

SHARIAH AND LEGAL FRAMEWORKS OF THE SHARIAH
COMMITTEE IN THE ISLAMIC FINANCIAL INSTITUTIONS IN
MALAYSIA

(PPPP (M) / 2004)

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JULY 2006

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RESEARCH REPORT

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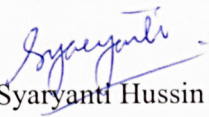
AUTHOR DECLARATION




We hereby declare that the work in this research is our own except for quotations and summaries which have been duly acknowledged.

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In the name of *Allah subhanahu wa ta'ala*, The Most Compassionate, The Most Merciful. All praise be to Allah who is Most Praiseworthy, Most High, May His peace and blessings be upon our beloved Prophet Muhammad *salla Allah 'alayh wa sallam* and upon his family, His companion and all his sincere followers after them.

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ABSTRAK

Perkembangan perbankan Islam dan sektor kewangan di Malaysia memerlukan sokongan infrastruktur yang baik. Salah satu bentuk sokongan yang penting ialah kewujudan Jawatankuasa Syariah. Untuk itu, tadbir urus Jawatankuasa Syariah yang sempurna merupakan intipati penting yang menentukan keharmonian perkembangan perbankan Islam dan sektor kewangan di Malaysia. Jawatankuasa Syariah biasanya terdiri dari cendekiawan –cendekiawan ilmu fikah, pengamal undang-undang and ahli akademik yang mempunyai ilmu dan kepakaran untuk menasihati institusi kewangan didalam bidang Syariah dan memastikan kehendak Syariah dipatuhi didalam setiap produk dan operasi. Kajian ini bertujuan melihat rangka kerja undang-undang mengenai Jawatankuasa Syariah di institusi-institusi kewangan di Malaysia dengan merujuk kepada sumber-sumber seperti peruntukan undang-undang ,buku panduan dan prosedur oleh Bank Negara Malaysia dan juga termasuklah informasi yang didapati melalui kaedah kaji selidik. Sungguhpun Malaysia sudah mencapai tahap yang membanggakan dalam pelaksanaan perbankan Islam dan takaful, kajian ini menawarkan beberapa cadangan dan saranan untuk penambahbaikan.

ABSTRACT

The development of Islamic banking and finance sector in Malaysia needs support infrastructure and one of the most important structures is the Shariah Committee. Good governance of the Shariah Committee is the very essence in the development of Islamic banking and finance sector in Malaysia. The Shariah Committee normally consists of *fiqh* scholars, practitioners and academicians with knowledge and expertise in Islamic jurisprudence in order to advise Islamic financial institutions on the shariah compliance in all aspects and its operations. This research explores the shariah and legal frameworks of the Shariah Committee of Islamic financial institution in Malaysia with reference to the relevant statutory legislation, Central Bank of Malaysia's Guidelines and Procedures including interviews with the practitioners and distributing questionnaires. It is submitted that Malaysia has set up an effective frameworks in the implementation of Islamic banking and finance and this research offers some recommendations for further improvement.

ملخص البحث

إن تطور البنوك الإسلامية وقطاع التمويل في ماليزيا بحاجة إلى دعم البنى التحتية، وإحدى أهم تلك الجهات لجنة خبراء الشريعة. إن حسن إدارة لجنة خبراء الشريعة هو جوهرى لتطوير البنوك الإسلامية وقطاع التمويل في ماليزيا. في العادة، يتكون لجنة خبراء الشريعة من الفقهاء، وأصحاب المهن والأكاديميين ذوي الخبرات والمعرفة في أصول الشريعة الإسلامية، وذلك لأجل تقديم النصح لمؤسسات التمويل الإسلامية بما ينسجم والشريعة في المجالات جميعها وعملياتها. يتطرق هذا البحث إلى الشريعة والإطار القانوني للجنة خبراء الشريعة لمؤسسات التمويل الإسلامية في ماليزيا إضافة إلى القوانين المناسبة وتشريعاته، ودليل وسياقات عمل البنك المركزي الماليزي، وإضافة إلى المقابلات مع المتخصصين أو أصحاب المهن وتوزيع الاستبيانات. لقد ثبت من خلال البحث أن ماليزيا قد أقامت الهيكلية لتطبيق البنوك الإسلامية ونظم التمويل، وقد تضمن البحث بعض التوصيات لأجل المزيد من التحسينات.

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GLOSARY

<i>Al-Qur'an</i>	the Holy book revealed by Allah SWT to Prophet Muhammad SAW
<i>Al-Sunnah</i>	The legal way or ways, orders, acts, of worship and statements of the Prophet SAW, that have become models to be followed by the Muslim
<i>Aqad</i>	The contract between persons in transaction
<i>Ijtihad</i>	The exercise of deduction of legal rulings from the detailed sources in the Shariah
<i>Istihsan</i>	To depart from a legal precedent due to a reason that is more appealing or just (equitable recognize).
<i>Maqasid al-Shari'ah</i>	Objectives of Islamic Law means recognizing the objectives of Islamic law, such as, the need to safeguard the five fundamentals of life according to Islam, life, religion, intellect, property and lineage, according to three main priorities, <i>daruriyyat</i> (dire necessity), <i>hajiyyat</i> (general needs) and <i>tahsiniyyat</i> (complementary needs)
Shariah	transliteration <i>Shari'ah</i> ; divinely revealed law, identified by its primary sources, <i>Al-Qur'an</i> , <i>sunnah</i> , <i>ijma'</i> and <i>qiyas</i>
<i>Usul Fiqh</i>	The methodologies for the derivation of legal rulings from their detailed sources or evidences.

ABBREVIATIONS

AS	ʿalayh al-salām
BAFIA	Banking and Financial Institutions Act 1989
BIMB	Bank Islam Malaysia Berhad
BMMB	Bank Muamalat Malaysia Berhad
BNM	Bank Negara Malaysia
CBA	Central Bank Act 1958
Comp	Compiler /compiled by
IBA 1983	Islamic Banking Act 1983
IBBM	Institut Bank-Bank Malaysia
LOFSA	Labuan Offshore Financial Services Authority
M	Miladiyyah
n.d	no date/ no year
n.pl.	no place
n.pb.	no publisher
p.	page
pp.	pages
RA	radiya Allāh ʿanhu / ʿanhā / ʿanhum
Rev.	review / revision of
RM	Ringgit Malaysia
SAW	Salla Allāh ʿalayh wa sallam
SWT	Subhānahu wa taʿāla

CHAPTER 1

RESEARCH BACKGROUND

1.0 Introduction

Malaysia is now the 18th largest trading nation in the world and respected as the model of Islamic and developing country, which is progressive and successful. It is noted that Malaysia's aspiration is to transform the country into the "Global Halal Hub" and one of the efforts is through the development of the Islamic banking and takaful industry.

The development of the Islamic banking and takaful industry needs support infrastructure and one of the most important structure is the establishment of the **Shariah Committee** (hereinafter referred to as "the SC"). The SC normally consists of *fiqh* scholars, practitioners and academicians in order to advise banks and takaful operators on the Shariah compliance in all aspects of the Islamic banking and takaful operations.

This research will contribute significantly towards the development of the Islamic banking and takaful industry through analyzing and strengthening the Shariah and legal frameworks and also roles of the Shariah Committee.

In order to examine and describe the preceding discussion, the study is classified into five chapters. Chapter One presents the background and the significance of the study. Chapter Two concerns with Shariah Committee in brief. Chapter Three discusses on the regulatory and legal frameworks of the SC, latest developments on the regulatory framework, statutory requirements for members of the SC and its effects to the SC's management and affairs. This research will study on the exact position of the resolutions of the SC in the eyes of law. Chapter Four focuses on the Shariah frameworks of the SC. In this chapter the study will touch on the methodology (*Manhaj*) used by the SC in making their rulings or resolutions. This chapter also concerns with the challenges faced by the SC with reference to the issue of

globalisation and the development of Islamic banking industry. Finally, Chapter Five presents the conclusion and some recommendations from the research.

1.1 Statement of Problem

In 2003, Malaysia had 11 domestic and 13 foreign commercial banks which operated through a network of 1,634 branches, 10 merchant banks provide a wide range of services. Malaysia has also 6 local Islamic Banks, 3 foreign Islamic Banks including more than 10 Islamic banking scheme banks and these numbers keep increasing from time to time¹. As at June 2004 the Islamic Banking assets in Malaysia has amounted to RM89 billion, accounting for 9.9 per cent of total banking asset. The establishment of the Shariah Committee is a statutory requirement to all banks and takaful operators which offer Islamic banking and takaful products pursuant to section 3 (5) (b) of the Islamic Banking Act 1983 (IBA 1983) for Islamic banks, section 124 (7) of the Banking and Financial Institution Act 1989 (BAFIA 1989) for Islamic banking scheme banks, Takaful Act 1984 (TA 1984) for takaful operators and section 16B of the Central Bank Act 1958 (CBA 1958) for Central Bank of Malaysia.

The main objective of the establishment of the Shariah Committee is to advise the Islamic financial institutions on any Shariah matter and also to ensure compliance with the Shariah tenets and requirements in their operations. Section 3 (5)(b) of IBA provides that the Central Bank shall not recommend the grant of a license, and the Minister shall not grant a license, unless he is satisfied that there is, in the articles of association of the bank concerned, provision for the establishment of a Syariah advisory body. Section 124 (7) of the BAFIA 1989 provides for the establishment of a Syariah Advisory Council to advise the Bank Negara on the Syariah relating to Islamic banking business or Islamic financial business. Section 8 3(a) of the TA 1984 states that a Religious Supervisory Council, whose members would be made up of Muslim religious scholars in the country, shall be established to advise the Company on the operations of its takaful business in order to ensure that they do not involve any element which is not approved by the Religion of Islam. Section 16B (1) of the CBA 1958 provides that the Bank may establish a Syariah Advisory Council which shall be

¹ *Halal Malaysia, Islamic Capital Market and Financial Services*, YADIM, Kuala Lumpur, 2003

the authority for the ascertainment of Islamic law for the purposes of Islamic banking business, takaful business, Islamic financial business, Islamic development financial business, or any other business which is based on Shariah principles and is supervised and regulated by the Central Bank. Based on those provisions it is understood that the statutory functions of the Shariah advisory body are to advise the Islamic financial institutions on Shariah matters and to ensure that their operations do not involve any element, which is not approved by the religion of Islam.

Even though the above provisions provide the regulatory frameworks for the establishment of the Shariah Committee but the legal ambit of those provisions is not clear. It does not state anywhere the effect and the legal standing of the decisions of the Syariah Advisory Council if it is in conflict with the decisions of the Court or with the *fatwa* of Mufti or Majlis Fatwa Kebangsaan. The researcher is of the view that the existing provisions in the above acts are inadequate. The frameworks are not clear and ambiguous. Certain sections of the Acts give rise to some legally interesting and intriguing issues. There are loopholes or lacunae in law and it requires a lot of interpretation, which is open to be challenged in Court.

For instance, section 2 of the Islamic Banking Act defines "Islamic banking business" as "banking business whose aims and operations do not involve any element, which is not approved by the Religion of Islam". The term "banking business" is not defined and the IBA does not stipulate how that term is to be understood in the context of Islamic banking.

The definition of "Islamic banking business as banking business whose aims and operations do not involve any element which is not approved by the Religion of Islam"² in the IBA leads to various interpretation. There are two main branches of schools (*Madhhab*) in Islamic jurisprudence, namely the *Sunniyy* branch and the *Shi'ah* branch. Within the *Sunniyy* there are four *madhahib*, i.e the *Shafi'yy*, the *Hanafiyy*, the *Malikiyy* and the *Hanbaliyy* schools. The *Hanafiyy* school was known as the most prominent school in the area of *muamalat* and transaction. These *madhahib* vary on many aspects of the Islamic law.

² Section 2, Islamic Banking Act 1983 (Act 276)

In Malaysia, the problem of differences of opinions amongst the *madhahib* is not so significant. However, this issue may affect the Islamic Banking operations in Malaysia when international entities such as Kuwait Finance House, Saudi Arabia's Al Rajhi Banking & Investment Corporation and a consortium led by Qatar Islamic Bank Al Rajhi established their Islamic Banks here. All those companies come from different Muslim countries and are practicing different *madhhab*. The IBA does not describe which *madhhab* is applicable and the definition of Islamic banking business is too general.

An illustration for this point is the status of the controversial *Bay' Al-'Inah* products. It is widely used by the Islamic banks in Malaysia to meet the need of Personal Financing and Credit Cards. Products like *Bay' Bithaman Ajil* for Home Financing is also actually operated based on the principle of *Bay' Al-'Inah*. *Bay' Al-'Inah* concept is not acceptable by many *fuqaha'* (scholars) in the Middle East and the only *madhhab* which allows such practices is the *Syafi'iy* school. What will happen if these foreign Islamic Banks declare that the *Bay' Al-'Inah* product is *haram* and forbidden? This will lead to many negative impacts and bad image to the development of the Islamic banking in Malaysia.

Therefore, this research will focus on the legal and Shariah frameworks of the Shariah committee. The researcher will study the methodology (*manhaj*) used by the Shariah committee and their approaches to the different schools of Islamic jurisprudence (*madhhab*) in making any resolution or ruling. This study will also attempt to discuss the legal standing of any ruling or resolution of the Shariah committee if it conflicts with the decisions of the Court or Mufti, Majlis Fatwa Kebangsaan or amongst the Banks' Shariah committee themselves. This study will find out whether the legislations which regulate the establishment of Shariah committee is sufficient and effective enough to promote Shariah compliance of the Islamic banking and takaful operations. This research may suggest some solutions and recommendations in order to ensure more efficient and progressive Shariah compliance Islamic banking and takaful operations in the country.

1.2 Research Questions

The study is conducted in order to answer all of the following formulated research questions. Firstly, what are the exact Shariah and legal frameworks of the Shariah committee? Secondly, how does it affect the development of the Islamic Financial System in Malaysia? Thirdly, what is the methodology used by Shariah committee in promulgating legal rulings? Fourthly, what are the latest developments of the structure of the Shariah Committee, the challenges faced by them and its effect to the Islamic banking and takaful Industry? Fifth, what are the solutions and recommendations? The findings from the research questions will enable the researchers to meet the objective and purpose of the study.

1.3 Scope of the Study

The scope of this study is limited to the legal and Shariah frameworks of the Shariah committees in Malaysia. This research investigates the regulatory framework, practices, procedures, methodology (*manhaj*), any controversial issue involved and the latest developments of the Shariah committees, which will affect the Islamic banking and takaful industry. In addition the study also explores the effectiveness of the management and governance of the Shariah Committee. It is hoped that the findings, suggestions and analysis of this research will further enhance the growth of Islamic banking and takaful industry in Malaysia.

1.4 Purpose of the Study.

There are several reasons that have led the researcher to conduct this study.

- (a) The study was attempted in finding out the exact legal and Shariah frameworks of the Shariah committee of the Islamic financial institutions in Malaysia.
- (b) To study the methodology used by the Shariah Committee in promulgating any ruling on Shariah issues and their approaches to the difference of opinions amongst the schools of Islamic jurisprudence.

- (c) To find out the perception of the effectiveness of the Shariah and regulatory frameworks of the Shariah Committee in ensuring the Shariah compliances of the Islamic Banking operations.
- (d) The researchers' aim is to offer some suggested recommendations and it is hoped that the result of this study will contribute significantly to the development of the Islamic banking and takaful industry in the context of the Shariah Committee.

1.5 Hypothesis

Malaysia has a set of regulatory frameworks to regulate the establishment of the Shariah Committee in the Islamic financial institutions. There are loopholes and weaknesses on the existing syariah and legal frameworks of the Shariah Committee in Malaysia.

1.6 Definition of Terms

In this study, the research provides definition of some terms, which will be very helpful in facilitating the readers in comprehending the flow and nature of the study.

Legal frameworks:

In the Concise Oxford Dictionary, legal is referred as anything, which is based on law or required by law. Law can be defined as rule either statutory legislation or principles of law laid down in the reported cases established by authority (parliament) or custom regulating the behavior of members of community. Legal frameworks of Fatwa Institutions in the Islamic Financial Institutions in Malaysia will be confined to the relevant statutory legislations such as IBA 1983, BAFIA 1989, CBA 1957 with reference to several reported cases.

Syariah frameworks:

Syariah is the divine law revealed by Allah SWT to the prophet Muhammad SAW. The main sources of Syariah are Al-Quran and Sunnah. Muslim scholars have classified Syariah into *Jinayat*, *Ibadat* and *Mu'amalat*. The Shariah frameworks of the

fatwa institutions in the Islamic Financial Institutions in Malaysia may only confine to the field of *mu'amalat*.

Shariah Committee

SC is a committee set up either in Islamic financial institutions or takaful operators with a purpose to ensure Shariah compliance to its operations and products. It is a statutory requirement provided under the Central Bank Act 1957, Islamic banking Act 1983, Banking and Financial Institutions Act 1984 and Takaful Act 1984.

Islamic financial institutions:

Section 2 of the IBA 1983 and BAFIA 1989 defines Islamic financial institution as a person, which carries on finance and banking business. In the context of Malaysia Islamic financial institution can be classified into two namely Islamic banks and Islamic banking scheme bank. The Islamic financial institutions are given license to do Islamic banking business. The Islamic banks are not the only financial institutions involved in Islamic banking. Other financial institutions also offer Islamic banking services through the "Islamic Banking Scheme".

Below is the list of Islamic financial institutions in Malaysia:-

(a) Islamic Banks

1. Bank Islam Malaysia Berhad
2. Bank Muamalat Malaysia Berhad
3. Commerce TIJARI Bank Berhad
4. Hong Leong Islamic Bank Berhad
5. RHB Islamic Bank Berhad
6. Kuwait Finance House (Malaysia) Berhad

(b) Islamic Banking Scheme Commercial Banks

1. Affin Bank Berhad
2. Alliance Bank Berhad

3. AmBank (M) Berhad
4. Citibank Berhad
5. EON Bank Berhad
6. HSBC Bank (M) Berhad
7. Malayan Banking Berhad
8. OCBC Bank (Malaysia) Berhad
9. Public Bank Berhad
10. Southern Bank Berhad
11. Standard Chartered Bank Malaysia Berhad

(c) Finance Companies

1. Southern Finance Berhad

(d) Merchant Banks

1. Affin Merchant Bank Berhad
2. Alliance Merchant Bank Berhad
3. AmMerchant Bank Berhad
4. Commerce International Merchant Bankers Berhad.

Takaful Operators

Islamic insurance companies are governed by Takaful Act 1984. This act is to provide for the registration and regulation of takaful business in Malaysia and for other purposes relating to or connected with takaful. "Takaful" in this context means a scheme based on brotherhood, solidarity and mutual assistance, which provides for mutual financial aid and assistance to the participants in case of need whereby the participants mutually agree to contribute for that purpose.

Below is the list of registered takaful operators in Malaysia:-

1. Mayban Takaful Berhad
2. Syarikat Takaful Malaysia Berhad
3. Takaful Ikhlas Sdn Berhad
4. Takaful Nasional Sdn Berhad.
5. Commerce Takaful Berhad.
6. HSBC Takaful Berhad.

1.7 Significance of Study

The findings of this study will provide beneficial information on the exact Shariah and legal frameworks of the fatwa institution in the Islamic financial institution in Malaysia. The research will study the methodology (*manhaj*) used by the SC and their approaches to the different schools of Islamic jurisprudence (*madhhab*) in making any resolution or ruling.

This study will also highlight the legal standing of any ruling or resolution of the SC if it conflicts with the decisions of the Court or Mufti or Majlis Fatwa Kebangsaan or amongst the Banks' SC themselves. The study will also find out whether the legislations which regulate the establishment of SC is sufficient and effective enough to promote Shariah compliance of the Islamic Banking operations. This research may suggest some solutions and recommendations in order to ensure more efficient and progressive Islamic Banking operations and at the same time complying the Shariah.

1.8 Literature Review

Generally, there are several books, journals and articles discussing on the regulatory aspects, instruments used, cases commentaries and syariah issues of the Islamic banking in Malaysia. In doing the study, the researcher has undergone several research journals, books, magazines, Internets and other sources of information in order to access related information .

As to the best knowledge of the researcher, there is no major and formal research done on the exact legal and Shariah frameworks of the SC in Malaysia. Many writers are focusing only on the regulatory frameworks of the Islamic Banking as a whole and do not give strong emphasis on the frameworks of the fatwa institutions. One example is a working paper presented during Seminar on Syariah and Legal Aspects of Islamic Banking Practice, BIMB Institute of Research and Training at Kuala Lumpur in 1996 by Mohamed Ismail bin Mohamed Shariff under the topic of *Salient Features of Islamic Banking Act 1983 and Banking and Financial Institutions Act 1989*". In this article, the writer discussed on the features of the IBA 1983 and BAFIA 1989. There

were loopholes and weaknesses on the provision of both acts. The writer recommended that the acts should be revised.

There was also an article written by late Tan Sri Dato' Professor Ahmad Ibrahim on the "*Legal Framework of Islamic Banking*" published by IKIM Law Journal in 1997. In this article late Tan Sri Dato' Professor Ahmad Ibrahim discussed on the legal frameworks of the Islamic financial institutions in Malaysia and not specifically focussing on the fatwa institutions.

Another relevant reference is a working paper presented by Ahmad Hidayat Buang under the topic of "*Muamalah Islam di Mahkamah-mahkamah Malaysia*" at Akademi Pengajian Islam, Universiti Malaya, Kuala Lumpur in 1998. In this paper the presenter has elaborated the jurisdiction and cases involved relating to the issue of *mu'amalah* in the court of Malaysia without concentrating on the issue of the legal standing of the fatwa institutions in Islamic financial institutions in Malaysia.

It is interesting to read a very informative book written by Tan Sri Nor Muhamed Yakcop under the title of "*Teori, Amalan dan Prospek Sistem Kewangan Islam di Malaysia*" published by Utusan Publication and Distributors. In this book the writer explained about the theory and practice of the Islamic banking in Malaysia. As an economist this book is very good to those who want to understand basic Islamic banking theory as practiced by the Islamic banks in Malaysia.

Another relevant book to be referred to is *Islamic Financial System in the 1990s* written by Tan Sri Jaafar Husin, former governor of Bank Negara Malaysia and the person who is responsible in introducing the dual banking system in Malaysia. This book discusses on the trend of the Islamic financial system in 1990s. At the first instance many countries had no gut to involve in the Islamic banking industry but the trend has changed whereby the development of Islamic banking is really tremendous in the 1990s all over the world.

There is a compilation of the resolutions of the Securities Commission Syariah Advisory Council published by Securities Commission in year 2002. This book states

the resolutions of the Syariah Advisory Council of the Securities Commission with brief explanation on their reasonings and relevant authorities. This book also elaborates the methodology used by the SC including the principles of *Taqlid*, *Talfiq*, *Ta'wil*, *Istiqra'*, *Maqasid Syar'iyah* etc.

From the researchers' observation, the above literatures are mainly focusing and discussing the frameworks of the Islamic Banking in general and they did not discuss in depth the legal and Shariah frameworks, the structure, issues involved and roles of the fatwa institutions in the Islamic financial institutions. Therefore, the researcher believes that a comprehensive study should be done on this area in order to justify the needs for effective mechanism for the development of the Islamic Banking industry through strengthening the structure, legal and Shariah frameworks of the SC in Malaysia.

1.9 Research Methodology

The method employed in conducting this study will be library research and fieldwork research. Library research or analytical research mostly concerns on collecting and reviewing the secondary sources such as those from the internet, books, journals, newspapers and magazines which are widely used by researchers. Information and data will be collected from the law libraries of universities and in the form of online articles published in various online and journals such as Malayan Law Journal, Current Law Journal and others. It offers suitable and convenient way to the researcher in obtaining information regarding the topic because the study is designed to obtain pertinent and precise information concerning the current status of phenomena and whenever possible, to draw valid general conclusions from the facts discovered. It is meant that, through this method, the researcher collects information based on reading the materials related to desired arising matters mainly from the secondary sources.

Fieldwork research refers to collecting and analyzing data from primary sources obtained mainly by means of questions and interviews. Interviews will be conducted

with practitioners including members of the SC of the Central Bank of Malaysia, Islamic Banks, Islamic Banking Scheme Banks, bank officers as well as lawyers and academicians. Research questionnaires will be distributed to the respective departments of the Islamic financial institutions for the purpose of getting their feedbacks on any relevant issue involving the SC.

1.9.1 Conclusion

The aim of this study is to provide the exact legal and Syariah frameworks in addressing several issues, which affect the operations and development of the Islamic financial institutions in Malaysia, in the context of the SC. The study will give emphasis to the legal and syariah aspects of the SC with reference to relevant statutory legislations, reported cases, text book and so on so forth. With quite a number of the SCs in various banks, it cannot be denied that there will be difference of opinions amongst them. These differences are actually reflecting the beauty and blessing of Islam because it provides the way out of every problem and satisfy the needs of the community. The researchers firmly believe with findings, solutions and recommendations from depth study on this area will contribute something significant towards the development and growth of the Islamic Banking industry and also to the development of the administration of Islamic Law in Malaysia as well.

CHAPTER 2

SHARIAH COMMITTEE IN BRIEF

2.0 Historical Background

Dynamic and good syariah governance is very important³. SC is a committee set up either in Islamic financial institutions or Takaful operators with a purpose to ensure syariah compliance to its operations and products. It is a statutory requirement provided under Central Bank Act 1957, Islamic Banking Act 1983, Banking and Financial Institutions Act 1984 and Takaful Act 1984. All banks and Takaful operators must insert provision regarding the establishment of SC in their Articles of Association and Memorandum of Associations. The SC consists of local and international Muslim scholars who are normally from the academic world such as lecturers and Mufti.

The term Shariah Committee or Shariah Supervisory Council or Shariah Advisory Council has been used interchangeably for the past 21 years. IBA 1983 used the term Shariah Supervisory Council while BAFIA 1984 used the term Shariah Advisory Council. The term Shariah Committee has been introduced by Bank Negara Malaysia in the Guidelines and Procedures for Shariah Committee issued in December 2004⁴.

With the issuance of this Guidelines and Procedures all Shariah Advisory Councils of Islamic financial institutions and takaful operators will be recognized as Shariah Committee and the term National Shariah Advisory Council will be used as Shariah committee of BNM.

The first Shariah Committee that has been set up was in 1983 by Bank Islam Malaysia Berhad. Bank Islam Malaysia Berhad started its operations as Malaysia's first Islamic bank on July 1st 1983, set up with an initial authorized capital of RM600 million and a paid-up of RM 79.9 million, the bank has gradually increased its authorized and paid-up capital to RM 2 billion and RM 563 million respectively, to accommodate the growth of its assets and to better position itself in meeting future expansion and

³ Speech by Dr. Zeti Akhtar Aziz, in 3rd Annual Islamic Finance Summit London, 13th January 2004.

⁴ See Annexure A

growth. BMB has been listed on the main board of the Kuala Lumpur Stock Exchange (KLSE) on January 17th 1992, Bank Islam was directly involved in developing the Islamic financial sectors dealing in banking, takaful, stock broking, leasing, research and training and other related Islamic banking services.

After 10 years, on 4 March 1993, BNM introduced a scheme known as "*Skim Perbankan Tanpa Faedah*" (Interest-free Banking Scheme) in which conventional banks may offer Islamic banking products through its windows. With that policy, many conventional banks set up their Islamic windows and at the same time they appoint selected Muslim scholars to be members of shariah committee.

For example AMBank (M) Berhad has 3 generations of Syariah Committee namely:-

1. First Shariah Committee - 1993 -1999
2. Second Shariah Committee- 2000 -2005
3. Third Shariah Committee - 2005 -2007

On 1 October 1999, a second Islamic bank, namely Bank Muamalat Malaysia Berhad (BMMB) commenced operations. The establishment of BMMB was the effect of the spin-off following the merger between Bank Bumiputra Malaysia Berhad (BBMB) and Bank of Commerce (Malaysia) Berhad (BOCB).

As part of the effort to streamline and harmonise the Syariah interpretations among banks and takaful companies, National Shariah Advisory Council of BNM was established on 1st May 1997 under BAFIA 1984. This Council is the highest Shariah authority on Islamic banking and takaful in Malaysia.

2.1 The SC, National Fatwa Committee and State Fatwa Committee.

The SC, National Fatwa Committee and State Fatwa Committee act as the prime referral bodies in the country in religious matters. They may share one common task, that is exercising reasoning in interpreting the Islamic source of jurisprudence for the Malaysian Muslim community, but their area and scope are different, taking into consideration the purpose of their establishment. Due to the natural development of Islamic law in the country, the late emergence of the SC may to some extent cause

confusion as to the redundancy or possibilities of difference of opinions as the case may be. To understand better, some introduction of the entities may be of use:

(a) National Fatwa Committee

The National Fatwa Consultative Committee (Jawatankuasa Fatwa Majlis Kebangsaan) for Islamic affairs was established in 1970 under the administration of the Secretariat of the National Council Islamic Affairs, Malaysia as provided under Article 11 Peraturan Majlis Kebangsaan Hal Ehwal Agama Islam di Malaysia⁵. It was later placed under the Administration of the Islamic Affairs division, Prime Minister's Department in 1984 subsequently under the administration of Islamic Advancement, Prime Minister's Department in 1997 until now.

This body has the authority to issue fatwa at national level to any matter referred by *Majlis Raja-raja*. *Majlis Fatwa Kebangsaan* consist of Chairman of the committee, Mufti for each state, five persons knowledgeable in Islamic law appointed by Majlis Raja-raja and a member of legal profession or judiciary appointed by Majlis Raja-raja⁶.

The functions of this Committee are to determine any issue at national level and eventually issue a fatwa on any matter related with the Islamic law that being referred to by *Majlis Raja-raja*. It also has a duty to unify or standardize contradicting *fatwa* in Malaysia and to advise Yang Dipertuan Agong in all matters regarding hukum syarak.

(b) State Fatwa Committee

The functions of the Fatwa Committee are to develop the Islamic law within the jurisdiction involving Muslim only. It has to advise the Ruler in all matters of Shariah and Mufti will be the chief authority in Islamic law matters in that state⁷. The Mufti

⁵ Jurnal Hukum, Vol 1, 1980, Bahagian Ugama Jabatan Perdana Menteri, Kuala Lumpur, Bahagian I-II page 47-48.

⁶ Perkara 11 Peraturan Majlis Kebangsaan Bagi Hal Ehwal Islam Malaysia.

⁷ Section 33 of the Administration of Islamic Law Federal Territories Act 1993.

shall make and publish in the Gazette, *fatwa* or rulings on any unsettled or controversial question relating to Islamic law⁸.

The Mufti may amend, modify or revoke any *fatwa* that has been issued earlier by him or by previous Mufti⁹. The Fatwa Committee would make an order that a study and research to be done on any issue posed to them¹⁰ and to advise and supervise the *Majlis* to operate within the scope of Shariah.¹¹

The only recognized *fatwa* is legal rulings published by state Mufti with the consent of rulers and it has been gazzetted. Those procedures will make any *fatwa* effective and legally binding. Other personal opinion is not legally enforceable.

Practically, the Mufti would issue *fatwa* by himself in simple cases but would call Fatwa Committee meeting in complicated and controversial issues. Mufti appointed by Rules has an authority to issue *fatwa*¹².

The State List of Federal Constitution provides an exclusive jurisdiction to states to administer Islamic law including establishing a Fatwa Committee. Various states recognized Fatwa Committee by various names such as *Jawatankuasa Fatwa*, *Jawatankuasa Undang-undang Majlis* and *Jamaah Ulama*.

In Federal Territory, *Jawatankuasa Undang-undang Majlis* consist of the Mufti as Chairman, the deputy Mufti, two members of *Majlis*, not less than two fit and proper persons to be appointed by *Majlis* and an officer of the Islamic Religious Department of the Federal Territories to be appointed by the *Majlis* as the secretary¹³. In Sabah, it consists of the Mufti, two *Majlis* members, and not less than 4 fit and proper person.

In Terengganu, it consists of the Mufti, three knowledgable persons ('*ulama*') from the *Majlis* and four other fit and proper persons. In Kedah, it consists of a Chairman,

⁸ Section 34 of the Administration of Islamic Law Federal Territories Act 1993.

⁹ Section 36 of the Administration of Islamic Law Federal Territories Act 1993.

¹⁰ Section 37 of the Administration of Islamic Law Federal Territories Act 1993.

¹¹ Section 13 of the Administration of Islamic Religious Affairs Terengganu Enactment 1986.

¹² Section 32 of the Administration of Islamic Law Federal Territories Act 1993.

¹³ Section 37 of the Administration of Islamic Law Federal Territories Act 1993.

two members of *Majlis*, and not less than two or not more than six fit and proper non-*Majlis* members. In Sarawak, the Fatwa Committee consists of the Mufti, not more than two members of the *Majlis*, and not more than 4 fit and proper persons.

In Johor it was recognized as *Lujnah Fatwa*, which consists of the Mufti and not more than 4 fit and proper persons. In Kelantan it is recognized as *Jamaah Ulama* which consists of Mufti, Deputy Mufti and not less than eight fit and proper persons.

In Selangor, *Jawatankuasa Perunding Hukum Syarak* consists of Mufti, Deputy Mufti, State Legal Advisor, and Islamic Religious Department officer knowledgeable in Shariah and not less than five persons knowledgeable in Shariah.

In Negeri Sembilan, it consists of the Mufti, two *Majlis* members, officer of Islamic Religious Affairs knowledgeable with Shariah and not less than three persons or not more than five persons knowledgeable in Shariah. In Pahang it consists of Mufti, not more than four 'ulama' from *Majlis*, and not more than 4 'ulama' not from *Majlis*.

In Perlis it consists of Mufti and six person of *ahli sunnah wal jama'ah* including three *Majlis* members. In Perak it consists of Mufti, not more than 4 'ulama' from *Majlis* and not more than 4 'ulama' not from *Majlis*. In Pulau Pinang it consists of Mufti, 2 members from *majlis* and not more than 2 persons qualified. In Melaka it consist of the Mufti, 2 *majlis* members and at least 3 but not more than 5 persons knowledgeable in Islamic law.

(C) The Differences of the SC with National Fatwa Committee and State Fatwa Committee.

(i) Committee Members

State Fatwa Committee has their own members specifically provided in the Administration of Islamic Law for respective states whereby National Fatwa Committee consist of representatives of mufti from all states including selected

members appointed by YDPA. State Fatwa Committee will be chaired by Mufti and National Fatwa Committee will be chaired by selected appointed person by YDPA.

(ii) Advisory Jurisdiction

National Fatwa Committee and State Fatwa Committee will discuss any matter which falls within the jurisdiction provided under the State List of Federal Constitution. This includes in the matter of Islamic family law such as marriage, divorce, ruju' maintenance, hadhanah, Islamic criminal offences and Islamic law of property.

(iii) Enforcement of Fatwa

A Fatwa of National Fatwa Committee and State Fatwa Committee is not binding and enforceable unless and until it is published in the state's gazette¹⁴. A Fatwa that is not gazetted shall have no statutory force in law. Eventhough representatives of all states (Mufti) attend the National Fatwa Committee such states may not necessarily adopt its fatwa. The only enforceable fatwa is fatwa which has been published in the state's gazette with consent of the Ruler.

The National Fatwa Committee and the State Fatwa Committee differ to the Shariah Committees in several aspects. In selecting the subject matter of fatwa, the former is subject to three occurrence, namely if it is ordered by the YDPA or if it is upon the request of the general public or on accord of the Mufti himself.¹⁵ Among the fatwa released by order of the YDPA are the fatwa forbidding *Al-Arqam* and on the issue of declaration of '*Kafir*'. Whereas, an example of fatwa based on the public request is on human cloning.¹⁶ The objective of the fatwa institution is to provide guidance to the public in appreciating and understanding the religion apart from acting as the formal opinion of the country relating to Shariah. Thus, the scope can be interpreted as general and wide yet limited to the demand of the YDPA or the public. As for some fatwa released on accord of the Mufti himself, like other fatwa, will only become

¹⁴ Section 34 of the Administration of Islamic Law Federal Territories Act 1993.

¹⁵ Section 34 of the Administration of Islamic Law Federal Territories Act 1993

¹⁶ Wan Mohamad Hj Abd. Aziz, Pengurusan Fatwa di Malaysia, Muzakarah Ahli –Ahli Majlis Penasihat Syariah Institusi Kewangan di Malaysia, Hotel Pan Pacific, KLIA, Sepang, 4-5 Mac 2004,p.4

binding for the state if it is gazzeted. There is no doubt that the National Fatwa Committees have also decided several *fatwa* on *mu^camalat* since the year 1971.

No.	Subject	Date of Muzakarah
1.	Interest	3 rd Muzakarah, 21-22 January 1971
2.	Insurance	2 nd Muzakarah, 1-2 October 1970 16 th Muzakarah, 15-16 February 1979
3	Inactive Saving Account in LUTH	27 th Muzakarah, 3 rd October 1990
4.	Ruling on <i>Mu^camalah</i> with Commercial Banks	32 nd Muzakarah, 10-11 Jun 1993
5	Hajj Scheme in Army Service	18 th Muzakarah, 25 th February 1987
6	Nominee	15 th Muzakarah, 6 th March 1978
7	Proposal of Education Loan According to Syraiah	51 st Muzakarah, 11 th March 2002
8	Listing of LUTH Subsidiary in the KL Stock Exchange	59 th Muzakarah, 27 th August 2003
9	Premium Saving Certificate According to Shariah (Syariah Research Panel Meeting)	2 nd Muzakarah, 9 th October 1991
10	Share Purchase (Syariah Research Panel Meeting)	9 th Muzakarah, 8 th February 1993

List of Fatwa National Committees on *mu^camalat* Issues¹⁷

Due to the good understanding and relationship between these entities in this democratic country, it is if agreed that the Fatwa Institutions, even if released on the Mufti's own accord, will not go into depth in areas which are likely under the scope Shariah Committees in the banks.

The Shariah Committees on the other hand have a rather active approach in selecting the subject matter of *fatwa*. Working hand in hand with the secretariats of respective

¹⁷ *Ibid.*

banks, the SC has to scrutinize the Shariah principles, suiting it to the proposed product, and in many instances they have to suggest for alternatives. The nature of studying the fiqh in the Islamic banking and takaful industry is also technical and in depth.¹⁸ Appointed by the banks, the SC answer the needs of the banks, not the public at large.

2.2 List of the SC in Malaysia¹⁹

Malaysia has a number of the SC to advise the banks and takaful operators in Malaysia. Below is the current list of the SC of the Malaysian Islamic financial institutions?

(a) BNM

Session 2004-2006

- i) Director, Jabatan Kehakiman Syariah Malaysia, Datuk Syeikh Ghazali Abdul Rahman,
- ii) Academic Fellow , International Islamic University Malaysia (IIUM) Datuk Md. Hashim Yahaya,
- iii) Director, Institute of Islamic Understanding Malaysia (IKIM) Datuk Dr. Abdul Monir Yaacob
- iv) Mufti Kerajaan Negeri Pulau Pinang Datuk Hassan Ahmad.
- v) Executive Chairman, BIMB Securities Sdn. Bhd., Datuk Dr. Abdul Halim Ismail,
- vi) Judge of Federal Court Malaysia, The Honorable Dato' Abdul Hamid Haji Mohamad
- vii) Timbalan Rektor UIAM Prof. Madya Dr. Mohd. Daud Bakar.
- viii) Lecturer, National University of Malaysia Prof. Madya Dr. Abdul Halim Muhammad,

¹⁸ Interview with Dr. Mohamad Ali Baharum, Shariah Advisory Committee of Bank Negara, 20th February 2006, Bangi.

¹⁹ Source from Shariah Secretariat Bank Negara Malaysia.

- ix) Deputy President, National Co-Operative Organisation of Malaysia (ANGKASA), Dr. Mohd. Ali Baharum
- x) Lecturer IIUM Dr. Mohd. Parid Sheikh Ahmad²⁰.
- xi) Suhaimi bin Mohd Yusof (Encik) – Secretariat
- xii) Ismail bin Nik (Encik) – Secretariat
- xiii) Hamzah bin Kamaruzaman (Encik) - Secretariat

Session 2001-2003

- Dato' Md. Hashim Haji Yahaya (Chairman)
- Dato' Sheikh Ghazali Abdul Rahman
- Dato' Hassan Ahmad
- Dato' Dr. Abdul Halim Ismail
- Dato' Dr. Abdul Monir Yaacob
- Dr. Mohd Daud Bakar
- Dr. Joni Tamkin Borhan

Session 1999-2001

- Dato' Md. Hashim Haji Yahaya (Chairman)
- Dato' Sheikh Ghazali Abdul Rahman
- Dato' Hassan Ahmad
- Dato' Dr. Abdul Halim Ismail
- Dato' Dr. Abdul Monir Yaacob
- Dr. Mohd Daud Bakar
- Dr. Joni Tamkin Borhan

Session 1997-1999

- Prof. Dato' Dr. Hj. Othman Hj. Ishak (Chairman)
- Prof. Emeritus Tan Sri Datuk Ahmad Ibrahim
- Dato' Sheikh Azmi Ahmad
- Dato' Md. Hashim Hj. Yahaya
- Dato' Hassan Ahmad
- Dato' Dr. Haron Din
- Dato' Dr. Abdul Halim Hj Ismail
- Dr. Abdullah Hj. Ibrahim
- Dr. Mohd Daud Bakar
- Dr. Ahmed Ali Abdalla

²⁰ Utusan Malaysia, 2 November 2005, p 7.

(b) BIMB

- i) YM. Dr. Abdullah Haji Ibrahim
- ii) YM. Dr. Ahmad Shahbari @ Sobri Salamon
- iii) YM. Ustaz Mohd. Bakir Haji Mansor
- iv) Y.A.A Dato' Haji Daud Muhammad
- v) YM. Dr. Yusof Ramli
- vi) YM. Dr. Asmak Ab. Rahman
- vii) Ustaz Nasrudin Yaakub²¹

(c) BMMB

- i) Haji Md Saleh Haji Md @ Haji Ahmad
- ii) Encik Azizi Che Seman
- iii) Engku Ahmad Fadzil Engku Ali
- iv) Dr. Mohamad Sabri Haron²²

(d) MAYBANK

- i) Aznan bin Hasan (Dr.)
- ii) Mohammad Deen bin Mohd Napiah (Dr.)
- iii) Zainudin bin Jaffar (Dr. Haji)

(e) COMMERCE TIJARI

- i) Professor Madya Dr Ahmad Hidayat Buang
- ii) Tuan Hj Mohd Na'im Hj Mokhtar
- iii) Dr Ismail B. Mohd@Abu Hassan

(f) RHB ISLAMIC BANK

- i) Sheikh Sir Dr Mohamed Abdulkhair. (London Muslim College director London Muslim College director).
- ii) Dr Ahmed Mohieddin Ahmad. (Saudi Arabia-based Al-Baraka Banking Group's Syariah panel member.)

²¹ <http://www.bankislam.biz>

²² <http://www.muamalat.com.my>

- iii) Prof Dr Abdul Samat Musa (Kolej Universiti Islam Malaysia's Dean of Syariah and Law).
- iv) Prof Dr Joni Tamkin Borhan (Universiti Malaya's Academy of Islamic Studies Associate); and
- v) Prof Dr Mohd Ma'sum Billah²³.

(g) AMBANK (M) BERHAD

- i) Prof Madya Dr Noor Naemah binti Abd. Rahman- UM
- ii) Dr. Amir Husin bin Mohd Nor - UKM
- iii) Ustaz Adnan bin Yusoff- UNITEN

(h) BANK RAKYAT MALAYSIA BERHAD

- i) Datuk Abu Hasan Lebai Din
- ii) Dato' Alim Panglima Hj. Mat Jahya Hj. Hussin
- iii) Dato' Hj. Kamaruddin Hj. Zakaria
- iv) Dato' Setia Hj. Mohd Tamyas Abd Wahid BA Syariah Universiti Al-Azhar.
- v) Prof. Madya Mohd Radzi Othman @ Rahman.²⁴

(i) STANDARD CHARTERED

- i) Shamsiah Binti Mohamad (Prof. Madya Dr.)
- ii) Hikmatullah Babu Sahib (Dr.)
- iii) Mohamed Fadzli bin Haji Hassan (Dr.)

(j) HSBC

- i) Mohamad Akram bin Laldin (Asst. Prof. Dr.)
- ii) Rusni Binti Hassan (Dr.)
- iii) Khairul Anuar bin Ahmad (Encik)

(k) AFFIN BANK

- i) Hailani bin Muji Tahir (Prof. Madya Dr.)

²³ <http://biz.thestar.com.my>

²⁴ <http://www.bankrakyat.com.my/index.php?ch=4&pg=30&ac=26&lang=en>

- ii) Jamil Khir bin Baharom (Kol. Haji)
- iii) Md Khalid bin Ruslan (Prof. Madya Dr.)

(l) CITIBANK

- i) Hashim bin Mehat (Prof. Madya Dr. Hj.)
- ii) Norhashimah binti Mohd Yassin (Prof. Madya Dr.)
- iii) Abdul Ghafar bin Ismail (Prof. Dr.)

(m) HONG LEONG BANK

- i) Ab. Mumin bin Ab. Ghani (Prof. Madya Dr.)
- ii) Uzaimah binti Ibrahim (Dr.)
- iii) Muhamad Rahimi bin Osman (Ustaz)

(n) ALLIANCE BANK

- i) Zainal Azam bin Abd. Rahman (Dr.)
- ii) Abd Rahman bin Awang (Dr.)
- iii) Ashraf bin Md. Hashim (Prof. Madya Dr.)

(o) PUBLIC BANK

- i) Mahmood Zuhdi bin Abd Majid (Prof. Dato' Dr.)
- ii) Mohd Ridzuan bin Awang (Prof. Madya)
- iii) Mohd Afendi bin Awang Hamad (Dr.)

(p) EON BANK

- i) Sano Koutoub Moustapha (Prof. Dr.)
- ii) Samsuri bin Sharif (Dr.)
- iii) Akhtarzaite binti Abdul Aziz (Puan)

(q) OCBC BANK

- i) Mohd Mokhtar bin Shafii (Prof. Madya Dato' Haji)
- ii) Abdullah @ Alwi bin Haji Hassan (Prof. Dr)
- iii) Mahamad bin Arifin (Prof. Madya Dr.)

(r) KUWAIT FINANCE HOUSE

- i) Sheikh Ahmad Bazie Al-Yaseen
- ii) Sheikh Dr. Mohammed Fawzi Faidullah
- iii) Sheikh Dr. Ahmed Al-Hajji Mohammed Al-Mahdi Al-Kurdi
- iv) Sheikh Dr. Ajeel Jasem Al-Nashmi
- v) Sheikh Dr. Anwar Shuaib Abdulsalam
- vi) Sheikh Dr. Mohammed Abdul Razaq Al-Tabtabae

(s) SOUTHERN BANK BERHAD

- i) Shafaai bin Musa (Prof. Madya Dr.)
- ii) Wan Sabri bin Wan Yusof (Dr.)
- iii) Abdul Karim bin Ali (Prof. Madya Dr.)

(t) CIMB

- i) Mohammad Hashim Kamali (Professor Dr.)
- ii) Hafiz Elsheikh Mohamed El Zaki (Assoc Prof.)
- iii) Engku Rabiah Adawiah binti Engku Ali (Assoc. Prof.)

(u) MALAYSIAN INDUSTRIAL DEVELOPMENT FINANCE BERHAD

- i) Muhamad Fuad bin Abdullah (Ir. Dr.)
- ii) Syed Othman Alhabshi (Datuk Dr.)
- iii) Muhamad Asri bin Haji Abdullah (Dato' Haji)

(v) TAKAFUL NASIONAL

- i) Y Bhg. Dato' Seri (Dr.) Haji Harussani Bin Haji Zakaria (Pengerusi)
- ii) Abdul Karim bin Ali (Prof. Madya Dr.) Y Bhg. Dato' Dr. Mahfodz Bin Muhamed (Member)
- iii) Ismail bin Mohd @ Abu Hassan (Dr.)
- iv) Wan Mansor bin Dato' Haji Wan Mohamed (Haji)
- v) Mokhtar bin Shafii (Dato' Dr. Haji)
- vi) Ahmad Hidayat bin Buang (Prof. Madya Dr.)
- vii) Ma'sum Billah (Prof. Dr.)
- viii) Nik Moustpha bin Nik Hassan (Haji)

(w) TAKAFUL IKHLAS

- i) Dato' Mohd Mokhtar Shafii (Chairman) Member Of The National Fatwa Council
- ii) Hj Nik Moustpha Hj Nik Hassan Deputy Director, IKIM
- iii) Prof. Madya Dr Mohd Ma'sum Billah Lecturer, Faculty Of Economics, IIUM

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