

**THE APPOINTMENT OF MEMBERS TO THE SHARIAH
ADVISORY COUNCIL OF CENTRAL BANK OF
MALAYSIA: LEGAL ISSUES**

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Abstract: *In Malaysia, the appointment of members to the Shariah Advisory Council (SAC) of the Central Bank of Malaysia (CBM) is prescribed by the Central Bank of Malaysia Act 2009 (Act 701). The Act stipulates the provisions pertaining to the eligible persons to be appointed to the SAC, procedures, terms and conditions of appointment and also remuneration and allowances for the members of the SAC. In this regard, the question arises whether the prescribed provisions are sufficient to regulate the appointment of members to the SAC and free from any shortcomings. Hence, this study sought to analyse the existing legislations governing the appointment of members to the SAC and to analyse the legal issues arising from the existing legislations. By using legal research methodology, this article analysed the entire provisions dealing with the appointment matter. Based on the data collected from statutes passed by the Parliament of and Malaysia published materials, the analytical*

method was used by scrutinizing the related provisions of the law pertaining to the appointment of members to the SAC. This study found that, several loopholes exist in the statutory requirement of the existing law which needs to be addressed by the respective authoritative body in order to avoid any legal conflict in the future. Hence this study is significant in order to strengthen the existing legislation governing the SAC especially related the appointment process.

Keywords: *Shariah advisory council, Shariah advisor, Islamic finance, Islamic law, Central Bank of Malaysia Act 2009.*

Abstrak: *Di Malaysia, pelantikan anggota Majlis Penasihat Syariah (MPS) Bank Negara Malaysia (BNM) ditetapkan oleh Akta Bank Negara Malaysia 2009 (Akta 701). Akta menetapkan peruntukan-peruntukan berkaitan orang yang layak untuk dilantik menganggotai MPS, prosedur, terma dan syarat-syarat pelantikan dan juga saraan dan elain anggota-anggota MPS. Dalam hal ini, persoalan timbul sama ada peruntukan yang ditetapkan memadai untuk mengawal selia pelantikan anggota MPS dan bebas daripada sebarang kekurangan. Kajian ini bertujuan untuk menganalisis undang-undang sedia ada yang mentadbir pelantikan anggota MPS dan untuk menganalisis isu-isu undang-undang yang timbul daripada undang-undang sedia ada. Dengan menggunakan metodologi penyelidikan undang-undang, artikel ini menganalisis keseluruhan peruntukan yang berkaitan urusan pelantikan anggota MPS. Berdasarkan data yang telah kumpul daripada statut-statut yang diluluskan oleh Parlimen Malaysia, kaedah analisis telah digunakan dengan meneliti peruntukan-peruntukan undang-undang yang berkaitan pelantikan anggota MPS. Kajian ini mendapati bahawa, beberapa kelemahan wujud dalam kehendak statut dalam undang-undang sedia ada yang perlu diberi perhatian oleh pihak berkuasa yang berkaitan dalam usaha mengelak daripada berlaku sebarang konflik undang-undang pada masa hadapan. Oleh itu, kajian ini adalah sangat penting untuk mengukuhkan undang-undang sedia ada yang mengawal selia MPS terutamanya berkaitan proses pelantikan.*

Kata kunci: *Majlis Penasihat Syariah, Penasihat Syariah, Kewangan Islam, Undang-undang Islam, Akta Bank Negara Malaysia 2009.*

INTRODUCTION

The *Shariah* Advisory Council (hereinafter referred to as “SAC”) was established by the Central Bank of Malaysia (hereinafter referred to as “CBM”) on 1st May 1997 pursuant to the requirement of the Banking and Financial Institutions Act 1989 (Act 372) (hereinafter referred to as “BAFIA”). In the early days, the establishment of the SAC was based on three objectives. Firstly, the SAC acted as the highest authoritative body to advise the CBM on Islamic banking and *takaful* business in Malaysia. Secondly, the SAC functioned to co-ordinate *Shariah* issues on Islamic banking and financial business. Thirdly, the SAC had a role to analyse and to evaluate *Shariah* aspects of new products or schemes submitted by banking institutions (Bank Negara Negara, 1999). The creation of the SAC as a central *Shariah* advisory board is in line with the intention of the government of Malaysia to streamline and harmonize the *Shariah* interpretations among *Shariah* committees established by Islamic financial institutions in this country (Mohd Lukman bin Abdull Mutalip, 2006; Wan Marhaini Wan Ahmad, 2006).

Regarding the essential role of the SAC, it would be good to quote the statement made by Rohana Yusuf J in the case of *Tan Sri Abdul Khalid Ibrahim v Bank Islam Malaysia Bhd & Another Case* [2010] 4 CLJ 388 which states that:

[18] To my mind there is good reason for having this body. A ruling made by a body given legislative authority will provide certainty, which is a much needed element to ensure business efficacy in a commercial transaction. Taking cognisance that there will always be differences in views and opinions on the *Shariah*, particularly in the area of *muamalat*, there will inevitably be varied opinions on the same subject. This is mainly due to the permissive nature of the religion of Islam in the area of *muamalat*. Such permissive nature is evidenced in the definition of Islamic Banking Business in s. 2 of the Islamic Banking Act 1983 itself. Islamic Banking Business is defined to mean, banking business whose aims and operations do not involve any element which is not prohibited by the Religion of Islam. It is amply clear that this definition is premised on the doctrine of “what is not prohibited will be allowed”. It must be in contemplation of the differences in these views and opinions in the

area of *muamalat* that the legislature deems it fit and necessary to designate the SAC to ascertain the acceptable *Shariaah* position. In fact, it is well accepted that a legitimate and responsible Government under the doctrine of *siyasah-al-Shariah* is allowed to choose, which amongst the conflicting views is to be adopted as a policy, so long as they do not depart from the Quran and Islamic Injunction, for the benefits of the public or the *ummah*. The designation of the SAC is indeed in line with that principle in Islam.

Therefore, the establishment of the SAC as the ultimate authoritative body in the ascertainment of Islamic law pertaining to Islamic financial business in Malaysia is deeply significant. In addition, the establishment of such a council is capable of strengthening the Islamic financial framework in general and the *Shariah* advisory framework in particular.

Since the establishment of the SAC in 1997, the council has been regulated by several statutes beginning with the BAFIA, the Central Bank of Malaysia Act 1958 (Revised 1994) (Act 519) (hereinafter referred to as “Act 519”) and the Central Bank of Malaysia Act 2009 (Act 701) (hereinafter referred to as “CBMA”). In the initial stage, the SAC was regulated by BAFIA. Pursuant to BAFIA, CBM was required to establish SAC which shall consist of such members, and shall have such functions, powers and duties as may be specified by CBM to advise the bank on *Shariah* matters relating to Islamic financial business (Banking and Financial Institutions (Amendment) Act 1996 (Act A954), section 66). BAFIA has provided an essential legal platform for the establishment of the SAC.

In 2004, the regulatory aspect of the SAC was fully placed under Act 519 due to the amendment made by the Central Bank of Malaysia (Amendment) Act 2003 (Act A1213). Act 519 has reinforced the role of the SAC and provided the legal recognition to this body as the highest authoritative body on *Shariah* matters relating to Islamic banking and financial business (Central Bank of Malaysia (Amendment) Act 2003 (Act A1213), Section 4). In the same year, paragraph 124(7)(a) of BAFIA was also amended by the Banking and Financial Institutions (Amendment) Act 2003 (Act A1211), which provided that the SAC be referred to the SAC established under subsection 16B(1) of Act 519 (Banking and Financial Institutions (Amendment) Act 2003 (Act A1211), Section 9).

Section 16B of Act 519 provided certain matters related to the SAC including the establishment, procedure, functions, remuneration and allowances, secretariat to the SAC, requirement of CBM to consult the SAC, reference to the SAC for ruling from a court or arbitrator, request for consultation or reference for a ruling shall be submitted to the Secretariat, effect of *Shariah* ruling made by the SAC and limitation to be appointed as a member of the *Shariah* committee of Islamic financial institutions (Act 519, Section 16B). Beginning 3 September 2009, the SAC was regulated by CBMA. In strengthening the regulatory framework of the SAC, several improvements were made to CBMA.

In relation to the appointment of members to the SAC, CBMA has retained the provision relating to a qualified person to be appointed as the SAC member as well as the qualification needed (CBMA, subsection 53(1), 53(2) and 53(3); Act 519, subsection 16B (2) and 16B (3)). However, there is a difference involving the appointment process. According to Act 519, the SAC members are appointed by the Minister on the recommendation of CBM (Act 519, subsection 16B (2)). However, CBMA stipulates that the SAC members are appointed by the Yang di-Pertuan Agong (the head of state of Malaysia) (hereinafter referred to as “YDPA”) on the advice of the Minister after consultation with CBM (CBMA, subsection 53(1)).

In order to ensure that only qualified persons are appointed as members to the SAC, the Government of Malaysia has inserted several provisions regarding the matter in the CBMA. With the implementation of CBMA, the matters pertaining to the appointment of members to the SAC are enshrined in Section 53. In general, the Section incorporates 4 key points regarding the appointment of the SAC members, i.e. (a) the eligible persons to be appointed to the SAC, (b) the appointment procedures, (c) terms and conditions of appointment and (d) remuneration and allowances for the members of the SAC.

Pursuant to subsection 53(1), CBMA permits two categories of persons to be appointed as SAC members, namely (a) persons who are qualified in the *Shariah*, or (b) persons who have knowledge or experience in the *Shariah* and in banking, finance, law or such other

related disciplines. Qualification in the field of *Shariah* is extremely essential to accommodate such members in deliberating on *Shariah* rulings relating to Islamic financial business. They also become the backbone of the SAC in the ascertainment of Islamic law pertaining to Islamic financial business. Accordingly, knowledge in *Usul al-Fiqh* (Islamic Jurisprudence) and *Fiqh al-Muamalat* (Islamic commercial/transaction law) are deemed extremely needed. Likewise the law allows persons who possess knowledge or experience both in the *Shariah* and in the areas of banking, finance, law or such other related disciplines to be appointed to the SAC. The appointment of such persons is an added advantage to the SAC. They may provide an appropriate input based on their expertise for a sound *Shariah* deliberation by the SAC. Subsection 53(1) also clearly states that the appointment of the SAC member is made by the YDPA on the advice of the Minister of Finance and after consultation with CBM.

Apart from that, subsection 53(2) specifically provides that a judge of the High Court, the Court of Appeal or the Federal Court and a judge of the *Shariah* Appeal Court of any State or Federal Territory may be appointed as a member of the SAC. The permission to appoint those civil court judges seems essential due to the fact that Islamic financial disputes fall under the jurisdiction of the civil courts. Accordingly, such permission enables them to provide their opinions from the legal perspective on applicable laws relating to Islamic financial business such as the contract law. In the meantime, they have the opportunity to deepen their knowledge in Islamic finance which is useful in deciding the Islamic financial disputes tried before them. Meanwhile, the appointment of a judge of the High Court, the Court of Appeal or the Federal Court is subject to prior consultation by CBM with the Chief Justice. In the case of the appointment of a judge of the *Shariah* Appeal Court of any State or Federal Territory, prior consultation by CBM with the Chief *Shariah* Judge of the respective State or Federal Territory, as the case may be, is required as stipulated in subsection 53(2).

Subsection 53(3) of CBMA stipulates that upon being appointed, SAC members shall hold office on such terms as may be provided in their respective letters of appointment. In addition, such members

are also eligible for reappointment upon the expiration of the appointment. In practice, the appointment of such members to SAC is for a period of 3 years.

Finally, subsection 53(4) specifies that the SAC members are entitled to be paid remuneration and allowances. In this regard, the Board of Directors of CBM has the right to determine the remuneration and allowances of the SAC members from the funds of the CBM. Such remuneration and allowances payable to the SAC members are reasonable and in accordance with the functions carried out by them.

Based on the latest provisions of CBMA in dealing with the appointment to the SAC, it seems that the intention of the Government of Malaysia is to equip and strengthen the legal framework of the SAC. However, the question arises, as to what extent the current legislation is sufficient to regulate the appointment to the SAC. Are there any loopholes pursuant to the current legislation which may invite a legal conflict in the future?

By using the legal research methodology, this article will scrutinized the existing legislation in order to discuss the legal issues arising from those relevant provisions. Hence, the following discussion is followed by the literature review, research methodology, findings and finally discussion and conclusion.

LITERATURE REVIEW

Angelo M. Venardos (2005) said that the statutory requirement for the establishment of the Shariah Supervisory Council in Malaysia as stated under the Islamic Banking Act 1983 (Act 276) and BAFIA 1989 has proved to be successful in regulating Islamic banking business in terms of *Shariah* compliance as well as standardization. According to Abdul Rani (2007) the SAC must show that they too, are learned in the field that they are expected to advise upon and this can only be discovered if they have at least written a few publications related to Islamic finance. It is important that a test must be conducted to be eligible to be a member of the SAC. To be qualified is one thing but a working knowledge is equally crucial

when one considers Article 20 of the guidelines on the governance of the *Shariah* Committee for Islamic Financial Institutions. It calls for an impeccable knowledge of both theory and practical.

According to the Central Bank of Malaysia (2009) and the Central Bank of Malaysia (2010) the appointment made by the YDPA reflects the enhanced role of the SAC as the highest authority for the ascertainment of Islamic law for the purposes of Islamic financial business. In this regard, Hakimah Yaacob (2010) states that the law has recognized the level of the SAC to be at parity with a civil judge, since the appointment process is the same. In addition, the appointment mechanism provides a significant platform for uplifting the standard of the SAC to the standard of Civil Court judges while at the same time distinguishing it from them. It should be noted that the appointment of the SAC members is made by the YDPA “on the advice of the Minister after consultation with the Bank”. Accordingly, the appointment is not the sole discretionary power of the YDPA. The words “on the advice of the Minister” and “consultation with the Bank” mean the decision is ultimately that of the Minister-in-charge.

Regarding the remuneration of the SAC, Aishath Muneeza (2012) commented that the law is lacking procedures in determining the remuneration of the SAC members. She suggests that a rule for guidance on this matter could be issued by the regulator and a similar committee could be set up in CBM to determine the remuneration matters of the SAC members in order to preserve their independence in discharging their functions.

Mohammad Azam Hussain, Rusni Hassan and Aznan Hasan (2015) in their work highlighted the development of legislations governing the SAC in Malaysia. They discussed the chronology of legislations governing the SAC since its inception pursuant to BAFIA to the present as prescribed by CBMA. They also comparatively analysed the provisions of CBMA with the previous Act 519 in regulating the SAC. However, that article did not thoroughly discuss the provisions of CBMA in dealing with the appointment of members to the SAC.

Due to limited literature in this regard especially in analyzing the provision of the law in dealing with the appointment to the SAC as

prescribed by CBMA, this article is able to contribute the findings of the research in order to strengthen the legal framework of SAC in general and the appointment to the SAC in particular.

METHODOLOGY

This study adopted a legal research approach. A legal research is a systematic method of exploring, investigating, analyzing and conceptualizing legal issues pertaining to the enforcement mechanisms and the implication of legal rules and principles (Zahraa, 1998). For the purpose of this paper, legal research was used to study the legislations regulating the appointment of members to the SAC. The materials used were largely library-based consisting of primary and secondary data. The primary data was collected from statutes passed by the Parliament of Malaysia, meanwhile the secondary data was based on published materials comprising of books, relevant articles from journals, on-line databases and the Internet. According to Yaqin (2004), legal research usually involves four methods, namely analytical, philosophical, historical and comparative. In this study, the analytical method was used by scrutinizing the related provisions of law pertaining to the appointment of members to the SAC.

FINDINGS

Based on the provisions of CBMA regarding the appointment to the SAC, there are some issues which need to be addressed. In relation to the qualification requirement, several important points need to be scrutinized. First, is the interpretation of the phrase “qualified in the *Shariah*”. Does it refer to the academic qualifications in *Shariah* such as certificate, diploma, degree or higher degree in *Shariah* from recognized higher learning institutions or otherwise? Second, pertains to the religion of the members. Is it restricted to Muslims or are non-Muslims also eligible to be appointed as SAC members, if they have qualifications in *Shariah* such as a degree in *Shariah*

or have knowledge or experience in the *Shariah* and other related disciplines? Thirdly, is the disqualification of the SAC members. In this regard, several questions need to be answered by the law; (a) what is the legal effect if a SAC member fails to perform his/her functions as provided by CBMA? (b) what is the legal effect if a SAC member is convicted of any criminal or civil offence that may tarnish his/her reputation as a SAC member and the SAC as well? (d) what is the legal effect if a SAC member has a relationship with any relevant parties that could interfere or be reasonably perceived to disrupt the member in exercising his/her functions? and (e) are the SAC members subject to any termination during their appointment period?

In relation to subsection 53(2), i.e. the appointment of judges of the *Shariah* court, the provision is that only the judges of the *Shariah* Appeal Court of any State or Federal Territory are eligible to be appointed as SAC members. Does the law only allow *Shariah* Appeal Court judges to be appointed as SAC members? What about the rest of the *Shariah* courts judges, i.e. the *Shariah* High Court and the *Shariah* Subordinate Court? Are they disqualified?

In terms of remuneration and allowances, the question arises, about the methods used by the CBM in determining such remuneration and allowances to be paid to the SAC members? In this regard, CBMA only explains that such remuneration and allowances are determined by the BoD of CBM. Due to that, another question may arise. To what extent would the determination by the BoD of CBM not affect the independence of the SAC members in performing their duties?

The final issue is regarding the composition of the SAC members. CBMA does not specify the number of members who should comprise the SAC at a time. Due to that, CBM has an advantage to determine the necessary number of members in accordance with the functions of the SAC. Nevertheless, it would be better if CBMA determines the minimum number of SAC members of the SAC. In addition, CBMA does not mention the number of members qualified in *Shariah* who should form the SAC. This point is raised due to the function of the SAC which is responsible for the *Shariah* deliberation relating to Islamic financial business. It must be noted that only qualified *Shariah* members are eligible to decide the *Shariah* issues.

DISCUSSION AND RECOMMENDATIONS

Albeit the provision is good by granting discretionary powers to CBM to suggest the qualified persons in the field of *Shariah* to be appointed as SAC members, the stipulation on the minimum academic qualification is deemed essential. A *Shariah* degree from a recognized university is suitable as a benchmark for a minimum academic qualification in the field of *Shariah*, whereas those with a certificate or diploma in *Shariah* can be included under the second category subject to have sufficient knowledge and experience in the area of *Shariah*. In terms of the religion of the SAC members, for the time being, it seems that only Muslims are appointed as SAC members. Luckily, the appointment of SAC members is not open to the public to apply for the position. If not, it may create a legal conflict if a non-Muslim applies to be a member of the SAC. Accordingly, the law must explain in detail the qualification in *Shariah* as well as the specific religion of the persons to be appointed as SAC members. Furthermore, it would be good if the law stipulates additional criteria such as language proficiency in Arabic, English and Malay both written and spoken. Likewise such persons must have reasonable knowledge related to modern banking and finance.

The law also should clearly stipulate the disqualification of SAC members in order to avoid any legal issues if the above situation occurs. The same goes to the cessation of a member of the SAC. The law should also clarify as to who has the power to approve the resignation of any member from his/her position. Similarly, the law should specify who has the authority to take legal actions if CBM wants to terminate the appointment of any member of the SAC. Apart from that, the law should also clearly state the procedures of the cessation of a SAC member.

Regarding the appointment of the judges of the *Shariah* Subordinate Court and the judges of *Shariah* High Court as SAC members, the author is of the opinion that the judges of the *Shariah* Subordinate Court and the judges of the *Shariah* High Court are eligible persons and they are qualified in *Shariah* to be appointed as SAC members. Actually, the appointment of the judges of the *Shariah* Subordinate Courts and the judges of the *Shariah* High Courts

are pursuant to the Administration of Islamic Law Act/Enactment or *Shariah* Court Enactment of the respective states in Malaysia. For example, subsection 44(1) of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) states that, the YDPA may, on the recommendation of the Chief *Shariah* Judge, appoint from amongst members of the general public service of the Federation as judges of the *Shariah* Subordinate Courts. Those judges of the *Shariah* Subordinate Courts are appointed from *Shariah* Officers (Grade LS41) of the general public service. To be appointed as a *Shariah* Officer (Grade LS41), according to the requirement set out by Public Commission of Malaysia, a person shall possess:

- (a) Bachelor of *Shariah* (Honours) recognized by the government from local higher learning institutions or other recognized qualifications equivalent thereto; and
- (b) Diploma in Law and Administration of Islamic Judiciary recognized by the government from the International Islamic University Malaysia or other recognized qualifications equivalent thereto; or
- (c) Bachelor of Law (*Shariah*) (Honours) recognized by the government from the International Islamic University Malaysia or other recognized qualifications equivalent thereto; and
- (d) Pass *Bahasa Melayu* (Malay Language) (including oral test) in the *Sijil Pelajaran Malaysia* (Malaysian Certificate of Education) or other equivalent qualifications recognized by the government.

Meanwhile, pursuant to subsection 43(1) and (2) of Administration of the Islamic Law (Federal Territories) Act 1993 (Act 505), the YDPA may, on the advice of the Minister, after consultation with the *Majlis Agama Islam Wilayah Persekutuan* (Islamic Religious Council of Federal Territory), appoint judges of the *Shariah* High Court provided that:

- (a) he is a citizen, and
- (b) he
 - i. has, for a period of not less than ten years preceding his appointment, been a judge of a *Shariah* Subordinate Court or a *Kathi* or a Registrar or a *Shariah* Prosecutor of a State; or
 - ii. is a person learned in Islamic Law.

Hence the judges of the *Shariah* Subordinate Courts and the judges of the *Shariah* High Courts of the states are eligible persons and qualified in *Shariah* to be appointed as SAC members. In addition, such judges are the individuals who directly deal with cases involving Islamic law within the parameter of Islamic law as enshrined in the Federal Constitution. Even though the Islamic financial disputes are under the jurisdiction of the civil court, it does not indicate that the *Shariah* court judges do not have knowledge of Islamic transaction law.

It is highly recommended that, the judges of the *Shariah* Subordinate Court and the *Shariah* High Court are eligible to be appointed as SAC members. Apart from providing knowledge in the field of Islamic financial business, it is also a platform to equip the *Shariah* court judges in the event the *Shariah* Court is empowered to hear cases involving Islamic banking and finance in the future.

In terms of appointment procedures, even though the appointment of a member of the SAC is not the sole discretionary power of the YDPA, it is not the issue. It is just a procedural matter. In reality, CBM plays an important role in selecting qualified persons to be appointed as SAC members. The appointment made by the YDPA indicates the status and the recognition given to those who are appointed as SAC members. Hence, it can be concluded that CBMA has a clear procedure in the appointment of SAC members.

The remuneration and allowances, payable to the SAC members are reasonable and in accordance with the functions carried out by them. However, it would be good if CBM issues standard rules which specify the methods in determining such remuneration and allowances to be paid to the SAC members. Simultaneously, it may avoid misunderstandings from the public on the level of independence of the SAC in performing its functions.

Finally, regarding the composition of the members of SAC, CBMA needs to determine the number of members qualified in *Shariah* who should comprise the SAC at a time. For example, stating that the majority or two-thirds of the members shall be the qualified persons in the field of *Shariah*. These two things are crucial to be included in the law. Meanwhile the aspects of gender and nationality are not necessary to be fixed. Hence, it will give an advantage to CBM to

appoint qualified persons to the SAC based on gender and nationality. Thus, matters relating to the composition of the members of the SAC should be addressed by CBM as well.

CONCLUSION

In conclusion, it can be observed that CBMA has outlined the qualified individuals as well as the necessary qualifications of the persons to be appointed as SAC members. However, the existing provisions still need explanation and improvement in dealing with the issues raised in the above discussion.

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