AN OVERVIEW OF LEGISLATIVE CONFLICTS IN MALAYSIAN ISLAMIC BANKING SECTOR BASED ON THE CENTRAL BANK OF MALAYSIA ACT 2009

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Abstract- Malaysia has emerged as the first country to implement a dual banking system whereby an Islamic banking system functions on a parallel basis with the conventional banking system. However, it is perceived that somehow there are conflicts within the banking system itself due to existence of the dual financial system where common law and Islamic law are applied to different group of people and in special circumstances as required by the Federal Constitution of the country. Another issue is that Islamic banking is a concept based on hundred percent Islamic ideologies but when adopted in Malaysia, it is forced to follow certain rules and regulations which are based on the principles of English common law which substantially inconsistent to Islamic law. This has led to clash of court approach as the law applicable to Islamic banking shall be in conformity with Islamic law. Therefore, Islamic banks in Malaysia are facing with the complex task of introducing and developing Islamic banking products which are not only Shariah compliant but also compliant with the existing Acts of Parliament. Hence, the purpose of this article is to specifically determine the legislative conflicts under the Central Bank of Malaysia Act 2009 and to propose several recommendations on how to overcome those conflicts. The findings suggest that there is a pressing need for Malaysian parliament to amend the provision of the Central Bank of Malaysia Act 2009 so that the efficacy of the Malaysian regulatory and supervisory framework for Islamic banking will always be at the top level.

Keywords- common law, conventional banking, Islamic banking, Islamic law, legislative conflict.

I. INTRODUCTION

The first edition of Islamic Economics Conference in 1976 which was held in Saudi Arabia kicked off the academic and research activities in the emerging arena of Islamic banking and finance. In the 1980's, Islamic banking was further expanded to the Islamic countries such as Pakistan, Iran and Sudan. Meanwhile, other countries such as Malaysia and Bahrain have accommodated Islamic banking system parallel to the existing conventional banking system which was based on interest (Monzer, 2004). Later in the 1990's, much attention has been given in creating accounting standards and regulatory frameworks. Furthermore, the attention was also focused on developing the other sectors of Islamic finance such as Islamic equities and sukuk (Islamic bond). The Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) was established and few slamic banking products such as takaful and Islamic insurance have been developed. Besides that, institutions like International Islamic Financial Market (IIFM), Islamic International Rating Agency (IIRA) as well as General Council for Islamic Banks and Islamic Financial Institutions (CIBAFI) have been

introduced to guarantee the sustainable development of Islamic banking and finance in the world (Iqbal & Mirakhor, 1999).

Be that as it may, concerted efforts are not made to develop a new framework in line with the sensibilities towards the role of religion in commercial and financial activities of society and to introduce laws compliant with core Shariah principles, prudential standard requirements for supervision, disclosure requirements for financial statements, corporate governance and transparency requirements, new product development requirement, consumer code of conduct to name a few (Rafay & Sadiq, 2015). Meanwhile Dr. Zeti Akhtar Aziz, the former Governor of the Malaysia Central Bank, stated in her presentation to the 3rd Annual Islamic Finance Summit that well-developed financial infrastructure is an effective legal, regulatory and supervisory framework which would underpin the stability of the financial system (Fouad, 2014). It is also paramount to take into account that Islamic banking system should be Islamic in all aspects. As such, the written legislations which are related to Islamic banking and finance shall be fully complied with Islamic rules rather than following the conventional style of banking.

The phrase of 'legislative conflict' is not easy to be defined and it may not have a universal meaning. Literally, it refers to incompatibility of legislations (Hornby, 2007). For instance, the general law applicable to Islamic banking is Islamic law. However, the current situation is that if Islamic banking transaction is conducted in Malaysia, the related law would be Malaysian law. Hence, it is crucial to examine whether or not there are any conflicts between the existing Malaysian law and the Islamic law of banking and finance. In other words, the phrase of 'legislative conflict' shall be described as the inconsistency between the legislation enacted by the parliament and the actual law which shall be applied to

solve legal issues at hand.

The goal of this article is to systematically explore and critically examine the legislative conflicts facing by the Islamic banking sector in Malaysia based on the Central Bank of Malaysia Act 2009. The Central Bank of Malaysia Act 2009 is relevant to Islamic banking system in Malaysia since most of the legal provisions deal with the Shariah governance structure of Malaysian Islamic financial institutions. The researchers attempt to provide several recommendations on how to overcome those conflicts in the later part of this article.

In the eyes of the law, there is need for law harmonization in Malaysia in order to develop an appropriate legal framework for Islamic banking.

II. LITERATURE REVIEW

In reviewing various literatures, the researchers found that not many writings discuss the specific topic at hand. There is a considerable amount of literature available both on Islamic banking in general and specifically on Islamic banking in Malaysia. However, most of these literatures are focused on either on the emergence of Islamic banking or on the products offered by the Islamic financial institutions.

Muslim et al. (2013) found that Muslim customers establish relationships with Islamic banks because they trust that Islamic banks are Shariah compliant. Meanwhile, Sulaiman et al. (2013) argued that Malaysia as an Islamic country has an outstanding infrastructure to support the establishment of an Islamic banking hub in the Islamic region. Nevertheless, the above authors did not examine the legal provisions related to Islamic banking in Malaysia in order to ascertain whether or not there are compatible with Islamic law of banking and finance.

Ching and Chee (2014) recommended that more empirical studies on customer perceptions towards Islamic banking in Malaysia should be conducted immediately. Without denying the importance of customer perception towards Islamic banking, it is also necessary to do research on Islamic banking from a legal point of view. Nuradli et al. (2013) have explained the historical establishment and provided some evidences of the development of Islamic banking and finance globally as well as in the Malaysian context. Besides that, Asad and Abdul (2015) tried to critically analyse the regulatory and supervisory frameworks that govern Islamic banks in the dual banking systems of Pakistan, Malaysia, Bahrain and the United Kingdom. With all due respect, the above authors also failed to analyse the relevant court cases while discussing the development of Islamic banking and finance in Malaysia.

Therefore, this research will complement the existing literature on the matter by focusing the analysis on the legislative conflicts within the Islamic banking sector in Malaysia based on the Central Bank of Malaysia Act 2009 and related court cases.

III. RESEARCH METHODOLOGY

The researchers opted the doctrinal research concept which falls under legal research methodology whereby it concerns with analysis of the legal doctrine and how it has been developed and applied. It is purely qualitative research and the analytical approach has been utilized to scrutinize the statutory provisions invoked in the reported case law as well as to examine the provisions under the Central Bank of Malaysia Act 2009. In addition, heavy reliance has been made on the related information which is available in journal articles, law reports, legislation and legal texts.

IV. RESULTS & DISCUSSION

The significance of Central Bank of Malaysia Act 2009 to Islamic banking system in Malaysia is that it creates provision to establish the Shariah Advisory Council at Central Bank of Malaysia. Section 52(1) of the Central Bank of Malaysia Act 2009 states that the functions of the Shariah Advisory Council are to ascertain the Islamic law on any financial matter and issue a ruling upon reference made to it in accordance with this Part, to advise the Bank on any Shariah issue relating to Islamic financial business, the activities or transactions of the Bank as well as to provide advice to any Islamic financial institution or any other person as may be provided under any written law. In the case of Mohd Alias Ibrahim v RHB Bank Bhd & Anor (2011), one of the critical issues raised was whether the legal provisions under Section 56 and 57 of the Central Bank of Malaysia Act 2009 are inconsistent with Article 121 of the Federal Constitution. The main reason behind this issue is because when the ruling of the Shariah Advisory Council is made binding on the court, it is conflicting with the constitutional right of the court of law to determine matters related to law. Nevertheless, the court in this case held that those sections are not inconsistent with the Federal Constitution and therefore the Shariah Advisory Council is not overriding the existing function of Malaysian courts.

Apart from that in the case of Tan Sri Abdul Khalid Ibrahim v Bank Islam Malaysia Berhad & Another Cases (2012), the court held that in view of the conflict of opinion of the experts, the trial of the matter is still open and the court is at liberty to refer the Shariah issue in dispute to the Shariah Advisory Council. Regarding the proposition that Tan Sri Khalid has a vested right to lead expert evidence, the court held that this claim is unsustainable as Shariah Advisory Council is a statute-appointed expert who has been given a function to ascertain the Islamic law on any financial matter.

From the above case, it shows that there is need to further expand Section 56 of the Central Bank of

Malaysia Act 2009 by specifying the basis in which the Malaysian courts are bound to the advice given by the Shariah Advisory Council so that it will serve as a complete guidance for the court.

CONCLUSION

To put it laconically, there is need to for a systematic harmonization of the laws to facilitate the sustainable growth of Islamic banking in Malaysia. Having such a comprehensive legislation would at the same time be a platform to eliminate or reduce the legislative conflicts facing by the Islamic banking sector in Malaysia.

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