

Shari'ah Corporate Governance Structure of Malaysian Islamic Banking and Finance: The Traces of Shura

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Abstract

Shari'ah Governance Framework for Islamic Financial Institutions 2010 or SGFI was introduced as an effort to establish and enhance the corporate governance structure which is in line with the requirements of Shari'ah. Opposite from the conventional corporate governance, the Shari'ah corporate governance has distinguished features where the priority is to fulfil the Shari'ah-compliant characteristics. By referring into the application of Shari'ah governance structure as operated within Malaysian Islamic banking and finance institutions, uniquely, there are traces of Shura concept where it is significant in achieving the objectives of Shari'ah corporate governance. This article explores the essence of Shari'ah corporate governance structure of Islamic banking and finance, the traces of concept of Shura and the relevancy of Shura in achieving the Shari'ah corporate governance in Malaysia.

Part I: Introduction

Almost five decades already passed after the first step made for the establishment of the Islamic banking and finance industry in the world scale. Nowadays, the Islamic banking and finance industry manages to obtain trust and obtain strong supports especially after their success in surviving the economic crisis in 2008 (Lin, 2008; Hyun, 2009: 101-120; Khan & Bhatti, 2008: 708-725) which were marked by the downfall of Northern Rock Bank of United Kingdom (Hyun, 2009: 101-120) and the crush of the sub-prime market involving real estates in the United States of America (Trabelsi: 15-25). Undeniably, the Islamic banking and finance industry is still young in comparison to the matured conventional banking and finance industry. Nevertheless, the golden colour in the dynamism of the Islamic banking and finance cannot be simply ignored. This is proven by the estimated growth of the global market which reached at more than US\$700 billion during the year of 2009 with approximately 15% p.a. rates of annual growth (Follak, 2012) and in the year of 2013, the value of the Islamic banking and finance industry is estimated to reach more than US\$1.3 trillion-dollars (Zulkepli, 2013:1). The major contributions of the said achievements are rooted and based from those who become the backbones for the Islamic banking and finance industry which are the Islamic financial institutions themselves. In order to maintain such achievements and to further ensuring the success of the Islamic banking and finance industry, the Islamic banking and finance institutions must be well-managed and able to operate at the optimum level of efficiency which are not only from theoretical and legal dimensions alone, but the Islamic banking and finance institutions must be able to be operated and managed to achieve their very essences of objectives as in line with the Shari'ah principles. Therefore, it is important to consider the concept of corporate governance to the Islamic banking and finance institutions.

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Malaysia as one of the pioneer countries of Islamic banking and finance has made an essential effort to come out with the corporate governance standards which are compliant with the divine Shari'ah. In 2010, Shari'ah Governance Framework for Islamic Financial Institutions or SGFI was introduced to meet the needs in establishing framework for corporate governance which are harmonized with the Shari'ah foundation of Islamic banking and finance institutions in Malaysia.

By having such Shari'ah governance framework, it is not only subjected the Islamic financial institutions to have comprehensive compliances with tenets of Shari'ah, but it is also able to increase the confidence of general public and foreign investors and boost up the credibility of Islamic banking and finance operational systems. From the researches done by the authors; uniquely, the Shari'ah governance concept as introduced in Malaysia stands with features which are identical to Shura (mutual consultation) which is more dominant in the discussion of Islamic political study. This paper explores the relevancy of Shura in order to achieve the objectives of Shari'ah corporate governance. For simplicity of discussion, this paper is divided into six parts. Part I consists of introduction, Part II gives a brief discussion about concept of corporate governance and Shari'ah corporate governance, Part III presents the concept of Shura where the discussion is divided to: (i) definition of Shura, (ii) the legality of Shura and (iii) the features of Shura. Subsequently, Part IV concerns with the traces of Shura in Malaysian version of Shari'ah corporate governance structure, where it is divided to four separate parts, which are: (I) Traces of Shura in relation to Shari'ah Advisory Council, (II) Traces of Shura in relation to Shari'ah Committee (III) Traces of Shura in relation to Shari'ah Committee and Shari'ah Advisory Council and (IV) Traces of Shura in relation to Shari'ah Committee and Board of Directors. Part V discusses the relevancy of Shura in achieving the Shari'ah Corporate Governance. Part VI is the conclusion.

Part II: Corporate Governance and Shari'ah Corporate Governance

Basically, there is no definite definition as agreed by scholars as to the meaning of corporate governance.⁴ However, by referring to the Organisation for Economic Co-Operation and Development (OECD), corporate governance is defined, as "a set of relationships between a company's board, its shareholders and other stakeholders. It also provides the structure through which the objective of the company is set, and the means of attaining those objectives and monitoring performance are determined" (Mallin, 2010: 7). As such, when the term 'corporate governance' is used, the understanding of the term is depended on three main features which are: (i) the way⁵(as cited in Mallin, 2010: 7) or manner or mean on how the companies are governed – which often related to the practices, procedures and policies of the company, and (ii) the objectives of the companies⁶ (as cited in Mallin, 2010: 7) – where the purpose of having such manners in governing the company is to ensure that the company is operated to achieves its objectives. (iii) The relationship in governing and maintaining the company – where checks and balances⁷ (as cited in Mallin, 2010: 7-8) are essential to be considered in order to minimize abuse of power and encourage fair treatment to the stakeholders (Cheah & Lee, 2009: 2). By having the above mentioned features, the main aims of having corporate governance are more towards business oriented where the performance of the business are highly considered and profit-making becomes the motivational core. Rationally, when the performances of the company are high (which is as a result of the way on which the company is governed), the company manages to achieve their objectives or goals, and the continuous existence of check and balance within the relationship of stakeholders; ultimately, the company will enjoy the increase in confidence level of investors and it is also an indication that the company is efficient and well-managed.

⁴This majorly attributed due to different theories as associated with the development of corporate governance.

⁵As defined by Shleifer and Vishny, "corporate governance deals with the way in which suppliers of finance to corporations assure themselves of getting a return on their investment".

⁶This is emphasized by the definition as adopted by the Organisation for Economic Co-Operation and Development (OECD) where corporate governance is defined as "a set of relationships between a company's board, its shareholders and other stakeholders. It also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined".

⁷By referring to check and balance, corporate governance is identified by Sir Adrian Cadbury as "... concerned with holding the balance between economic and social goals and between individual and communal goals ... the aim is to align as nearly as possible the interests of individuals, corporation and society".

Consequently, the company will more likely to enjoy the stability in flow of business opportunity and cash. Due to such situation, the corporate governance becomes priority concern of the companies especially when the evaluations on the companies' performances are highly depended on the said concept. Similarly, the said three main features of corporate governance are also existed in Shari'ah corporate governance. Shari'ah corporate governance is defined as "a system by which companies are directed and controlled with a purpose to meet the corporation's objective by protecting all the stakeholders' interest and right" (Hassan, 2009: 277-293). Such control of the company can only be done through practices, procedures and policies of the company, whereby the objectives of the company are relevant to be considered.

Additionally, the interests and the rights of the stakeholders can only be efficiently protected when there is check and balance relationship in governing and maintaining the company. However, Shari'ah corporate governance has one additional feature which distinguishes it from the corporate governance. In order to say that the corporate governance is Shari'ah in nature, the entire system of the company must be directed and controlled according to Shari'ah, where the objectives that the company wants to achieve must be valid according to Shari'ah and even the rights and interests of the stakeholders must follow the tenets of Shari'ah. As a result of it, the entire activities of the company must be in line with the values as agreed and accepted by the Shari'ah. This unique and distinct feature of Shari'ah compliant is a result from the Islamic socio-scientific epistemology (Hassan, 2009: 278) which generated based on the belief of the oneness of God (Hassan, 2009: 277-293). Therefore, the Shari'ah corporate governance is not only considered the business-making approach and the profit-generated consideration; but above all, the religious orientation is superior to be considered and valued. The concept of Shari'ah corporate governance is very related and essential to Islamic banking and finance institutions; without having proper Shari'ah corporate governance, the Islamic nature of the Islamic banking and finance will only left merely in theoretical formulation and not truly Islamic in the realm of operations and practices. As such, Islamic finance and banking institutions that carry out businesses in banking or financial activities must make sure that their businesses are indeed in accordance to Shari'ah. By having Shari'ah corporate governance, the Islamic banking and finance institutions as companies themselves will be able to eliminate any elements which are prohibited in Islam such as *riba* (interest), *maysir* (gambling) and *gharar* (uncertainty) (Rosly, 2005: 20) which are not only limited to their business activities, but also cover the way the Islamic banking and finance institutions is governed (their practices and procedures), the objectives and goals that they want to achieve and all other related interests and rights as generated by their memorandum of association and articles of association which legally treated as the constitution of the companies.

Part III: The Concept of Shura

The concept of Shura is one of important divinely inspired Islamic principles which majorly take place in discussions of Islamic political study. Through the rapid development on the issues of leadership and managerial study, the concept of Shura gains a place where in one of the study done (Choudhury & Hoque, 2006: 116-128), Shura or mutual consultation is considered as one of major attributes for a successful leader or manager. From management perspective, the concept of Shura or mutual consultation is able to assist the leader or manager in effective decision making and empowers the managerial system of the institutions that the leader or manager represents. Therefore, the concept of Shura does not limited to the Islamic political study alone, but it is an essential attribute of Islamic principles for Muslims (El-Awa, 1980: 86-97; consistent with Al-Qur'an - Ash-Shuraa: 38).

(a) Definition of Shura

Lexically, Shura is an Arabic term which derived from a verb, 'Shawara'. It is also related with a word 'Shara' (Shara – Yashuru – Shawrun) which means "the exhibited, showed or displayed a thing" (Thaib, 1994: 57-58). The phrases of (i) "Sharat al-'Asal" used by the Arabs to indicate "he took out honey from its place"; (ii) "Sharat al-Dabbat Washawratuha" is an indication of "he exhibited or displayed, the bees, for sale". Therefore, the literal meaning of the root word of Shura is an indication "to extract honey from the small hollow in the rock in which it is deposited by the wild bees or to get it from its hives and other places" (Thaib, 1994: 58). As for technical sense, Muslim jurists have different opinions for its definitions. Some of the opinions are: (a) according to Al-Asfahani (d. 916 A.D.), Shura is "extracting an opinion as a result of consulting one another" (Shibab al-Din, 1345 A.H.: 42; as cited in Thaib, 1994: 58). (b) Ibnu 'Arabi (d. 1148 A.D.) said, Shura is "a meeting on a matter on which each one seeks the advice of another for bringing up his opinion" (Al-'Arabi, 1958: 297; as cited in Thaib, 1994: 58).

(c) For contemporary scholars such as al-Khaliq and al-Duri, they defined Shura as “to evaluate opinion of the experienced people in certain affairs so as to direct us to the positive position which is closest to the truth” (Abd al-Rahman al-Khaliq, 1975: 14; Qahtan ‘Abd al-Rahman al-Duri, 1974: 14; as cited in Thaib, 1994: 58). In addition, al-Khalidi emphasizes that “Shura is a meeting to discuss something in which each considers the others so as to obtain opinion or to present the matter to the chosen group of people in order to know its meaning or aim” (Mahmud ‘Abd al-Majid al-Khalidi, 1984: 14; as cited in Thaib, 1994: 58).

(b) Legality of Shura

The application of Shura derives its legality from the holy Quran and the Sunnah of Prophet Muhammad (bless and peace upon him). From the holy Quran, there are two verses concerning to Shura which are highlighted in discussions of Muslim jurists; these verses are: (i) Surah Al-Imran, verse no. 159 (Al-Qur’an) which said, “So by mercy from Allah, [O Muhammad], you were lenient with them. And if you had been rude [in speech] and harsh in heart, they would have disbanded from about you. So pardon them and ask forgiveness for them and consult them in the matter. And when you have decided, then rely upon Allah. Indeed, Allah loves those who rely [upon Him]”. (ii) Surah Ash-Shuraa, verse no. 38 (Al-Qur’an) which said “And those who have responded to their lord and established prayer and whose affair is [determined by] consultation among themselves, and from what We have provided them, they spend”. The first mentioned verse was directed to the Prophet (bless and peace upon him) himself, whereas the second mentioned verse is revealed in more general form where the focus is on Muslims as believers. According to an author, the second mentioned verse “denotes that Shura is one of the traits of Islam which should be adorn Muslims whether they are only a group without an established state . . . , or form a fully established state . . . ” (El-Awa, 1980: 87). Shura or mutual consultation is one of the established Sunnah of Prophet Muhammad (bless and peace upon him). This is proven by observation made by Abu Hurairah where he reported that there was no one made consultation with the Companions as many times as the Prophet (bless and peace upon him) himself. For examples, the Prophet (bless and peace upon him) consulted his Companions in matters of the day to set out for Badr, and he (bless and peace upon him) even consulted them about the place to set the camp. Therefore, Shura was taken as an important element in decision making, this is traceable from the practices of the Prophet (bless and peace upon him) himself. Shura or mutual consultation is permissible to be carried out for any matters especially when the matters concerned are related to worldly interactions or mu’amalah (El-Awa, 1980: 87). On the contrary, Shura is not applicable when (i) it touches the issues on which there is an injunction exists in the holy Quran or in the Sunnah and (ii) when the decision made is contradictory to Quran and Sunnah. Therefore, Shura or mutual consultation can be done in any matters, but it must not deviate from Shari’ah. Moreover, Shura is applied in order to make decision which is in line with Shari’ah.

(c) The Features of Shura in relation to Shari’ah Corporate Governance

As previously discussed on the Shari’ah corporate governance, the essentiality of Shari’ah corporate governance is basically placed on the achievement in making the entire system of the Islamic banking and finance institutions to be in line with Shari’ah. Starting from the objectives or aims, the ways that the institutions are governed and the relationship between the stakeholders must also be maintained as according to Shari’ah, as well as their activities. In order to achieve as such, the Shari’ah corporate governance is depended on the decision making process, where Shura is the important concept to be applied. By following the definition as given by al-Khaliq (1975) and al-Duri (1974),⁸ there are basically four main features of Shura which are: (i) there must be a specific opinion or the view that is specifically tried to be evaluate or consult pertaining to a certain issue or affair, (ii) the opinion or view must come from experienced people or qualified people or experts on the said issue or affair. (iii) Such consultation or reference to the opinion is to achieve a specific aim or objective and (iv) such opinion given by the qualified people and the objective from which the reference is initiated must not against the Shari’ah, but rather close to and in line with Shari’ah. These features as mentioned above; are traceable from the Malaysian Shari’ah corporate governance structure as applied to Islamic banking and finance institutions.

⁸ They defined *Shura* as “to evaluate opinion of the experienced people in certain affairs so as to direct us to the positive position which is closest to the truth”. *Emphasized added*.

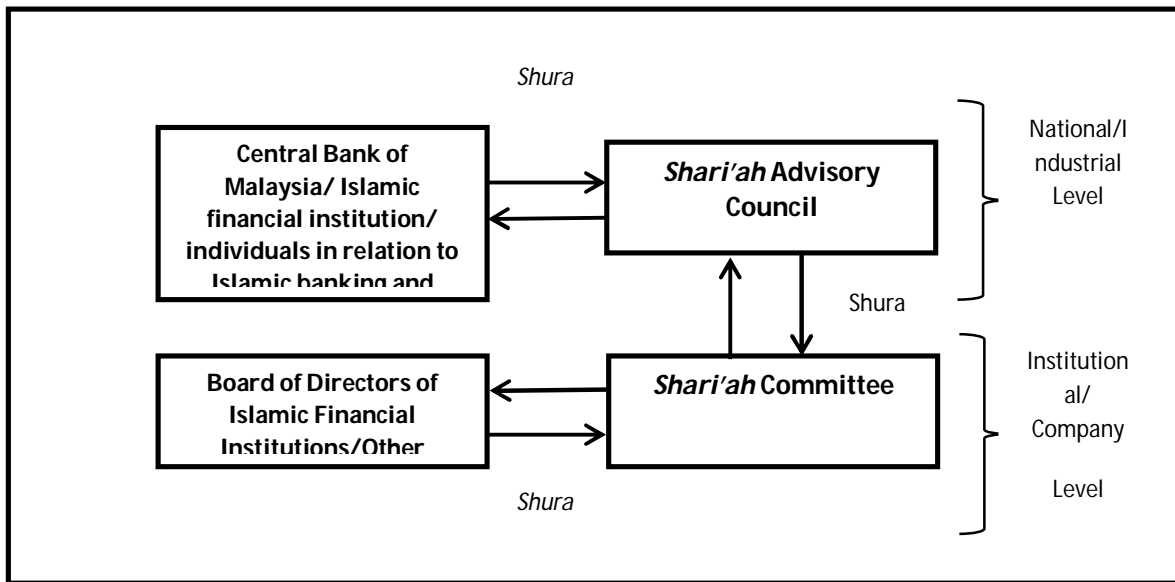


Table 1.0: Shura in the Shari'ah Corporate Governance Structure

Part IV: Traces of Shura in Malaysian Shari'ah Corporate Governance Structure

As already discussed in Part II of this writing, the most distinguished feature of Shari'ah corporate governance (in comparison to the corporate governance) is the requirement of Shari'ah compliances. In order to fulfil such feature, Shari'ah Supervisory Board or SSB is established and treated as essential and important organ of Shari'ah corporate governance, where the SSB operates as a mechanism to monitor and ensure all activities, products, procedures, services and even the objectives of the Islamic banking and finance institutions are indeed in accordance with Shari'ah. Under the Shari'ah corporate governance structure of the Islamic banking and finance industry in Malaysia, the SSB is established uniquely through the establishment of (i) Shari'ah Advisory Council⁹ and (ii) Shari'ah Committee. The Shari'ah Advisory Council denotes for the qualified members of the Shari'ah Supervisory Board or SSB who are appointed at the Central Bank of Malaysia. The said Council enjoys the position of the highest authority in deciding matters which are concerned to Islamic finance business and issues of Shari'ah compliance. On the other hand, the Shari'ah Committee consists of those qualified members who are appointed at all Islamic banking and finance institutions, where their major role is to ensure the Shari'ah compliance requirement is applied accordingly by the said institutions. From a managerial viewpoint, the establishment of the Shari'ah Committee is deemed important, as their major role is to assist the Shari'ah Advisory Council to monitor effectively all the existing Islamic banking and finance institutions in Malaysia within the same time. In relation to the application of Shura, the said concept can be traced and divided into two main levels which are: (i) the national level or industrial level, where the main key player for application of Shura is the Shari'ah Advisory Council which is established at the Central Bank of Malaysia, and (ii) the institutional level or company level, where the Shari'ah Committee is the main key player for application of Shura at the Islamic banking and finance institutions.

(I) Traces of Shura in relation to Shari'ah Advisory Council

The main functions of Shari'ah Advisory Council are: (i) to determine the Shari'ah law on any Islamic financial matters, (ii) to issue a ruling when there is any case being referred to the Central Bank of Malaysia, (iii) to provide advice for the Central Bank of Malaysia regarding any Shari'ah issues in Islamic financial business, as well as (iv) to give advice for Islamic financial institutions or any individuals in relation to Islamic banking and finance matters (as provided in Section 52 of CBMA, 2009). From these clear main functions, the Shari'ah Advisory Council has similarities features with concept of Shura. The traces of Shura can be found when:

⁹ The main regulation for the establishment of *Shari'ah* Advisory Council is the Central Bank of Malaysia Act 2009 (CBMA), particularly Part VII of the act which specifies the regulations on *Shari'ah* Advisory Council. Section 51 of CBMA stipulates that the *Shari'ah* Advisory Council shall be established at the Central Bank of Malaysia which will be regarded as the highest authority in deciding on matter related to Islamic financial business. Section 58 of CBMA provides that in the case where the ruling issued by any *Shari'ah* Committee members of Islamic financial institutions are in conflict with the rulings issued by the *Shari'ah* Advisory Council, the rulings made by the *Shari'ah* Advisory Council prevails.

- (a) The Shari'ah Advisory Council is sought for their opinion by the Central Bank of Malaysia or any Islamic financial institution or any individuals in relation to Islamic banking and finance matters. This fulfilled the first feature of Shura as derived from the definition given by al-Khaliq and al-Duri, where (i) there must be a specific opinion or the view that is specifically tried to be evaluate or consult pertaining to a certain issue or affair.
- (b) Such opinion of Shari'ah Advisory Council is done by the qualified and experts scholars of the Islamic banking and finance. This is again confirmed with another feature of Shura. In regards to Shari'ah issues, the members of Shari'ah Advisory Council are eligible to give such advice or ruling due to their expertise and qualification. Rationally, those members of the Shari'ah Advisory Council are appointed based on their high qualifications and expertise within the realm of Islamic banking and finance (as provided in Section 53 of CBMA, 2009) and Shari'ah. This is considered relevant since the appointment of Shari'ah scholars is crucial and they are the responsible persons to ensure that Shari'ah compliance is observed by all Islamic financial institutions while conducting their financial and banking activities. Additionally, the Islamic banking and finance institutions are not restraint from seeking advices and assistances from the Shari'ah Advisory Council at the Central Bank of Malaysia in connection to any matters which are related to Islamic financial business (as provided in Section 55 of CBMA, 2009). Such reference made for the opinion of Shari'ah Advisory Council is based on mutual consultation and not based on compulsion or coercion. This fulfilled the second feature of Shura as derived from the definition given by al-Khaliq and al-Duri, where (ii) the opinion or view must come from experienced people or qualified people or experts on the said issue or affair.
- (c) Moreover, the opinion of Shari'ah Advisory Council is sought in order to fulfil certain objective or aim, and not merely for playful reason. This fulfilled the third feature of Shura as derived from the definition given by al-Khaliq and al-Duri, where (iii) such consultation or reference is made in order to achieve a specific aim or objective. And;
- (d) The aim or objective of the consultation of the Shari'ah Advisory Council is to confirm with the tenets of Shari'ah and the opinion which they give is to ensure the issues are settled and compliant with Shari'ah. This is also fulfilling one of features of Shura. This fulfilled the fourth feature of Shura as derived from the definition given by al-Khaliq and al-Duri, where (iv) such opinion given by the qualified people and the objective from which the reference is initiated must not against the Shari'ah, but rather close to and in line with Shari'ah.

(II) Traces of Shura in relation to Shari'ah Committee

In Malaysia, the Islamic banking and finance institutions can be divided to three types of institutions which are different in matter of operational. They are categorized into (i) Islamic financial institutions which operate and carry out the full-fledged Islamic financial business, (ii) the conventional institutions which establish Islamic banking windows, and (iii) any other financial institutions that carry out Islamic financial business which are governed under the Development Financial Institutions Act 2002. In order to guarantee the above mentioned Islamic banking and finance institutions to strictly follow the tenets of Shari'ah; without exception, the Shari'ah Committee is established at the institutional or company level and only qualified members are appointed. After the enforcement of Islamic Financial Services Act 2013 (IFSA) and Financial Services Act 2013 (FSA), the first category of Islamic banking and finance institutions are left to be governed under IFSA and subjected to Shari'ah Governance Framework 2010. As for the second category, FSA is eligible to be follow by those conventional financial institutions which are offering the Islamic banking windows. The third category of financial institutions is maintained to follow the same provisions of Development and Financial Institutions Act 2002. However, the requirement for the establishment of Shari'ah committee is maintained.¹⁰

¹⁰ As for the conventional banks which operate Islamic windows, the institutions are authorized to operate Islamic windows under Section 15 of the Financial Services Act 2013. By virtue of this authorization, these institutions are required to establish the *Shari'ah* Committee members to monitor their Islamic financial business which is in line with *Shari'ah*. Section 15 (2) (a) of the Financial Services Act 2013 specifically mentioned that the establishment of the *Shari'ah* Committee members in these institutions are subjected to parts IV, VI, IX, X as well as part XII of the Islamic Financial Services Act 2013 institutions. In addition to that, the Act also mentions that the *Shari'ah* Committee shall be established by the board of directors. Under the Development Financial Institutions Act 2002, for those other financial institution which conducts Islamic banking and finance activities in accordance with *Shari'ah* principles, Section 129 (4) of the Development Financial Institutions Act 2002 requires these institutions to seek an advice from the Shari'ah Advisory Council or consulting them in any *Shari'ah* matters pertaining to Islamic financial business.

Additionally, under IFSA, several provisions are legislated in manner which concerned about corporate governance¹¹ and under a separate provision of IFSA, the Shari'ah committee must be established (as provided in Section 30 of IFSA, 2013). By having such insertion, the Shari'ah Committee has a vital role to play in achieving good corporate governance which is in line with the principles of Shari'ah for Islamic banking and finance institutions that run the full-fledged Islamic banking business. Based on Shari'ah Governance Framework for Islamic Financial Institutions 2010 or SSGFI, there are several duties of the qualified members¹² of Shari'ah Committee in connection to the application of Shari'ah corporate governance. Among others, are:

- (a) The accountability of Shari'ah Committee to the decision that they made – they will be held responsible for any Shari'ah decisions as issued by them for Islamic financial institutions (No. 1 of Appendix 4 of SSGFI, 2010).
- (b) The reasonability of advice – when the Shari'ah Committee give their advice to the board of directors and Islamic financial institutions, such advice that they made must be reasonable, especially in relation to the operations of the Islamic finance institutions (No. 2 of Appendix 4 of SSGFI, 2010).
- (c) The endorsement of Shari'ah policies – the members of Shari'ah Committee also have the responsibility to endorse Shari'ah policies made by Islamic financial institutions after thorough inspection has been conducted by them (No. 3 of Appendix 4 of SSGFI, 2010). Such thorough inspection is considered relevant in order to make sure such policies are really in accordance to the Shari'ah.
- (d) Shari'ah compliance requirement – the Shari'ah Committee members must also make sure that the products of the Islamic financial institutions do not involve any prohibited elements such as *riba* (interest) and *maysir* (gambling). This is the basic requirement in conducting Islamic banking business which is paramount to the establishment of Islamic banking and finance institutions.
- (e) Internal Shari'ah compliance performance - The members of Shari'ah Committee has a duty to evaluate the Shari'ah review and Shari'ah audit department's works.

Thus, the Shari'ah Committee members have the responsibility to ensure that these departments are carrying out their duties and responsibilities in accordance with Shari'ah, as well as the annual report of the institutions are provided in a proper manner without any influence from other people (No. 5 of Appendix 4 of SSGFI, 2010). In order to ensure the Shari'ah compliant performance in their operations, such internal Shari'ah evaluation is deemed necessary.

- (f) Consultation with other related parties – Not limited only to the review and audit of the Shari'ah review and Shari'ah audit department, the assistant of Shari'ah Committee members is extended to any other related parties such as the legal counsel, auditor or consultant in connection to issues of Islamic finance and Shari'ah. In situation of failure to achieve settlement in regard to the Shari'ah issues, a proper consultation to the Shari'ah Advisory Council at the Central Bank of Malaysia can be sought (No. 6 and No. 7 of Appendix 4 of SSGFI, 2010).

¹¹ As provided under Part VI Division 2 under the functions and duties of Board of Directors, by virtue of Section 65 (2) (f) which states "have due regard to any decision of the *Shari'ah* committee on any *Shari'ah* issue relating to the carrying on of business, affairs or activities of the institutions".

¹² (i) The first criteria that need to be fulfilled is the committee's member must be a Muslim individual and shall not be any institution, as per No. 1 of Appendix 2 of the *Shari'ah* Governance Framework for Islamic Financial Institutions 2010. (ii) The member shall at least hold bachelor's degree in *Shari'ah* in which the degree includes Islamic jurisprudence subject as well as Islamic transactions for the purpose of understanding Islamic financial matters, as per No. 2 of Appendix 2 of the *Shari'ah* Governance Framework for Islamic Financial Institutions 2010. (iii) The member is also expected to have strong proficiency in Arabic knowledge due to the fact that most original sources of Islamic finance is in Arabic language and he is also required to have good knowledge in Bahasa Melayu and English language, as provided under No. 3 of Appendix 2 of the *Shari'ah* Governance Framework for Islamic Financial Institutions 2010. The *Shari'ah* Committee members can also include experts from various backgrounds such as finance, accounting and law to decide on *Shari'ah* matters, but it is to be reminded that those experts shall not form the majority of the members, as per No. 4 of Appendix 2 of the *Shari'ah* Governance Framework for Islamic Financial Institutions 2010. The qualifications of *Shari'ah* Committee shall be taken into consideration because they have the responsibility to ensure *Shari'ah* compliant of the operations in Islamic financial institutions. Thus, they shall be appointed from people who acquire good understanding with regards to Islamic financial business. In addition to that, the *Shari'ah* Governance Framework for Islamic Financial Institutions 2010 also provides the functions of the *Shari'ah* department in Islamic financial institutions to assist the *Shari'ah* Committee in executing their duties and responsibilities. These functions including the *Shari'ah* Risk Management Control, the *Shari'ah* Review, the *Shari'ah* Research as well as the *Shari'ah* Audit. All these functions will ensure that the *Shari'ah* Committee will be able to monitor overall performance of Islamic financial institutions. These are the structure of *Shari'ah* governance applicable to all Islamic financial institutions conducting Islamic banking and financial activities in Malaysia.

From the above mentioned duties and responsibilities of the members of Shari'ah Committee, the features of Shura can be traced. Such traces are:

- (a) In issues of Shari'ah compliance or Shari'ah issues, not only the board of directors or Islamic financial institution can go and seek the Shari'ah committee's advice or opinion, other related parties are also eligible to consult for their advice, specifically by referring to the Shari'ah matters or issues. This is one of the important features of Shura. Where upon in emergence of certain issue or affair (which in our discussion pertaining to Shari'ah compliance matter), the Shari'ah Committee's opinion is consulted.
- (b) The opinion that they seek to value is from qualified and experts which are also the members of the Shari'ah Committee.
- (c) And, such opinion is sought by the party in order to fulfil specific aim or objective which might be for ruling or advice concerning to Shari'ah compliance.
- (d) The opinion or advice which is given by the Shari'ah Committee that requires by the party who seek it, does not meant to go against the Shari'ah, but rather to be in line with the Shari'ah. Moreover, the objective or aim of the party who seek for such advice or opinion must also in line with the Shari'ah.

Due to such reliance of all those related parties which also include the board of directors and Islamic financial institutions, it is rather rational and understandable as to the reasons of such high accountability is put on the shoulders of the members of the Shari'ah Committee, because in the end, in achieving effective Shari'ah corporate governance, the advice or opinion which is given to the parties by the Shari'ah Committee will give a huge impact and influence to the operational system of Islamic banking business and activities.

(III) Traces of Shura in relation to Shari'ah Committee and Shari'ah Advisory Council

The concept of Shura is also can be found in the relationship between the Shari'ah Advisory Council and the Shari'ah Committee. As the highest authority pertaining to Islamic banking and finance matters, any ruling made by the Shari'ah Advisory Council will bind the Islamic financial institutions and their ruling cannot be superceded by any Shari'ah Committee (as provided in Section 58 of CBMA, 2009). However, it does not prevent the Shari'ah Committee to make a consultation in matter of reference to the Shari'ah Advisory Council in situation where they fail to arrive to a concrete solution for Shari'ah issues which related to Islamic banking and finance. Moreover, by virtue of No.7 of Appendix 4 of the Shari'ah Governance Framework for Islamic Financial Institutions 2010, they can advise the Islamic financial institution to seek for advice for the Shari'ah Advisory Council.

(IV) Traces of Shura in relation to Shari'ah Committee and Board of Directors

By virtue of section 65(2)(f) of IFSA, the board of directors must have due regard to or consider any decision of the Shari'ah Committee especially when it is Shari'ah oriented issue which is closely related to the carrying on of Islamic banking business affairs or in connection to the relevant activities of the Islamic financial institutions. Based on this section, the board of director is not debarred from making any mutual consultation to the Shari'ah Committee in achieving appropriate decision for their Islamic financial institution. Moreover, by having such mutual consultation, the board of directors will be efficient in making a decision which is in accordance to Shari'ah principles as essential for Islamic banking business. Here again, the Shura concept can be traced from such practice of Shari'ah corporate governance between the board of directors and Shari'ah Committee.

Part V: The Relevancy of Shura in Achieving the Shari'ah Corporate Governance

The main objective of having Shari'ah corporate governance in relation to Islamic banking and finance institutions is to endure the said institutions are governed, controlled and operated as accordance to the principles of Shari'ah, not only from their policies, procedures, auditing, services and products, but also extended to cover the decision making process of the board of directors and any other related parties in connection to the Islamic banking business. In relation to concept of Shura, by having the process of Shura where mutual consultation is carried out in proper and consensual manner between the main key players of Shari'ah corporate governance (which are the Shari'ah Advisory Council and the Shari'ah Committee) with any other relevant parties to the Islamic banking and finance institutions, the Shari'ah compliance issues will be rest assured to be settled in accordance to Shari'ah.

Moreover, by having such Shura process in managerial function of the internal operation of the Islamic banking and finance institutions such as between the Shari'ah Audit Department or the board of directors with the Shari'ah Committee, the theoretical essence of the Islamic banking and finance as accordance to Shari'ah can be applied properly in the real practice. Additionally, in application of reference to Shari'ah Committee or Shari'ah Advisory Council, the confident of the investors or the public at large will be rest assured in which their Islamic financial institutions are not only Islamic by name, but also Shari'ah compliance in application.

Part VI: Conclusion

The application of Shari'ah corporate governance is essential and important to Islamic banking and finance institutions. Whether conscious or not, the legislators through the establishment of Shari'ah Advisory Council and Shari'ah Committee, have manage to revive and applied the concept of Shura where the identified features of the said concept can be found in the application of the laws and regulations. Even though such concept of Shura is not exactly similar with the discussion of the Islamic political study, however, in connection to Islamic banking and finance institutions, Shura is important for conformity of Shari'ah compliance matters. Furthermore, in achieving Shari'ah corporate governance in operational sense, the concept of Shura is relevant to be applied and considered. Moreover, with or without realization, the concept of Shura already applied with success in connection to application of Shari'ah corporate governance as established under the Shari'ah corporate governance structure of Islamic banking and finance in Malaysia.

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