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SHARIAH GOVERNANCE: SOME PROBABLE CHALLENGES THAT MAY BE FACED BY SHARIAH COMMITTEE (SC) AT ISLAMIC FINANCIAL INSTITUTIONS (IFIs)

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Abstract:

Shariah governance is an integral part of the Islamic Financial Institutions to ensure that all operations and activities always conform to the Shariah principles. The duty of ensuring the Shariah governance is entrusted on the Shariah committee of the IFIs. The aim of this study is to explore some probable challenges that the Shariah committee may encounter while discharging their duty. The study adopts doctrinal approach which utilizes descriptive approach of qualitative research methodology which relies on secondary data in form of textbooks, journals, newspapers, related websites etc. The study found that there are certain challenges the Shariah committee may likely face while performing their duty i.e., ignoring Shariah committees' (SC) recommendations by the management; lack of Independence of Shariah Committee (SC); variations in fatwa of different Shariah committees (SC); and multiple appointments of Shariah committee member. The researcher then recommended probable solutions to the said challenges.

Keywords:

Shariah Governance, Shariah Committee (SC), Shariah Advisory Council (SAC), Shariah Supervisory Board (SSB), Shariah Compliance.

Introduction

Observing Shariah principles which include avoiding usury (*riba*), uncertainty (*gharar*), and gambling (*maisir*) is a fundamental requirement in Islamic financial activities (Hassan, 2011). In addition to this requirement, Islamic financial institutions (IFIs) are also necessitated to observe some Islamic business ethics and norms including principle of justice, fulfilling

covenants, paying liabilities, fair dealing, removal of hardship etc. (Ayub, 2007). Shariah governance is essential to all Islamic financial institutions (IFIs) to ensure that all their activities and dealings conform to Shariah principles. And this duty of ensuring Shariah principles is observed by the Islamic financial institutions always is vested on the Shariah committee (SC) of the IFIs (Laldin, 2008).

Shariah Committee (SC), also known as Shariah Advisory Council (SAC), Shariah Supervisory Board (SSB) is an important organ in corporate governance of the IFIs (Clode, 2002). Thus, it is essential that the IFIs observe the Shariah principles in the dealings and activities of the IFIs to prevent them from violating the fundamental principles of the Shariah through involving in activities such as gambling, alcohol, pornography (Brown et al., 2007). Shariah committee (SC) is an independent Shariah auditor to the IFIs that evaluate all new contracts and approve them as well as the existing ones. Moreover, they supervise the collection and distribution of alms (*Zakat*) in the IFIs (Latifa and Lewis, 2007).

It is required for all IFIs to appoint Shariah committee responsible for issuing fatwa and advice to ensure their operations are being carried out by conforming to the Shariah principles. The composition of the Shariah committee may vary from one jurisdiction to another or from one institution to another. However, their role is the same, which is supervision of the IFIs to make sure their operations are Shariah-compliant. Nevertheless, in the discharge of their duty, the Shariah committee may likely face certain challenges that may slow down the effectiveness of their tasks. This study investigates the literature to identify some of the challenges and provide probable recommendations for them.

Methodology

This paper is library-based research. The researcher adopted qualitative method in conducting the research. According to Sekaran and Bougie (2013), qualitative data are data in form of words. Thus, the secondary data are collected from books, journals, academic magazines, websites etc. Content analysis was used in analyzing the data.

Concept of Shariah Governance

The concept of Shariah governance derives its basis from the Qur'an and Sunnah. Shariah which its literal meaning refers to 'the way' is the law that guides the lives of Muslims in all their actions and activities which include financial and others (Mohamad et al. 2016). According to Chaar, (2008), Shariah is "a set of norms, values and rules that aim to ensure that people have a life in accordance with the divine will". Shariah is the result of efforts made by the early Muslims that covers all aspects of human life i.e., social, politics, and economy. And these efforts were all derived from the Qur'an and the Sunnah. In Islam, any transaction whether it is financial or otherwise must always conform to the Shariah principles, failure of which will render it questionable. This is because failure to observe Shariah in the financial transactions may lead to '*riba*' which is a great sin under the Shariah. The fundamental objective of the Shariah governance is to ensure all activities and transactions at the IFIs conform to Shariah principles, otherwise will lead to loss of confidence and credibility from the public, and this will hinder the growth of the IFIs (Mohamad et al. 2016). According to the IFSB (2005), there can be reputation risk if the business of IFIs is not conducted based on the Shariah principles.

The structure of governance at IFIs is similar to the one in conventional system (Bhatti & Bhatti, 2010), save that the Islamic system derived its principles from the Shariah (Ashraf et al., 2015). Thus, governance in IFIs has additional supervisory system known as 'Shariah governance' that is vested on the Shariah committee (SC) of the IFIs (Farook et al., 2011; Noor, 2011; Smaoui et al., 2020). And this system plays a vital role in the business control of the IFIs to ensure Shariah principles are not violated (Haniffa & Hudaib, 2007). For example, Brunei Darussalam practices a two-tier Shariah Governance Framework, a national Shariah Financial Supervisory Board (SFSB) and Shariah Advisory Body (SAB) at the industry level (Omar, 2019).

Basically, there is no standard definition of the Shariah committee (Nathan Garas & Pierce, 2010). According to AAOIFI (2010), the Shariah committees are an independent body of scholars and specialists in transactions by adding another member to the specialists in the field of Islamic financial institutions who is familiar with the field of Islamic transactions. The member of SSB is responsible for the follow-up the tasks and the validity of the implemented transactions in the IFI and to find legitimate solutions to the irregularities. The Shariah committee is also responsible for following up, examining, analyzing activities, business, behaviors, and operations that carried out by the several Islamic Financial Institutions (IFIs), to ensure that they are in accordance with the rules and principles of Shariah. The Shariah committee using the appropriate legitimate tools and methods, with the indication of mistakes and corrections, at the same time, finds a legitimate alternative (Al- 'layat, 2006).

Dubai Islamic Bank (DIB) (2015) has also defined the Shariah committee as a body that supervises and monitors the process of developing the Islamic products and services of finance and investment in the Islamic bank. In addition to strengthening the activity of the bank by issuance Fatwas and a legal guidance for the daily transactions, according to the needs of the different business units in the bank, Shariah committee also known as the preventive, remedial and complementary process of control, review and analyses all the IFIs activities, products, contracts and transactions starting from the incorporation of the IFI onwards to ensure compliance with Islamic Shariah for the purposes of generating legitimate profits (*Halal*) and improving the IFIs performance (Nathan Garas & Pierce, 2010, p. 388).

According to Suleiman (2000), the Shariah committee is given the responsibility of verifying the products, activities, and services of the IFIs as well as its customers comply to the Shariah principles. Thus, the Shariah committee (SC) is responsible for maintaining the confidence and credibility of the IFIs in the public through the legitimate and soundness of their activities. If it can be proven that the IFIs management is interfering in the decisions of the Shariah committee (SC), both customers and investors will lose trust and confidence in the IFIs. The main role of the Shariah committee (SC) in the IFIs is summarized in the participation to formulate the instructions, regulations, forms of contracts, correction, and development. They are also responsible for supervising the activities of the IFIs to ensure the conformity of its works to Islamic legal precepts and principles. The Shariah committee (SC) has the task of Fatwa by answering to the questions and queries, whether those inquiries are from the employees of the IB or the customers, also participating in the preparation of drafts of decrees, decisions and orders presented by the bank, in addition to preparing explanatory notes thereto (Gulzar, 2006).

The requirements of selection of the Shariah committee (SC) have been set up by different bodies (AAOIFI, 2008) and (IFSB, 2009). However, applications and standards vary

internationally because of various factors, for example prudential regulations of different countries, size, and the benchmark of the Islamic financial sector.

Basically, there are no limitations on the number of Shariah committee (SC) members that can be appointed, but various studies indicate that three members is the preferable number. Moreover, AAOIFI requires a minimum of three members (Ginena and Hamid 2015). But higher number of Shariah committee (SC) members normally brings a better-quality supervision (Quttainah et al., 2013). According to AAOIFI standards, the composition of the Shariah committee (SC) members should consist of bankers, economists, and financiers. Hasan (2009), mentions that in some jurisdictions, such as Saudi Arabia, Kuwait, Nigeria, Arab Emirates, Bahrain, Syria, Libya, Palestine, Oman, and Jordan, the Shariah committee (SC) must be composed of three auditors, however in Qatar, the Shariah committee (SC) must be composed of at least two members. According to Ayedh, et al. (2015), in some regions it is required the Shariah committee (SC) composition to be fixed. For example, in Iraq. The Shariah committee (SC) number is required to be between three and five auditors, and for Indonesia, two and five auditors, whereas in Yemen three and seven auditors.

The Shariah committee (SC) members just like the external auditors are also appointed by the IFIs shareholders in the general meeting, and their remuneration is normally approved by Board of Directors (BOD) after been proposed by managers (Siagh et al., 2004). However, the Shariah committee (SC) is an independent body and shall not be under the authority of the shareholders as well as the BOD (Nienhaus, 2007).

Literature Review

Lack of disclosure, lack of compliance as well as weakness of the system would have a bad effect on the performance of the IFIs (Liem, 2016). Furthermore, ignoring recommendations provided to the management of the IFIs by the Shariah committee (SC) related to customer complaints unfavourably affect the financial and non-financial performance of the IFIs (Mustapha et al., 2017).

There is a doubt on the ability of the Shariah committee (SC) to make independent and objective decision devoid of fear from the management of the IFIs. This is because the Shariah committee (SC) can only express their opinion and expert testimony but cannot force the management for implementation. There have been a lot of debate and criticism on the role of the Shariah committee (SC), and their decisions is being closely scrutinized and criticized particularly related to their independence from the management of the IFIs (Mohamad et al. 2016).

A huge amount is being spent in developing new products and services at the IFIs and the management may be more concerned in fulfilling their short-term target to earn remunerations which may lead to putting pressure on the Shariah committee (SC) to approve the product even if it is questionable. On the other hand, the Shariah committee (SC) also receive remunerations, though just a token compared to what the board earn, there is possibility of conflict of interest to legitimize dubious and unlawful operations (Mohamad et al. 2016). Warde (2010), states that there is an accusation that scholars employed by IFIs in Egypt are paid generously to legitimize dubious practices that are not Shariah compliant.

There is a concern on the issue of appointment of same scholars on more than one Shariah committee (SC) of different IFIs in same countries. Multiple appointments are allowed in Middle Eastern countries and many IFIs like to appoint reputable scholars known for their knowledge and leniency in their approach of fatwa and this increases the risk of fatwa shopping by IFIs. In addition to this, there is a concern on the ability of the scholars with multiple appointments to manage their time properly and be effective while working in more than one committee. Multiple appointment is a way of compromising confidentiality and may bring conflict of interest due to access to confidential information of more than one institution. However, in Malaysia, multiple appointment of Shariah committee (SC) member by the IFIs into same industry is not allowed by virtue of 16B (6) of the Central Bank of Malaysia Act 1958 (Mohamad et al. 2016).

One more issue is that of differences and variations in the deliberations of the Shariah committee (SC) because of different interpretations, sometimes on the argument of 'public interest'. This may sometimes lead to allowing products and services that are Shariah non-compliant (Mohamad et al. 2016). Conflicting opinions and inconsistency of fatwa on similar issues in different countries is another big challenge to harmonization and compliance in the IFIs. The General Council for Islamic Banks and Financial Institutions (CIBAFI) reported that 10% out of 6000 fatwas of different IFIs with more than 100 Shariah scholars were inconsistent (Iqbal & Mirakhor, 2007). According to IFSB survey (2008), reconciliation of Shariah issues between Shariah committee (SC) of different IFIs is very low (McMillen, 2006). However, the inconsistencies are not strange because of differences between Schools of thoughts. For example, scholars who validate BBA rely on a view from the Shafi'i school of thought, whereas the Maliki and Hanbali schools of thought consider it unlawful and view it as a legal trick (*hilah*) to deal with riba (Askari, Iqbal and Mirakhor, 2010). Moreover, attempts to uniform different interpretations were made way back in the second Century of Hijrah. The Caliph of that time once asked Imam Malik to unify *fiqh*, however, Imam Malik objected to the idea on the ground that diversity is natural, and it was not right to compel the Ummah to follow only one school of thought (Lahsasna, 2010a).

Discussion

From the literature, the following challenges that may likely be faced by the Shariah committee of the IFIs while performing their roles are found:

Ignoring Shariah Committee (SC) Recommendations

It is a basic requirement that all Islamic financial institutions (IFIs) establish Shariah committee to ensure business activities of the institutions always comply with the Islamic principles. Therefore, it is obligatory on the management of the IFIs to listen and implement all recommendations provided by the Shariah committee. Failure on the part of the management to implement the recommendations will undoubtedly affect both the financial and non-financial performance of the IFIs. It is evident from the literature that the management of the IFIs may likely ignore the recommendations forwarded to them by the Shariah committee in certain circumstances.

Lack Of Independence Of Shariah Committee (SC)

The ability of the Shariah committee to issue independent and objective decision without fear of interference from the management is another issue of concern. The role of the Shariah committee is confined to issuing fatwa and advice to the management, but they do not have the

authority to enforce the implementation of the said fatwa and advice. There might be a challenge from the management on the Shariah committee as the former may sometimes put pressure on the latter to approve a particular operation because their target is mainly focus on earning their remunerations and some other benefits. Furthermore, the Shariah committee themselves may be tempted to approve dubious and unlawful operations due to the remunerations and other benefits they earn.

Variations In Fatwa Of Different Shariah Committees (SC)

Various Shariah committees across IFIs do have differences and variations in their fatwas and decisions. On many occasions, Shariah committees rely on public interest (*maslahah*) to validate a particular operation. This may sometimes lead them to allowing products and services that are non-Shariah compliant. Moreover, there are many conflicting opinions and inconsistencies of fatwa on similar issues in different countries and sometimes in different IFIs in one country. Basically, inconsistency of fatwa is not strange to the Muslim Ummah and variations and differences in this regard has been in existence for so long and is acceptable if it is done with good intention.

Multiple Appointments Of Shariah Committee (SC) Member

In some jurisdictions, some scholars may be appointed in various Shariah committees of different IFIs. Some of these IFIs like to appoint reputable scholars known for their knowledge as well as their leniency for issuing fatwa which increase the risk of fatwa shopping. Furthermore, the scholars with multiple appointments may not be able to discharge their duty effectively and may create conflict between different IFIs they with.

Recommendations

1. The management of the IFIs shall always accept and implement the advice and inputs of the Shariah committees. The role and duty of the Shariah committees at the IFIs is to ensure all operations are being carried out in accordance with the Shariah principles, hence it is not right for the management of the IFIs to ignore what they have been advised by the Shariah committee as this may affect the financial and non-financial performance of the IFIs. It may also lead to reputational and non-compliance risks.
2. It is vital that the Shariah committee get full independence to be able to discharge their duty without fear and pressure from the management of the IFIs. Therefore, the management shall not interfere in the duty and job of the Shariah committee for the sake of achieving personal gain. On the other hand, the Shariah committee must not submit to the interest and pressure of the management while making their decisions and must always fear Allah (swt) as validating any dubious operation would make them accountable for the sin committed by all customers for accepting the operation.
3. Due to differences of jurisdictions and sometimes interest from various bodies, they heavily rely on public interest '*maslahah*' to support certain operations at the IFIs. Although, public interest '*maslahah*' is acceptable as a source of Shariah, caution shall be exercised by the Shariah committee while relying on this source, as many dubious operations are validated based on this source. Moreover, variations and inconsistencies of fatwa between different Shariah committees is recognized if it is done with good intention as this phenomenon exists in the Muslim Ummah for long which is evident in the presence of various School of thoughts. However, the Shariah committee shall always have good intention while

issuing fatwa and shall not be switching from one school of thought to another with the sole aim of validating a particular operation.

4. Some jurisdictions allow the appointment of one Shariah committee member to more than one IFIs. It is highly recommended that this practice shall be discouraged because of the adverse effect it may create. For example, conflict of interest between the various IFIs the Shariah committee member is representing. Moreover, information that is confidential may be easily leaked to the different IFIs.

Conclusion

The study reveals that there are some probable challenges that may be faced by the Shariah committees of Islamic financial institutions (IFIs). Firstly, the management of the IFIs may ignore recommendations by the Shariah committee due some reasons. It is recommended that the management of the IFIs shall always implement the recommendations of the Shariah committee to ensure Shariah-compliance so that financial and non-financial performance of the IFIs would not be affected as well as to avoid reputational and non-compliance risks.

Secondly, the Shariah committee may lack sufficient independence that would allow them to discharge their duty without fear and pressure from the management to validate dubious operations. Therefore, it is recommended that the management shall not interfere in the duty and job of the Shariah committee for the sake of achieving personal gain. On the other hand, the Shariah committee must not submit to the interest and pressure of the management while making their decisions and must always fear Allah (swt) as validating any dubious operation would make them accountable for the sin committed by all customers for accepting the operation.

Thirdly, various Shariah committees across IFIs do have differences and variations in their decisions. On many occasions, Shariah committees rely on public interest (*maslahah*) to validate a particular operation. This may sometimes lead them to allowing products and services that are non-Shariah compliant. Moreover, there are many conflicting opinions and inconsistencies of fatwa on similar issues in different countries and sometimes in different IFIs in one country. Basically, inconsistencies of fatwa are not strange to the Muslim Ummah and variations and differences in this regard has been in existence for so long and is acceptable if it is done with good intention. Thus, it is recommended that the Shariah committee shall exercise caution while dealing with variations and inconsistencies in fatwa. Furthermore, while relying on public interest '*maslahah*' when making fatwa, the Shariah committee must ensure that the conditions for utilizing this Shariah source are complete.

Fourthly, in some jurisdictions, some scholars may be appointed in various Shariah committees of different IFIs. Some of these IFIs like to appoint reputable scholars known for their knowledge as well as their leniency for issuing fatwa which increase the risk of fatwa shopping. Furthermore, the scholars with multiple appointments may not be able to discharge their duty effectively and may create conflict between different IFIs they work with. Hence, it is highly recommended that this practice shall be discouraged because of the adverse effect it may create. For example, conflict of interest between the various IFIs the Shariah committee member is representing. Moreover, information that is confidential may be easily leaked to the different IFIs.

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