ROLES AND RESPONSIBILITIES OF SHARIAH ADVISERS IN MALAYSIAN ISLAMIC CAPITAL MARKET:
AN EPIGRAMMATIC DISCOURSE

By
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Preamble

It should be recognised from the outset that the Islamic Capital Market (ICM) is an anchor component of the overall financial market in Malaysia. In the ICM arena, Malaysia has made tremendous progress as reflected by the increasing issuance of instruments for purpose of fund raising, such as Islamic bonds and Islamic unit trusts, to meet the demands for greater product sophistication of investors and businesses. This has enhanced Malaysia's position as the pioneer and leader in ICM development efforts within the international financial community.

The Malaysian ICM has effectively functioned as an alternative market for capital seekers and providers, at the same time playing an important complementary role to the Islamic banking and Takaful industry. The ICM complements the conventional market by providing value-added services that meet the needs of the market for a broad range of instruments, and have effectively mobilised and channelled funds to fuel economic growth. What has been considered a niche offering is now becoming mainstream. Presently, there is a sufficiently wide array of Shariah-compliant products in the Malaysian capital market to fulfil the needs of investors looking for faith-based investing. These include, amongst others, Shariah-compliant shares, Islamic securities, Islamic risk management products and Shariah-based unit-trust funds.

An ICM refers to a market where the capital market transactions, operations and activities are carried out in ways that do not contravene with Shariah principles and requirements. The emergence of a distinct ICM is part of the outcome of a revival of interest to develop an Islamic economic system and an increasing demand from Muslims on a national and international scale for products and modes of investment that comply with Shariah. Therefore, it is perhaps true to say that the ICM is a kind of faith-based industry, where the market should be liberated from the involvement of prohibited elements of a commercial transaction such as usury (riba), gambling (maysir), ambiguity (gharar), non-halal (prohibited) and immoral activities.

The general perception of ICM is that it prohibits the practice of paying and receiving interest in its activities, and that in actual fact, is not so accurate. Therefore ICM is not just a way of conducting typical capital market business but without being involved in riba. This is a fallacy stems from perception that the system is more-or-less the same

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with its conventional counterpart and also stems from a misapprehension of the moral rationale for ICM. As a matter of fact, the ICM is a unique, dedicated capital market system, which underpinned by the specifically designed capital market instruments, products, services and market activities which adhere to Shariah rules and principles in its entirety. These characteristics make it poles apart in its mechanism and more importantly in its spirit and philosophy from conventional capital market. As such, a core component of the Islamic system of capital market is Shariah compliance. There can be no compromise on Shariah compliance or else the products, instruments or market itself may be reckoned as unacceptable.

Due to the fact that Shariah infrastructure and governance is pivotal to the Malaysian ICM, this article will discuss, in general, the conceptual framework of Shariah advisory, thus defining Shariah advisers and their role as a key feature in Malaysia’s ICM. In particular, as an illustrative discourse, the paper will skim over some of the projected role of the Shariah advisers within the context of the SC’s Guidelines on the Offering of Islamic Securities and Guidelines on Unit Trust Fund. Supplementary epigrammatic exposition and deliberation of the issue will be made on the basis of the classical Islamic jurisprudential disciplines.

**Shariah Advisory and Its Genealogical Antecedents**

The present Shariah advisory establishment is, in actual fact, an establishment closely related to the practical manifestations of three Islamic legal classical institutions namely *ifta’*, *ijtihad* and *hisbah*. Accordingly, before going into further detail about the topic under discussion, it may be appropriate to sketch out these central traditional institutions as a prelude of the discussion.

(i) *Ifta’*

Literally, the Arabic word *fatwa* is derived from the root *fata*, which includes in its semantic field the meanings “youth, newness, clarification, explanation.” Technically *fatwa* is defined as an unbinding legal opinion issued in response to the question of a *mustafti* (inquirer). The act of giving *fatwa* is called *futya* or *ifta*; the person who gives *fatwa*, or is engaged in that profession, is a *mufti*. In the methodological language of Shariah, the word *fatwa* clarifies the Islamic ruling in an answer given to a question or a set of questions usually related to an issue.

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It does not make any distinction whether the questioner is a person or a group of persons.\(^7\) It stands to reason that issuing *fatwa* is not an easy task, but rather an arduous one. This is because the one who commits himself to issuing *fatwas* has acquired religious authority analogous to that exercised by the Prophet. "The *mufti*" writes al-Shatibi, "stands before the Muslim community in the same place as the Prophet stood."\(^8\)

The act of giving fatwa has flourished across time and place in Muslim societies from early in the Islamic era to the present day, contributing vitally to the continuing dynamism of the Shariah. Historically, the concept of *fatwa* in early Islam developed in the framework of a question-and-answer process of communicating information about Islam. Its subject was ‘*ilm* (knowledge) without further specification. Later, *fatwa* came to be associated with *ra’y* (opinion) and *fiqh* (jurisprudence or law). The technical usage of the term was further refined when, after the compilation of legal literature by different schools of Islamic law, the term *fatwa* was used for cases not covered in the *fiqh* books.\(^9\)

Issued by a *mufti* and taking the form of a response to a query, a *fatwa* is a careful and measured opinion embodying an interpretation of the Shariah. The overall significance of the *fatwa* is twofold. *Fatwas*, by leading jurists articulated formal, legal religious views of key doctrinal questions, societal issues, and political events. At this level, *muftis* employed their creative interpretations of the Shariah to grapple with the major continuities and changes in Muslim life. The impact of such interpretations, however, depended on the overall place of the Shariah in their respective societies. On the other hand, the mass of unremarkable fatwa issued by muftis official and unofficial, and of diverse schools and statures, has assisted Muslims from all walks of life in efforts to arrange their affair in accord with the design of the Shariah.\(^10\)

Whereas in pre-modern times *fatwas* commonly were issued by an individual mufti, in modern times they have come to be issued by specialized Shariah committees charged with collective fatwa giving. Institutions with titles such as *Dar al-Ifta’* or *Majlis Fatwa* have appeared in many countries and localities.

**(ii) Ijtihad**

Literally, being a derivation from the root word *jahada*, *ijtihad* means striving or self-exertion in any activity which entails a measure of hardship.\(^11\) Juridically, *ijtihad* principally consists not of physical but of intellectual effort on the part of the jurist. In its technical legal connotation, *ijtihad* is defined as the total expenditure of effort made by jurist in order to infer, with a degree of probability, the rules of Shariah from

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their detailed evidence in the sources. Some scholars have defined *ijtihad* as the application by a jurist of all his faculties either in inferring the rules of Shariah from their sources or in implementing such rules and applying them to particular issues.

The importance of *ijtihad* is so understandable due to the fact that the “non time-bound” nature of Islam as a divinely revealed religion. Its very historicity however, i.e. the manner and the context in which its content was actualized, makes for its continued relevance to the historical situation per se, i.e. wherever events intersect in space and time. The challenge, for the jurist, is to relate its historically relevant propositions, which are inherently timeless in their content or provisions, to the changing contexts and situations “in time”.

The role of *ijtihad* is needed particularly in issues where textual evidence (*nusus*) is absent and it is not an exaggeration to note that except for a relatively limited number of cases where the *Quran* and the *Sunnah* offer ready-formulated legal judgements; the great majority of branch cases (*furu’*) are derived through the mechanism of *ijtihad*. This is justified simply because written texts are limited but the incidents of daily life are unlimited and it is impossible for something infinite to be enclosed by something finite.  

It is important to note that *ijtihad* is not a source of law; the sources in the true sense of the term are the texts of the *Quran* and the *Sunnah*. It is an activity, a struggle, a process to discover the law from the texts and to apply that law to the set of facts awaiting decision. *Ijtihad*, in fact, is a rational elaboration of laws either based on the sources or stipulated through human reasoning and self-exertion. The various sources of Shariah that feature next to the *Quran* and the *Sunnah* are all manifestations of *ijtihad*, such as *ijma’, qiyas, istihsan, istishab, masalih mursalah, sadd al-zara’i’* and are all inter-related, not only under the main heading of *ijtihad*, but also within the interpretation of the *Quran* and the *Sunnah*.

In a nutshell, *ijtihad*, is the instrument that has been given to the Muslim community, along with the *Quran* and the *Sunnah* that guarantees a solution to any problem faced by them at any time. It preserves the dynamism and relevance of Islam.

(iii) *Hisbah*

The word *hisbah* literally means “sum” or “reward”. The verb “*hasaba*” means “to compute”, “to measure”. The verbal form “*ihtasaba*” means “to anticipate a reward in the Hereafter by adding a pious deed to one’s account with Allah.” Technically, it

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connotes the state institution to promote what is proper and forbid what is improper
(al-amr bi al-maʿruf wa al-nahy ‘an al-munkar).

*Hisbah* is a religious institution under the authority of the state that appoints people to
carry out the responsibility of enjoining what is right, whenever people start to neglect
it, and forbidding what is wrong, whenever people start to engage in it. The purpose
of this is to safeguard society from deviance, protect the faith, and ensure the welfare
of the people in both religious and worldly manners according to the Law of Allah.

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The *hisbah* is essentially organized around safeguarding the limits of Allah from
being violated, protecting the honor of the people, and ensuring public safety. It also
includes monitoring the marketplace, craftsmanship, and manufacturing concerns to
make sure that the laws of Islam are upheld by these entities. It must also ensure that
quality standards are maintained. The *hisbah* carries out these responsibilities in
conjunction with the appropriate government agencies and other relevant
establishments.

The *hisbah* institution operationalizes through the function of *muhtasib* whose
responsibilities are almost open-ended in order to implement the foregoing principle:
commanding the good and forbidding the evil of wrongdoing. *muhtasib* and/or his
deputies must enjoy high qualifications of being wise, mature, pious, well-poised,
sane, free, just, empathetic, and learned scholar. He has the ability to ascertain right
from wrong, and the capability to distinguish the permissible (*halal*) from the non-
permissible (*haram*). The *hisbah* carries out these responsibilities in conjunction with
the appropriate government agencies and other relevant establishments.

**Appointment of a Shariah Adviser**

Globally, Muslim scholars have always played a crucial role in the contemporary
movement of Islamic finance and investment. For one, they interpret and analyse the
sources of Islamic law and constitute a link with the vast body of work on commerce
within the Islamic legal tradition. This is crucial in deriving the requirements of
Islamic finance and investment. As a group, they also arrive at collective positions on
contemporary financial issues in representative bodies such as the Organisation of
Islamic Conference (OIC) Islamic Fiqh Academy.

At the national level, Muslim scholars play a major role in the development of the
ICM through, *inter–alia*, their involvement as *Shariah* advisers. At this juncture, one
can distinguish between the ICM and the conventional capital market vis-à-vis the
requirements of the Securities Commission (SC), i.e. appointing *Shariah* advisers
within institutions participating in the ICM. The appointment of *Shariah* advisers is
important to serve as a check and balance, to ensure that the management and
operations of these institutions do not deviate from the Islamic requirements in the
formulation of their products and policies.

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16 Abu Hamid al-Ghazzali (1967), *Ihya ’Ulum al-Di*. Cairo: Mu’assat al-Halabi wa-Shuraka’ihi, 2:
398.


18 Muhammad Faruq Al-Nabhan (1986), *Abhath fi’l-Iqtisad al-Islami*. Beirut: Mu’assasat al-Risalah,
p. 88.
The SC, in this regard, has addressed the development of the ICM from two fronts, i.e. establishing the necessary support infrastructure and widening the product base. In the area of infrastructure, the SC has established the ICM department and the Shariah Advisory Council (SAC) to support its work. This department comprises researchers trained in fiqh muamalat and also capital market practitioners, to undertake research in product origination and ICM operations. The SC is committed to building up knowledge in fiqh and skill in the deduction and extraction of Shariah rulings from the text so that this discipline can be fully appreciated and incorporated into all aspects of market regulation and development.

At the forefront of the ICM, the SAC, which comprises renowned fiqh scholars, together with key market participants of the Islamic financial market and academics, advises the SC on Shariah-compliance matters in all aspects of ICM operations. This council has been given the mandate to ensure that the functioning of the ICM complies with Shariah requirements. In principle, its scope of jurisdiction is to advise the SC on all matters related to the comprehensive development of the ICM, and function as a reference centre for issues related to the ICM. Being an apex body, the council standardises Shariah rulings on similar issues - to provide greater certainty and confidence to the financial institutions as well as to investors and consumers.

Qualification of Shariah Adviser

Many Muslim scholars maintain that, ideally, for a person to qualify as a Shariah adviser, he must be a mujtahid; to reach the rank of mujtahid, an encompassing knowledge of legal reasoning is a pre-requisite. Thus, it is obvious that not every individual has the right to issue opinions/advice and make pronouncements on Shariah-related matters. The Shariah demands that the person eligible to issue opinions/advice to be fully qualified and to have satisfied all the necessary conditions imposed by the Shariah.

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21 “Ask those who recall, if you know not” (Al-Qur’an, 16:43), and “If they had referred it to the Messenger and to those of authority among them, then those of them whose task it is to find it out would have known the matter” (Al-Qur’an, 4:83), in which the phrase those of them whose task it is to find it out, expresses the words “alladhina yastanbitunahu minhum”, referring to those possessing the capacity to draw inferences directly from the evidence, which in Arabic is called istinbat. These and other verses and hadiths oblige the believer, who is not at the level of istinbat or directly deriving rulings from the Quran and hadith, to ask and follow someone in such rulings who is at this level. It is not difficult to see why Allah has obliged us to ask experts, for if each of us were personally responsible for evaluating all the primary texts relating to each question, a lifetime of study would hardly be enough for it, and one would either have to give up earning a living or give up one’s Din, which is why Allah says in Surah al-Tawbah, in the context of jihad: “Not all of the believers should go to fight. Of every section of them, why does not one part alone go forth, that the rest may gain knowledge of the religion and admonish their people when they return, that perhaps they may take warning” (Al-Qur’an, 9:122).
Looking at the present scenario, it is rather difficult to find a mujtahid; however, the appointing authority should try to appoint the best-qualified and trained person as a Shariah adviser.

As a general rule, three qualities are pre-requisites for a person to be a Shariah adviser:

1. A deep understanding of the objectives (maqasid) of the Shariah, its classifications and priorities.\(^22\)

2. Real mastery of the different methods of deduction and extraction (istinbat) based on knowledge and understanding.\(^23\) This needs lengthy experience and practice, knowledge of the various branches of fiqh and where to look for information, knowledge of the opinions of the scholars and jurists, and the records of these committed to memory.

3. Knowledge and awareness of the problems in daily life and contemporary issues.\(^24\)

Therefore, it is important that the Shariah advisers shall at least have qualifications or possess the necessary knowledge, expertise and experience in the following areas:

(i) Islamic jurisprudence (Usul al-Fiqh)\(^25\)

(ii) Islamic transactions/commercial laws (Fiqh al-Mu'amalat)\(^26\)

However, as the industry moves wider and deeper into the complexities of the economic system, there would naturally be many issues which might be beyond the grasp and comprehension of the individual Shariah adviser. Therefore, the task of Shariah-advising should be done institutionally on a collective basis by scholars of all

\(^22\) Yusuf Hamid al-'Alim stresses that the jurists unanimously agreed that the main objectives of the Shariah of Islam is the protection and promotion of the well-being of human beings (Al-Maslahah al-'Ammah li'l-'Ibad) in protecting five basic categories: (1) religion; (2) human life; (3) human honour and dignity; (4) human lineage; and (5) wealth and property. See Yusuf Hamid al-'Alim (1993), al-Maqasid al-'Ammah li'l-Shari'ah al-Islamiyyah. Riyadh: Dar al-'Alamiyyah li'l-Kitab al-Islami, p. 80.

\(^23\) A Shariah adviser has to be able to know the evidence, the wording and the apparent meaning of the texts, what is Sahih (authentic) and what is Da'if (weak), al-Nasikh wa'l-Mansukh (the abrogating and the abrogated), what is specific in application and what is general, and what is stated in brief and what is mentioned in detail.

\(^24\) Imam Ahmad (may Allah be pleased with him) said that the one nominated to hold the position of Shariah adviser should possess the following characteristics: he should have a pure intention to guide the questioner and never to misguide him; he should have deep insight, equanimity and tranquility; he should have a firm religious background and deep knowledge; he should have adequate means to earn his livelihood; he should be attentive to his community matters. See Hasbullah Ali (1997), Usul al-Tashri' al-Islami. Cairo: Dar al-Fikr al-'Arabi, pp. 89-90.

\(^25\) The exemplary role of Usul al-Fiqh in ICM has been discussed by Dato’ Hassan Haji Ahmad in his paper “Meninjau Kaedah Shariah dalam Menilai Sekuriti Tersebar” , Kolokium Pasaran Modal Islam, organised by Securities Commission, 28th Mac 2002, Kuala Lumpur.

\(^26\) The exemplary role of Fiqh Mu'amalat in ICM has been discussed by Suhaimi Mohd Yusoff in his paper “Penyelidikan Shariah dalam Pasaran Modal” , Kolokium Pasaran Modal Islam, organised by Securities Commission, 28th Mac 2002, Kuala Lumpur.
schools of fiqh, law, hadith, tafsir and social sciences.\textsuperscript{27} A close rapport and collaboration between the Shariah advisers, the practitioners and other related parties is also inevitable. This kind of synergistic collaboration will help to provide a proper focus and perspective on the issues under investigation.\textsuperscript{28}

**Shariah Adviser: Roles and Scope of Responsibilities**

It can be said that the Shariah advisers have both supervisory and consultancy functions. Since they shoulder great responsibility, it is of utmost importance that only high-calibre scholars are appointed.

Categorically, the overall applications of the Shariah by Shariah advisers have a two-fold objective. First, the Shariah advisers review the operations of the institutions participating in the ICM, ensuring that they comply with the requirements of the Shariah. This is, to a large extent, equivalent to an investigatory role. Second, in the increasingly complex and sophisticated world of modern and dynamic Islamic finance, the Shariah advisers shall endeavour to answer any issues or concerns for a particular transaction or product conformation with the Shariah, and, where deemed necessary, offer constructive, creative and/or alternative recommendations.\textsuperscript{29}

Institutions participating in the ICM are required to establish operating policies and procedures to ensure that their activities, investments or operations are undertaken in line with Shariah requirements.\textsuperscript{30}

Shariah advisers are expected to participate and engage themselves actively in deliberating the Shariah issues put before them. Amongst the duties and responsibilities of the Shariah adviser that are prevalent in the ICM are as follows:

\begin{itemize}
  \item[a)] \textbf{Review}\textsuperscript{31} the products and services to ensure conformity with Shariah requirements
\end{itemize}

As an example, in the unit-trust industry, the Shariah advisers are responsible for ensuring that the funds they oversee are managed and administered in accordance with the principles of the Shariah. This also includes the responsibility to provide expertise and guidance to the unit-trust management companies and fund managers in all matters relating to the principles of the

\textsuperscript{27} Al-‘Alwani proposes three Islamic requirements to base the \textit{ijtihad} in economics. The first is \textit{tawhid}, the second is \textit{tazkiyah} (purification of man and society) and the third is \textit{’umran} (building of civilization). For further discussion, see Taha Jabir al-‘Alwani (1997), “The Role of Islamic Ijtihad in the Regulation and Correction of Capital Markets,” \textit{American Journal of Islamic Social Sciences}, 14, pp. 39-66.


\textsuperscript{30} Ibid.

Shariah pertaining to the fund, including the trust deed, the prospectus, the investments of the fund and other operational and administrative matters.

b) Review and endorse relevant documents

In order to be Shariah-compliant, ICM products and services need to undergo a pre-defined vetting and endorsement process\(^\text{32}\) by Shariah advisers. A quick check with the guidelines on Islamic securities issued by the SC\(^\text{33}\) reveals that the Shariah adviser’s role is to advise on all aspects of Islamic securities, including documentation, structuring, investment as well as other administrative and operational matters and to ensure compliance with applicable Shariah principles and relevant resolutions, on top of the rulings made by the SAC from time to time. In the course of reviewing and endorsing the documentation, it has been observed that “no other person is competent enough to ensure that the documentation conforms and is consistent with the contemplated Shariah transaction”\(^\text{34}\) other than the Shariah adviser.

c) Supervise investments made by the institutions in the ICM

Another integral role of the Shariah adviser is to supervise and ensure that the investments made by these institutions, particularly in the unit-trust industry, comply with the Shariah. In this case, the Shariah adviser must ensure that the fund managers invest only in securities classified as Shariah-approved by the SAC of the SC.

d) Deliberate on Shariah issues pertaining to the day-to-day operations of the institutions and provide advice accordingly

In the day-to-day operations of these institutions, there are various Shariah issues that the practitioners will come across, particularly those with regard to the practice and implementation of financial transactions. These issues are usually not covered by text books or the theoretical framework of a particular transaction. Thus, Shariah advisers are compelled to understand and resolve these issues. By and large, this requires them to be closely involved with the actual practice and implementation side, as this would give them a more comprehensive and deeper understanding of the issues that they are dealing with.

e) Conduct research and development of new products

As the financial system advances, the need to compete, not only with the existing but also upcoming conventional products, requires Shariah advisers to

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\(^{32}\) This role has been discussed quite extensively by DeLorenzo in the context of Islamic mutual fund. See Yusuf Talal Delorenzo (2000), “Shari’ah Supervision of Islamic Mutual Funds”, 4th Annual Harvard Forum on Islamic Finance, 30th September 2000, Harvard University, pp. 7-11.

\(^{33}\) “Guidelines on the Offering of Islamic Securities”, 26th July 2004, Securities Commission, no. 6.01.

develop or approve innovative new products which are competitive and acceptable to all.

By general observation, the more complex areas which demand better alternatives which are permissible by the Shariah are risk management, hedging tools, derivatives and hybrid financing facilities. When Shariah advisers are equipped with the essentials of both the fiqh and the muamalat, especially concerning capital and asset management, they are primed to churn out more constructive ideas towards developing creative financial products.

f) Provide training and education on muamalat based on Shariah contracts

In the course of developing the ICM, its dynamic nature is not meant to be complacent. The large, growing pool of Islamic-finance practitioners must be well informed and systematically educated to prepare them with the necessary knowledge in running Islamic financing activities. The dissemination process must be continuous, to train as many practitioners as possible so as to provide lines of successors who are well trained prior to succeeding their superiors. Since the Shariah advisers are those who possess the right knowledge in muamalat, it is pertinent that they lead the way in imparting knowledge to these practitioners as well as society. This is vital towards achieving a true and accurate understanding of the Shariah and the application of the contracts in muamalat.  

(g) Assist related parties on Shariah matters and provide advice upon request

The related parties of the institutions in the ICM, such as their legal counsels, auditors and consultants, may seek advice on Shariah matters from the Shariah advisers, who are expected to provide the necessary assistance so that full compliance with Shariah principles can be assured.

Over and above this, they must also explain the Shariah issues and the recommendations offered for a particular decision. This, however, must be supported by the relevant Shariah jurisprudential literature from established sources. The Shariah adviser is also expected to assist the SAC on any matter referred by the institutions within the ICM. Upon obtaining advice from the SAC, the Shariah adviser shall ensure that all the SAC’s decisions are properly implemented by these institutions.  

Conclusion

It is clear that the Shariah advisers play a very important role in the development of the Malaysian ICM. They shoulder a heavy responsibility and accountability, not only

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35 IBFIM has played part of this role since its inception.
to the management of these institutions and the public, but also towards Allah, the Legislator of the Divine laws.

Our quest to develop a dynamic Islamic financial system would definitely be stunted should we fail to recognise the importance of the Shariah’s advisory role. With this in mind, we must take all the correct steps and measures to chart the overall progress, and to nurture more Shariah advisers while preparing the right framework for them to contribute towards the development of the ICM, together with the market practitioners as well as the regulators.