maqasid al-syariah*, balancing between positives and negatives consequence, balancing between demands and lightness, and in line with the customary practice (*'urf*). This approach is very important to ensure that the resolution is not too heavy (*syadid*) or too light (*taysir*). Additionally, *mujtahids* need to know well about the general principles of Islamic financial management. The first general principle as suggested by al-Muslih (2005) is to comprehend the concept that "the original rule in *muamalat* is permissibility". It is very important to master this principle in order to ensure that any innovation in Islamic finance may flourish as the time changes as long as the Islamic law does not

forbid it. The second general principle to be mastered as suggested by al-Salus (2013) is that *fatwa* in *muamalat* should prioritize both *maslahat* and *illah*. Meanwhile, al-Qaradawi (2012) emphasizes the mastery of the concept of permanence (*thabat*) and changes (*al-murunah*) so that the *mujtahids* are not rigid with the classic *fatwas* and strive to perform *ijtihad* fairly.

The intellectual capacity of *muamalat* regulations is important in producing a *hukm*. This is to avoid tyranny, usury, fraud, *gharar*, *haram*, speculation, and gambling (Abu Zahrah, 1995). In addition of above, *mujtahid* also need to expert on *dalil* of *istinbat* such as al-Quran and al-Hadith and other source of jurisprudence, that is, *ijmak*, *qiyas*, *qawl al-sahabi*, *al-istihsan*, *al-istislah*, *sadd al-dhariah*, *al-'urf*, and *al-istishab*. The above views have nearly agreed upon by majority of the Islamic scholars of *usul* (Asni, 2016; Asni et al., 2017).

Besides that, there are additional qualifications which is *mujtahid* have to understand, that is, the debates on trade and finance as well as on contracts (*akad*) that were discussed among traditional jurist (Al-Bazz, 2007). This is important as modern perspectives somehow have its own distinctiveness compared to traditional practices. Apart from that, *ijtihad* has to be done by a large group of experts in *muamalat* knowledge and Islamic finance so that *fatwa* can be issued collectively (al-Khadimi, 1998). This approach is important because it takes into account all the findings produced by experts, and thus, is more trusted by the stakeholders, incorporating the expertise of various branches in the knowledge of *muamalat* and it is the practice of all authorized *fatwa* bodies worldwide.

Mujtahids should be free from any school of law in their *ijtihad* and it is a must for them to examine and study views of all sects so that the resolutions that were produced can maximize *maslahat* and solve visible problems (al-Marwazi, 2000). This is important because with the rapid development of the world economy, restriction to certain sects will limit the ability to solve problems, unless by looking at various interpretations and views of all *mujtahids* past or present. This method of comparing between the sects is noteworthy in order to pick a stronger view. For example, Redha (1986) had compiled a comparison of *fatwas* on the prohibition of *riba* of the previous and contemporary Islamic scholars, where finally he concluded based on the strong point of *dalil* even though the result is in different of the majority opinion. This approach was revised more systematically by al-Qaradawi (1988), whereby, he acknowledged the method as *al-Tamhis wa al-Tarjih* based on process of analysing *hukm* from (1) general *nass* (a known, or clear, legal injunction), (2) trusted *ijma'* and (3) precise *qiyas* method that based on *maqasid* and *masalih*. Moreover, the *mujtahids* must also possess the highest qualification (Doctor of Philosophy) in *Shariah* from recognized institutions. This is important in order to prove that the individual has been trained to carry out a comprehensive *shariah* study (al-Zuhaili, 2014).

A *mujtahid* cannot simply to decide that certain product as corrupt, illegitimate, illegal, and *batil* without providing reasons as well as providing an alternative way under the Islamic law to overcome the situation (Hammad, 2010). For instance, if a debt-based product brings much risk and *shariah* implications, then an alternative way can be taken by producing more equity-based products (Borhan, 2002).

Possessing high skill in computers software or other technological tools is essential in order to gather informations so that some data could be assembled on time, particularly *muamalat* and finance matters (al-Bazz, 2007). This is important because the quality of *fatwa* depend on the richness of references, such as the *dalil* and its arguments. Besides outstanding in Arabic language, *mujtahid* also obliged to excellent in English (al-Tawijri, 2010) which is now being used worldwide in global financial transactions.

In addition, *mujtahid* also need to master in the Maxim of *Fiqh* (*Qawaid Fiqh*) which were prescribed by Islamic jurist from their comprehension on *nas* and principle of shariah (al-Qaradawi, 2008). Thus, its application in current *muamalat* affairs is unavoidable as *nas* of shariah is limited. Therefore, *mujtahid* needs to be skillful in the maxim of *fiqh* to solve recent issues. The maxims are also constructed based on the Quran, *sunnah*, *ijma'*, *qiyas*, *qawl al-sahabi*, *tabi'in*, *tabi' tabi'in*. Among maxim of *fiqh* in *muamalat* matters, that is, matters that are taken into account in contracts are purpose and meaning, instead of word and form (*al-'ibrah fi al-'uqud li al-maqasid wa al-ma'ani, la li al-alfaz wa al-mabani*), the basic principle of the contract is mutual reconciliation between two parties (*al-asl fi al-'uqud reda al-muta'qidain*), the benefit of the goods with assurance (*al-Kharaj al-daman*), any income or profit produced is based on the risks taken (*al-ghunm bi al-ghurm*), the basic principle in conditions is that allowed by the Islamic law (*al-asl fi al-syurut al-sihhah wa al-luzum*), every conditioned debt is usury (*kullu qard masyrut fahuwa riba*), and matters that have been accepted through *'urf* are the same as matters that have been agreed upon by conditions (*al-ma'ruf 'urfan ka al-masyrut syartan*). Hence, the validation and construction of each *aqad* or contract must be confirmed to ensure that they do not contravene to the methods of *fiqh* (al-Nadwi, 1999).

Furthermore, *mujtahid* must talented in gaining the *maqasid al-syariah*. *Maqasid al-syariah* refers to the objective of *shariah* which is intended to safeguard the benefit of people through formulation of law (Lahsasna, 2013). Thus, the objective to be attained behind the *fatwa* and resolution in the *muamalat* is justice, preservation of assets, *halal*, clarity without any uncertainty, fraud and usury (al-'Askar, 1435H). The law will changed and amended to achieve *maslahat* (public goodness). Therefore for instance, the prohibitions of *tas'ir* (pricing of goods) may be omitted if there is a demand for *maslahat* (Ibn Qayyim, 1428H).

The Islamic scholars also underline steps that must be followed when issuing a *fatwa*. The first step is by using the method of *tasawwur*. *Tasawwur* is an overview on the background of issues in which a *fatwa* was called for (Zaid, 2006). Hence, if *mujtahid* does not get a comprehensive picture of one issue, it may result a *fatwa* to be deviant from the fact. Therefore al-Qahtani (1422H) suggested that *fuqaha* when issuing *fatwas* on *muamalat*, such as insurance products, banking products, stocks as well as financing matters to take into account overall concept of the product, that is, the procedure of its application from the beginning until the end. This is to ascertain the decision taken is in line with the fact of the product.

The next step is by using the method of *takyif*. *Takyif* is the adaptation and matching of problems studied with the existing *fiqh* legal framework (Syibr, 2004). At this stage, *mujtahid* will determined whether the conflicting issue is already have *qat'i* reference or a first-hand issue that

require *ijtihad* (Rahman, 2009). Thus, *mujtahid* will decide on the law (*al-hukm*) as well as the rationalization. *Al-Hukm* is the determination of *hukm* issued by *mujtahid* in accordance with the problems which is known as *fatwa*. However at this stage, Al-Jizani (1996) states that it is not merely a determination of *hukm*, but a problem-solving and setting guidance. Likewise, Al-Qaradawi (1988) compares *mujtahid* as a doctor who treats his patients, whereby, if a doctor does not know profoundly about the problems regarding medical and treatment, the patients will undoubtedly be the victim.

The next step is that the *mujtahid* should anticipate the effects of the *fatwa* that will be issued, and the expectation is known as *i'tibar ma'al* (al-Husen, 2009). It is important to adhere on the method as it can guaranteed an achievement of *maqasid* and *maslahat* towards ummah (Al-Sanusi, 1429H).

The Implications of Neglecting Methodology of *Istinbat*

There are allegations that some products which were approved by SAC are not *shariah* compliance, such as *bay' bithaman ajil (BBA)*, *tawarruq*, and *bay' inah* contracts (Bank Negara Malaysia, 2017). The claims was justified that BBA contracts involve *gharar* and carry elements of *mafsadah/darar*. For instance in the housing contract when developers fail to complete the house, the liability is incurred by the customer. However under the Islamic principles, the banks as property owners have to bear all liabilities incurred including defects or incomplete houses. But in today's practice, the bank is only a financier and not a seller and it excludes its side in bearing liability, which may cause *mafsadah* to customer (Ahmad et al., 2012; Azli et al., 2011).

Gharar also occurred when a customer sells a house based on the concept of beneficial ownership, that is, not a total ownership (*milk naqis*) to the bank and the bank resell the house to customer using the contract of *bay' al-inah*. This beneficial ownership is considered conflicting with the concept of ownership in Islam, and thus, contradicts the *maqasid al-syariah* (Ghani et al., 2016). This matter is based on the modus operandi of BBA contract, that is, customers buy an asset from developers through *Sales and Purchase Agreement (S&P)* by paying a deposit or down payment to the developer as much as 10% and the buyer gets the benefit of ownership of the house. Then, the customer sells the asset that has been purchased from the developer to the bank through the *Property Purchase Agreement (PPA)* with cash price, that is, the cost of the house. Then, the bank settles the balance of 90% of the total amount payable by the buyer to the developer, and the bank has become a joint owner of the house with the buyer. The bank resell the asset to the customer through the *Property Sale Agreement* or *PSA* at a deferred price which includes the cost price of an asset, plus an additional profit margin. When the buyer paid the amount of financing to the bank, the house will became the buyer's absolute property (Dusuki, 2010; Shuib et al., 2013).

Instead of *mafsadah* and *gharar*, the implication of oppression *ad'afan muda'afah* continues via BBA until the majority of Middle Eastern Islamic scholars have banned the contract which own the similar concept of conventional practice (Aris et al., 2012). In addition, the liability obviously took place in the event of early redemption or defiance in instalments, whereby the balance of financing is higher than conventional products. The BBA concept also makes it easier

to offer a very high sales price for the sake of gaining a lot of profits until it exceeds the profits taken by conventional products where customers need to pay four times the original price. Thus, it is unsurprising when people think that the BBA is a reflection of conventional bank products (Aris et al., 2012). In fact, according to Azli et al. (2011), taking too many profits in sales could bring unsound Islamic spirit. Similar implications also occur when the initial payment solution in conventional banks are cheaper than the Islamic banks. This is because if the Islamic banking system imposes profit rate from the original price, as in the system of conventional banks, why is it that when the customer fully settles the debt earlier than the original date, the calculation is not done meticulously to provide benefits to the customer? Thus, the elements of persecution and oppression are still invisible to the Muslim Islamic banking customers and there are among them who felt more burdened in bearing monthly debt than the conventional system (Ahmad et al., 2012).

Another implication is on the issue of fixed usury (*riba*) when the products offered are also linked to the concept of time value of money which has a close relationship with the concept of usury. Although the time value of money is criticized by most Islamic scholars and it is said to be the basis of usury mandatory, the practice of time value of money, particularly in Islamic banking continues to apply, especially in the sale and purchase contract (Khair, 2013; Kahf, 1994). Time value of money is the principle adopted to rationalize the obligations of usury practice in financial activities based on the capitalist system (Khan, 2005). The present main core of the time value of money concept is not of the same value as the value in the future, where the value of money in the future is lower than the present. Therefore, interest or usury is an added value of the capital being loaned so that the value of the payment will be equal to the current value of the capital loaned (Al-Misri, 2001; Rosly, 2007). The Islamic scholars agree that the usury which is prohibited by Allah is *riba jahiliyyah*, but the Islamic scholars' opinion of the definition of *riba jahiliyyah* differ in terms of whether it is an increase of payment due to time postponement or an increase of payment due to the inability to pay upon the term of agreement reached (Al-Jassas, 1992; Ibn 'Ashur, 1984; Hindi, 1984). Based on this definition, sales and purchase postponement with added value to the original price such as *bai' taqsit* is based on *bai' hilah* where it is classified as *riba jahiliyyah*.

Al-Misri (1999) states that an added price which exceeding the original price in sales and purchase postponement during the *aqad* is permissible, but not after the *aqad*. Based on this matter, if the time value of money is acceptable in sales and purchase, there is no difference with usury which also follows the concept of time value of money. Thus, it is unsurprising if any party claims that the permitted and prohibited differences through sales and purchase are merely symbolic aimed at obtaining bank financing. Hence, al-Misri (2001) has likened the concept of BBA to *riba al-nasiah*.

Likewise, according to Khan (2005), the application of the concept of time value of money can lead to the recognition of usury. The recognition can be illustrated when current Islamic scholars do not provide an explanation on why the price of goods through BBA *aqad* is higher than cash prices, while most Islamic scholars reject the concept of time value of money which becomes the grassroots of the existence of usury (Rosly, 2007). Although the concept of time

value of money is a controversial issue, it is widely practised in the products of BBA, *bai' istisna'*, *'inah* and *tawarruq*. The application of this concept has resulted a similarity between the use of mark-up method in increasing principle price as profit through *murabahah* financing and the loan contract adopted by conventional banks. In fact, the economic value offered by conventional banks is far more competitive rather than in the Islamic banks.

The implication of usury also occurred in *al-tawarruq* contract. It is as claimed by Ibn Taimiyyah who quotes Umar bin Abd al-Aziz as saying that the concept of *al-tawarruq* contract is similar to usury transaction (Qasim, 1995). Likewise, it was supported by Ibn al-Qayyim and al-Syaibani (Ibn Qayyim, 1423H). Based on Bahari et al.'s (2014) findings, a majority of middle eastern Islamic scholars reject contracts containing the element of *bai' al-'inah* because it is a trick to usury as contained in *al-tawarruq* contract. Majma' al-Fiqh al-Islami, in its 17th conference have decided that the contract of *al-tawarruq al-munazzam/al-masrafi/al-muassasi* is prohibited (Akademi Fiqh al-Rabitah al-Islami, 2003). Besides that, Khan (2009) states that most bank institutions implement *al-tawarruq* without following the terms and standards set by AAOIFI. This finding is also coincides with Kasmon et al.'s study (2014).

Therefore, it is the duty of the SAC to outline the methodology of *istinbat* which conforms to *syarak* or construct an Islamic financial products which take into consideration an *i'tibar al-ma'al* that is shariah compliance. As a result, the products of Islamic bank will be guaranteed from slipping away from *syarak*, apart from strengthening the customers' confidence as well as bringing *maslahat* and universal justice. This is very important because the products that were produced are carrying the brand of Islam, and thus, the products offered must conform to the *shariah* spirit.

Conclusion

Islam is a religion which emphasizes positive values and wisdom in every task and prohibits any oppression and injustice. This principle ought to be adopted and adapted in all aspects of Muslim life including *muamalat* affairs based on the guidance of Quran and Sunnah. To achieve this objective, the Islamic scholars have outlined a concrete concept in the methodology of *istinbat* to accommodate current developments in *muamalat* and financial matters. Hence, if the methodology is followed closely, the current financial resolutions will be in line with the *maqasid shariah*. But if does not so, the resolutions will be far from *maqasid* as well as keep away of social confidence towards the Islamic banking system. Therefore, in order to avoid a shariah non-compliance products', the study proposes that the draft framework on the methodology of *istinbat* should be underlined clearly and followed by the SAC fairly so that the resolutions produced are parallel with the will of Islam and bring universal *maslahat* for the institution as well as publics.

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