

RESPONSIBILITIES, RIGHTS, AND INDEPENDENCE OF SHARIAH COMMITTEES IN ISLAMIC FINANCIAL INSTITUTIONS BASED ON SHARIAH GOVERNANCE 2019

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Abstract

Shariah governance forms an essential part of corporate governance within an Islamic bank. The objective of Shariah Governance is to 'ensure Shariah compliance' and to 'strengthen public confidence in the integrity, management and business operations of the Islamic financial institutions'. Among the key function within Shariah governance is the Shariah committee. However, past studies have shown that there are issues related to the independence of the Shariah committee that may affect it in discharging its responsibilities. The independence is vital because the Shariah committee is accountable towards God as well as the shareholders. Thus, the objective of this study is to examine the independence of the Shariah committee within the aspects of significance, roles, rights, and responsibilities of the committee based on Shariah Governance 2019 in comparison to Shariah Governance Framework 2010. This study employs summative content analysis and comparative analysis on relevant legislation and past literature on Shariah committees in Malaysia. It was found that the significance, roles, rights, and responsibilities of the Shariah committees in Malaysia have been duly established within the Malaysian legal framework. Some enhancements are evident in the current Shariah Governance 2019 compared to the Shariah Governance Framework 2010. However, the enhancements also have reconceptualized the independence of the SC of the IFIs. On the bright side, it may be the original intention of BNM, perhaps to ensure standardization and reduce legal risks within the practice of Shariah compliance. On the other side, it is not clear how the SG 2019 has and will mould the decision-making minds of the SC members within IFIs.

Keywords: Shariah governance, corporate governance, BNM guidelines

INTRODUCTION

Shariah governance forms an essential part of corporate governance within Islamic financial institutions (IFIs). The primary objective of corporate governance is to foster the long-term shareholders' values and interests of other stakeholders (Chapra & Ahmed, 2002; Shamsheer

Mohamad & Muhamad Sori, 2012; OECD, 2015). This is achieved through a well-structured framework of control mechanisms that supports the bank in fulfilling its aims. On the other hand, the objective of Shariah Governance is to ‘ensure Shariah compliance’ (BNM, 2005, 2010, 2019) and ‘strengthen public confidence in the integrity, management and business operations of the Islamic financial institutions’ (BNM, 2019).

Shariah compliance is an indispensable element within the operation of Islamic Financial Institutions (IFIs) in Malaysia. The importance of Shariah compliance has been explained within the core legislation of Islamic finance, i.e., the Islamic Financial Services Act 2013 (IFSA 2013). Section 28(1) of the Act stipulates that Shariah compliance falls under the duty of the IFIs. In a bid to ensure Shariah compliance, amendments have been made to the Central Bank Act 1958 (CBA 2009) to empower the Shariah Advisory Council (SAC) with the highest authority in Islamic finance. Simultaneously, the roles of the SAC are to be complemented by Shariah committees within the IFIs (BNM, 2005).

Shariah Committee (SC) is a term introduced in the Guidelines on the Governance of Shariah Committee for Islamic Financial Institutions (BNM, 2005). Prior to this, various terms have been used to indicate the same committee (Hasan, 2007), such as Shariah Advisory Body (SAB), Shariah Advisory Council (SAC), and Shariah Supervisory Board (SSB) (Malek Marwan, Mohamad Sabri, Rashila, & Raghad, 2016). In the Malaysian context, the guidelines have confined the term Shariah committees (SC) to the Shariah bodies that act as Shariah advisers in the industry of the IFIs (BNM, 2005). To facilitate the roles of the SAC in ensuring Shariah compliance, the establishment of the SC has become a regulatory obligation of the IFIs as provided by Section 30 of IFSA 2013.

Shariah governance forms part of the corporate governance of IFIs (Mizushima, 2013). In the early stage of corporate governance of IFIs legislations in Malaysia, Shariah governance only forms a small part of the corporate governance, as seen in Guideline on Corporate Governance for Licensed Institutions issued in 2010. In the same year, the first Shariah Governance Framework (SGF) was issued to complement the former. On November 13, 2017, BNM issued SGF Exposure Draft 2017 to enhance the regulatory requirements and expectations of BNM over the IFIs Shariah governance (BNM, 2017). It was noted that the enhancements were needed to cope with the current development of Islamic finance and the

recent policy developments in regards to governance, compliance, and risk management (BNM, 2017). Among the highlights was “enhanced requirements for the Shariah committee in providing objective and sound advice to Islamic financial institutions, in line with the Islamic Financial Services Act 2013 (IFSA)” (BNM, 2017). This SGF Exposure Draft 2017 has come into force on September 20, 2019, through Shariah Governance 2019 (SG 2019) (Ali, 2019).

Prior to these developments, past studies have shown that there were some issues to the position of SC, particularly its independence. It was noted that there is a possibility that the independence of the SC has been compromised due to several factors, e.g., management pressure and undue influence due to remuneration received by the SCs from the IFIs (Shamser Mohamad et al., 2016). A study has found that the independence of the SCs was duly established within the relevant laws (Mohammad Azam Hussain, 2017). However, it was highlighted that some loopholes were evident in the laws that may obstruct the independence, e.g., the organizational structure of the SCs to be in control of BoD and the need for the SCs decisions to be in line with those of SAC (Mohammad Azam Hussain, 2017). These two studies employed the SGF 2010.

As indicated earlier, the objective of SG 2019 was to enhance the Shariah governance of IFIs. Inevitably, this includes enhancements on the SCs of the IFIs. Past studies about SG 2019 have shown that there have been significant enhancements. Some enhancements were in the aspects of the structure of Shariah governance, enhanced obligation for continuous development of Shariah knowledge, length of SC members’ appointment, non-physical SC meetings, and annual reporting of Shariah governance practices (Kamaruddin et al., 2020). On the annual reporting aspect, it was also found that reporting was heavily focused on the SC, and less reporting were made on the attributes and practices of other Shariah governance functions, i.e., Shariah risk management, Shariah review, and Shariah audit (Masruki et al., 2020). In Zainal Abidin et al. (2020), it was found that SC members held certain perceptions in the context of their independence. The striking points found in the findings were that the SC members still believed that independence might be hindered if they did not exercise certain acts or manners, e.g., steadfast to their opinions, even after enhancements have been made in the SG 2019.

Based on these, it is apprehensible that the independence of the SC within SG 2019 is still open for further research. In order to do this, the independence of the SCs may be analysed

from its significance, roles, rights, and responsibilities, as seen in the study of Mohammad Azam Hussain (2017).

LITERATURE REVIEW

In the Malaysian context, there are few significant studies of the SC. Studies on the SC of the IFIs can be found either in the topics of Shariah compliance or Shariah governance (Bahari & Bahrudin, 2016; Hafiza & Nurdianawati, 2017; Hanifa et al., 2014; Hasan, 2007; Kamaruddin et al., 2020; Kunhibava, 2012; Masruki et al., 2020; Muhamad Sori et al., 2015b). Some of them highlighted the roles of the committee (Hussain et al., 2016; Muhamad Sori et al., 2015b; Wardhany & Arshad, 2012), and some advanced on the effectiveness of the committee (Ahmad Fahmi, 2012; Hamza, 2013; Shamsheer Mohamad & Muhamad Sori, 2016; Samsuddin et al., 2011). With the issuance of SGF 2019 that took effect in 2018, the roles of the SC have been put in the spotlight.

Corresponding to the SGF 2010, some studies have addressed the SC's independence within the IFIs. For instance, the SC's independence was compromised due to the remuneration provided by the IFIs and limited ability to decide due to the prevailing SAC rulings (Muhamad Sori et al., 2015b). In addition, one of the interviewees in the study has also suggested a clear definition of independence of the committee to assist the industry. Other than that, it was also opined that the independence of the SC was not wholly observed since the committee is not involved in the execution of its decisions (Muhamad Sori et al., 2015b). Similar points were echoed in Ahmad Fahmi (2012, p.74),

“An interesting debut on the independence of Shariah board is the absence of proper segregation of Shariah board duties on their product endorsement function and, later, when they perform Shariah review”.

Some other more recent studies were also conducted to discuss the position and independence of the SC within IFIs, based on SG 2019. Comparative analysis was conducted by the previous study to highlight significant changes in terms of SG 2019 enhancements. Even though some enhancements are evident, the study merely conducts a general analysis. For instance, the study pinpointed enhancements concerning the SC in SG 2019 in SC

confidentiality, competency, independence, consistency, and appointment of SC. However, the enhancements or their findings were not explained in detail.

In Zainal Abidin et al. (2020), the independence of the SC chairmen was investigated from the perspectives of undue influence of management, the holding of multiple positions, length of tenure, and financial reliance. The study found that the independence of the SC was safeguarded by few measures, i.e., personal characters of the SC members, competency and accountability of the SC members, roles played by the SC chairman, and the BoD engagement. These findings implied that the enhancements made within the existing SG 2019 may not adequately address the SC's independence, that the SC chairmen in the study did not highlight their positions based on the SG 2019. This past literature showed that clarification is needed in terms of the independence of the SC. In order to do this, the significance, roles, rights, and responsibilities of the SC based on relevant legislation, particularly the SGF2019, may be helpful to understand the former's position.

Thus, this research aims to analyse the independence of SC within the IFIs based on SG 2019. In order to do this, this study will determine the significance and roles of the SC of IFIs in Malaysia as well as the rights and responsibilities of the SC based on related legislations, particularly SG 2019.

METHODOLOGY

This study is both doctrinal and comparative legal research (Razak, 2009). It employs an inductive qualitative approach to attain its objectives. Data were collected from relevant legislation, i.e., Shariah Governance 2019 (SG 2019), Shariah Governance Framework 2017 (SGF 2017), Guidelines on the Governance of SC for Islamic Financial Institutions 2010, Islamic Financial Services Act 2013 (IFSA 2013), and Central Bank Act 1958 (CBA 2009). However, data was primarily taken from SG 2019 and SGF 2017. Summative content analysis (SCA) was employed to analyse the data, i.e., data on the responsibilities and rights of the SC within the relevant laws. Unlike the conventional and directed content analysis, SCA uses identified word search in specific texts (Hsieh & Shannon, 2005). It is noted that systematic content analysis is a more established analysis method within legal research. However, it is also confined to legal opinions, judicial decisions, or analysis of case reports (Hall et al., 2008;

Salehijam, 2018). This study, however, used relevant legislation, mostly guidelines issued by the BNM. Thus, summative content analysis is more appropriate and adapting past research on SGF 2010 (Mohammad Azam Hussain, 2017). Comparative analysis, using analytical structure (Van Hoecke, 2016), was also undertaken to present the enhancements that have been included within SG 2019 compared to SGF 2017 in specific concepts, i.e., responsibilities and rights of SC. Findings of both the content and comparative analysis are then employed to analyse the concept and principles of independence of the SC within IFIs.

RESULT AND DISCUSSION

Significance of the Shariah Committee of the IFIs

Although the term ‘Shariah committee’ is widely employed in the legislations or guidelines, its definition cannot be found. Nonetheless, a closer definition of the Shariah committee can be observed in the AAOIFI standard. Shariah supervisory board (SSB), as equal to Shariah committee, is defined as:

“an independent body of specialized jurists in Fiqh al-Muamalat (Islamic commercial jurisprudence). The SSB may also include a member(s) other than those specialized in Fiqh al-Muamalat, called expert member(s) who is(are) expert(s) in areas such as banking, finance, economics, accounting, law, etc. and have knowledge of Fiqh al-Muamalat. The SSB is entrusted with the duty of directing, reviewing and supervising the activities of an IFI in order to ensure it is in compliance with Shariah principles and rules. The Fatwa and rulings of the SSB are binding on the IFI”.

According to this definition, the salient features of an SC are an independent body, and it consists of specialized scholars in Islamic commercial laws. These scholars are entrusted with the duty of ensuring Shariah compliance. The independence of the SC is a crucial element for the SCs. This is because the independence of the SCs presents the religious commitment requirement and how the committee regards themselves as accountable in front of God (Abdel Karim, 1990; Ahmad Fahmi, 2012). Other than that, the committee’s independence is also about being free from the economic interest or pressure from the Islamic banks’ management

(Abdel Karim, 1990; Ahmad Fahmi, 2012). In Mohamad and Muhamad Sori (2016), the independence of the SC was also questioned from the perspectives of its restricted role, i.e., 1) producing resolution without engaging in the execution of the resolution and 2) possible influence due to the state of being remunerated by the management of the IFIs. Therefore, the independence of the SC can be perceived as having both active engagements in producing resolution and execution of the resolution. Other than that, it was opined that the SC should be remunerated from particular fund manage by the BNM (Mohamad & Muhamad Sori, 2016).

Besides that, another more important feature of the SC is its function to ensure Shariah compliance. In order to ensure compliance, the SC must direct the IFIs, review and supervise the execution of any particular matter, so it complies with the Shariah (Laldin, 2008). This function is also disseminated in a few guidelines issued by the BNM. For instance, the duties of the SC as delineated in the Guidelines on the Governance of SC for Islamic Financial Institutions (BNM, 2005). The duties outlined in the Guidelines are undoubtedly structured to ensure Shariah compliance in the operation, activities, and business of the IFIs. The function of the SC to ensure compliance with the Shariah is also stipulated in Section 30(1) of IFSA 2013. With these, the significance of the SC lies on the Shariah compliance function within the IFIs.

Shariah compliance can be defined as “observing strictly to the permissible (*halal*) and abstaining from the prohibited (*haram*) as commanded by God (Azhar Rosly, 2010). It is generally understood as adhering to the Shariah principles. According to the principles of *Maqasid al-Shariah*, such adherence will safeguard one’s faith, life, progeny, intellect, and property. Nonetheless, in the perspective of Malaysia, Shariah compliance that the IFIs need to safeguard is also confined to complying with the SAC rulings regarding the operation of the IFIs. This is because Section 28(2) of IFSA 2013 states that compliance with the SAC ruling is deemed compliance to Shariah. Simultaneously, Section 58 of the Central Bank of Malaysia Act 2009 states that where the SC ruling is different from the ruling of the SAC, the latter shall prevail. In other words, Shariah compliance within the Islamic finance in Malaysia is restricted to compliance with the ruling of the SAC. Nonetheless, the power of SC to produce rulings on the matter not yet issued by the SAC is entertained.

As such, the significance of the SC lies in the restricted Shariah compliance function. In other words, it is to compliment to roles of ensuring Shariah compliance played by the SAC

(BNM, 2005). Other than that, the SC's significance can also be observed through the Shariah governance framework (SGF) issued by the BNM. In the SGF (BNM, 2010) that became effective in January 2011, the SC must report directly to the Board of Directors (BoD). In this view, the SC assists the BoD in all matters about the Shariah matters. This is mentioned in the BNM (2010, p.11):

“While the board bears the ultimate responsibility and accountability on the overall governance of the IFI, the board is expected to rely on the Shariah Committee on all Shariah decisions, views and opinions relating to the business of the IFI.”

This significance is dealt with comprehensively within the aspects of roles, responsibilities, and rights of the SC in both SGF 2010 and SG 2019. As elucidated before, some enhancements have been made on the SGF 2010 through SG 2019. Thus, it is anticipated that the SC's roles, responsibilities, and rights were part of the enhancements. By analysing these, it should delineate the enhanced independence of the SC within SG 2019.

Roles of the Shariah Committee of the IFIs as in SGF 2010 and SG 2019

Besides its significance in Shariah compliance and Shariah governance of the IFIs, specific roles are entrusted to the SC. These roles are generally formed from the SCs' responsibilities. Comparative analysis of the roles as in SGF 2010 and SG 2019 are explained as follow:

Advisory Role

Among the imperative role of the SC is to advise the BoD on Shariah matters. The advices given by the SC is to ensure that the business operations of the IFIs comply with Shariah principles at all times. This role is practiced through the Shariah meetings conducted within the IFIs regularly. Although it is called the 'advisory' role, the SC is held accountable for all the decisions, views, and opinions they addressed (BNM, 2010, Appendix 4; 2019, part C, para 10.2). This function is maintained in both SGF 2010 and SG 2019. However, scrutiny on the detailed responsibilities of the SC in SG 2019 entails more differences. These will be dealt with in the next part of the responsibilities of the SC.

Consultancy Role

This role is different from the advisory role placed on the SC. There are a few occasions where the SC has to perform its consultancy role. For instance, related parties of the IFIs, such as the IFIs' legal counsel, auditor, or consultant, may seek advice on Shariah matters from the SC. Under this circumstance, the SC is obligated to provide appropriate consultancy for them. Under the SGF 2010 (BNM, 2010, para 2.2, 7.11, 7.21, 7.24), BoD consultation with the SC is also a must when the BoD intends to approve policies related to Shariah matters.

In SG 2019, the key responsibility of the SC has been confined to “provide a decision or advice”. The use of ‘consult’ or ‘consultation’ was not found in the SG 2019.

Oversight Role on Shariah Matters

Instead of issuing decisions, views, and opinions on Shariah matters, the SGF 2010 (BNM, 2010, para 2.8) obligated the SC to observe the Shariah review and Shariah audit reports to identify issues that need the attention of the committee, and where applicable, recommend corrective measures. This role is carried out by reporting the issues to the BoD. If the SC has reason to believe that the issues have not been addressed adequately or effectively or the IFIs have not taken the corrective measures, they must report it to the BNM (BNM, 2010, para 3.6-3.8). This role is heightened in the SGF 2010 due to the growth within Islamic finance and more weighted concern of the stakeholders over the Shariah compliance process.

In SG 2019, the oversight role is not linked to the SC specifically. The oversight role, particularly the oversight accountability for Shariah governance implementation, is vested on the BoD. In other words, the BoD is held accountable for the Shariah governance of its IFIs, and the oversight roles are comprised in the BoD's key responsibilities as set in para 8.

From the comparative analysis of the roles of the SC as prescribed in SGF 2010 (BNM, 2010) and SG 2019 (BNM, 2019), some of the roles of the SC have been changed. In term of SC's advisory role, the SGF 2010 has provided the former within an appendix attached to the SGF 2010 that enlist all the duties and responsibilities of the former. In SG 2019, the advisory role of SC is included within the SG, under the SC key responsibilities. Looking at all the

provisions, the advisory roles of the SC in SG 2019 are more straightforward and all-encompassing. In terms of consultancy and oversight roles, the changes made in SG 2019 indicate that the roles of the SC are more restricted and more precise. It is more apprehensible to vest the BoD with the sole oversight role due to its power within IFIs, hence accountable for it. More details that may elucidate the SCs' roles are discussed in the following part.

Rights and Responsibilities of the Shariah Committee of the IFIs in SGF 2010 and SG 2019

Responsibilities and rights are two essential legal conceptions. Among the earliest literature on rights and responsibilities was Wesley Hohfeld (1879-1918). He has identified four essential elements of right: privilege, claim, power, and immunity in 1923 (Gooding-williams, 2015). The relationship between right and responsibility or duty has been established (Corbin, 1924; Lazarus et al., 2009).

In the past literature, there are a few perspectives on how rights and responsibility are related. Right can be defined as "entitlements (not) to perform certain actions, or (not) to be in certain states; or entitlements that others (not) perform certain actions or (not) be in certain states". On the hand, responsibility is defined as "a sphere of duty or obligation assigned to a person by the nature of that person's position, function, or work" (Vincent E. Barry in Bivins, 2012, p.20). As for Hohfeld, the relationship between right and responsibility is described as "A "right" exists when its possessor has the aid of some organized governmental society in controlling the conduct of another person. The first is said to have a "right" against the second and the latter a "duty" to the first" (Corbin, 1924). In other words, the right entails responsibility.

Interestingly for Lyons (1970) he spoke of the right and responsibility correlatively. He echoed this:

"Suppose that Bernard owes Alvin ten dollars: we then have equal reason to ascribe a right to Alvin and a corresponding obligation to Bernard. Bernard's obligation is to pay Alvin ten dollars; but his obligation is also to Alvin-or, as we say, it is "owed" to Alvin - in particular Alvin has a corresponding right,

to be paid ten dollars by Bernard, which is held “against” him specifically. Alvin’s right and Bernard’s obligation do not merely coexist: their coexistence is necessary, not contingent. Neither the right nor the obligation could arise without the other, and if one is discharged, waived, cancelled, voided, forfeited or otherwise extinguished the other must be extinguished as well. For the “ground” of the obligation-the undischarged debt-is the “title” of the right. This right and obligation entail one another. A statement ascribing one warrants fully an inference to the other, without appeal to contingent facts or substantive principles. It is not that facts or principles have no bearing on the case: assertions of the right or obligation may presuppose principles deriving them from certain kinds of fact. But, if we are given either the right or the obligation we can infer the existence of the both”.

In his view, despite the understanding that right creates responsibility, they both co-exist. In other words, responsibility can also create rights.

This view is particularly interesting for the discussion of the responsibilities and rights of the SC. It is because some rights of the SC arise from the responsibilities conferred on it. Simultaneously, some responsibilities also arise from the rights given to it. In other words, they both co-exist and complement each other. As stipulated by Section 32, the duties of the SC are set out under the standards issued by the BNM, following Section 29(2)(a)(i) of IFSA 2013. Therefore, the duties or responsibilities of the committee are discussed based on the SGF 2010 and SG 2019.

Responsibilities of the Shariah Committee

Issue Decisions, Views, and Opinions related to Shariah Matters

The SC is under the obligation to issue decisions, views, and opinions on the Shariah matters pertaining to the business of the IFIs. The decisions, views, and opinions are considered accountable advice to the BoD and the IFIs regarding the IFI’s Shariah compliance. Since the SC is accountable for its actions, it must exercise rigorous deliberation before issuing the decisions (BNM, 2010, para 2.7). The accountability of the SC is provided in Appendix 4 on the duty of SC of SGF 2010. The term used was “*responsible and accountable for all Shariah decisions, opinions and views provided by them*”.

In SG 2019, the accountability of the SC of its decisions or advices is prescribed in para 10.3. Compared to SGF 2010, SG 2019 highlights that accountability covers the quality, accuracy, and soundness of its decisions. As provided in SG 2019, “*The Shariah committee shall be accountable for the quality, accuracy, and soundness of its own decision or advice*”. These accountability aspects may be proven through the robust methodology established by the SC itself to guide its’ decisions (BNM, 2019, para 10.4). These indicate that there are enhancements on the responsibilities of the SC in SG 2019 compared to SGF 2010.

It is also worth noting that the first key responsibility of the SC was stated as,

“... to provide objective and sound advice to the IFI to ensure that its aims and operations, business, affairs and activities are in compliance with Shariah. This includes– (a) providing a decision or advice to the IFI on the application of any rulings of the SAC or standards on Shariah matters that are applicable to the operations, business, affairs and activities of the IFI”

(BNM, 2019, para. 10.2 (a))

Only in the preceding sections is the responsibility to provide decision and advice general, i.e., without restriction to observing the SAC rulings. These imply that another enhancement of the key responsibilities of the SC is to confer compliance to SAC rulings as in SGF 2010 more stringent.

Identify Issues Related to Shariah Matters (Oversight)

Instead of advising the IFIs in Shariah meetings regularly and provide advices or consultancy upon request, it is also the responsibility of the SC to identify issues that require the attention of the IFIs. For instance, in the case of non-compliance activities by the IFIs. To discharge this responsibility, the SC is under the obligation to scrutinize the Shariah review and Shariah audit reports (BNM, 2010, para 2.8).

In SG 2019, the oversight role is reduced to merely deliberating issues highlighted by IFIs. It was stated: “*Where the Shariah committee has reason to believe that any Shariah issues*

or matter may affect the safety and soundness of the IFI, the Shariah committee must immediately update the board on such matter.” (BNM, 2019, para 10.5). This is apprehensible since the oversight role is conferred to the BoD. Thus, SC is only responsible to the extent that he/she believes there is a risk of Shariah non-compliance. As indicated in a study, SC relies on the information presented to them by the IFIs (Agha, 2018). Therefore, it may be more appropriate not to extend SC’s responsibility towards the oversight of the Shariah governance of the IFIs.

Endorse Policies, Procedures, and Relevant Documents

It falls under the responsibility of the SC to endorse Shariah’s policies and procedures (BNM, 2010, Appendix 4). This endorsement by the SC is necessary before the BoD approves the policies and procedures. At the same time, the SC also has to endorse and validate certain documents to fulfil its advisory and consultancy roles (Hasan, 2007). When the SC issues its views on certain matters, like product and manual, all the related documentations must be endorsed and validated (BNM, 2010, Appendix 4).

In SG 2019, the responsibility to endorse policies and procedures is set in para 22.7, i.e., about the duty of the IFIs to ensure transparency and disclosure within their annual report. SC (at least two SC members) must sign on the disclosure of the Shariah governance policies and practices reported by the IFIs. SC is also required to endorse a written policy produced by the IFIs regarding SC’s responsibilities and the IFIs state of Shariah compliance (BNM, 2019, para 22.6, 22.7). Another endorsement that needs to be discharged by the SC is pursuant to rectification measures towards Shariah non-compliance events within the IFIs (BNM, 2019, para 10.2 (e)).

In comparison to the SGF 2010, the responsibility for SC to issue endorsement has been made clearer. Unlike the SGF 2010, the responsibilities of the SC is more general, e.g. “... *to endorse Shariah policies and procedures prepared by the IFI and to ensure that the contents do not contain any elements which are not in line with Shariah*” (BNM, 2010, Appendix 4 para 3).

Develop Structured Process of Issuing Decisions

The SC is also expected to develop a structured process of its decisions. This is to ensure consistency within the decisions. In a bid to ensure this, the SC must document, adopt and maintain the decisions or reports at all times (BNM, 2010, para 6.1). When the SC issues its views on certain matters, like product and manual, all the related documentations must be endorsed and validated.

In SG 2019, similar responsibilities were prescribed in para 10.3 and 10.4 of the SG. Para 10.3 provides that SC will be held accountable for his/her decision. Thus, it is required for the SC to establish a robust methodology to guide its decisions (BNM, 2019, para 10.4). This requirement is also parallel with the responsibility of SC to maintain consistency in their decisions (BNM, 2019, para 10.12).

Advice on matters to be referred to the SAC

The SC may advise the IFI to consult the SAC on Shariah matters that cannot be solved by the IFIs (BNM, 2010, Appendix 4). In SG 2019, this responsibility has been included in para 10.2(b) of the SG. This refers to the responsibility of the SC to provide a decision as well as advice on matters that require the former's attention.

Provide Written Shariah opinions

The SC is required to provide written Shariah opinions in circumstances where the IFI makes reference to the SAC for further deliberation. For instance, when there are uncertainties and differences in opinions, reference can be made to the SAC. Under this circumstance, the SC is required to assist the deliberation by providing a written Shariah opinion. Other than these, the written Shariah opinion is also required when the IFIs submit applications to the BNM for a new product approval (BNM, 2010, Appendix 4).

In SG 2019, the responsibility to provide written Shariah opinions has been amended. These bring the discussion to the final responsibility of the SC, i.e. responsibility to observe the SAC rulings. However, should the SC not arrive to a decision on matters referred to them, the IFIs shall refer the matters to the SAC of BNM according to Manual Rujukan Institusi Kewangan Islam kepada Majlis Penasihat Syariah (BNM, 2019, para 10.6). In this way, the

reference to the SAC may only be made via the IFIs, through the Secretariat of SAC. This implies that more stringent steps are drawn in SG 2019 to ensure that the responsibility of SC to comply with SAC rulings is observed by the IFIs.

Observe the SAC Rulings in Arriving at Decisions

In SGF 2010, the SC is required to observe and respect the SAC rulings and act in a manner that does not undermine the latter. This responsibility is provided in BNM (2010, para 6.2). Hence, reference must be made to SAC when differing opinions are held by the SC (BNM, 2010, para 6.3).

However, it is worth noting that in SGF 2010, non-compliance to SAC rulings is not considered a Shariah non-compliance risk (BNM, 2010, para 1.3). Unlike SG 2019, Shariah non-compliance risk includes non-compliance to SAC rulings (BNM, 2019, para 5.2). This is also in line with s 28 of IFSA 2013 (Laldin & Furqani, 2018). In SG 2019, the SC is also required the same, i.e., to act in a manner that does not undermine the SAC rulings. The SC's key responsibilities have also outlined the need to provide decisions and advices on applying the SAC rulings (BNM, 2019, para 10.2).

Rights of the Shariah Committee

Indicated above are the responsibilities of the SC. Arising from these responsibilities are some rights of the SC. These rights are embedded within the SGF 2010 and SG 2019 to assist the SC to discharge its responsibilities:

Right to Remuneration

Due to the services provided by the SC, it is the right of the committee to be remunerated. The BoD must ensure that the SC is remunerated appropriately (BNM, 2010, para 2.6). A similar right is guaranteed in SG 2019 in para 9.7., which states that it is the responsibility of the IFIs to approve a remuneration policy that commensurate the SC's accountabilities, duties, and responsibilities.

Right to Confidential Information/Data

The SC has the right to access files, records, draft materials, and conversations, inclusive of those categorised as confidential. This right is given to the SC since the information is related and critical to the work undertaken by the committee. Therefore, this right also obliges the SC with the responsibility to observe the principle of confidentiality at all times (BNM, 2010, para 5.1).

In SG 2019, some enhancements on this right are evident. Firstly, the right to access all information required by the SC to arrive to their decisions is secured in para 11.10. Secondly, the right is enhanced by providing the SC access to third-party experts on any matters deliberated by them, in para 11.11. Thirdly, if these rights are being declined or denied, this matter can be brought to the BoD for proper rectification, as in para 11.12.

Given the enhancements, it can be implied that they are in line with the objectives of SG 2019 to provide enhanced rights of the SC to deliver objective and sound decisions and advices to the IFIs. However, the above analysis also indicates that some enhancements impliedly aim to confine SC's responsibilities to specific roles, i.e., advising and deciding only without undermining the SAC rulings. At this point, these enhancements may superficially affect the independence of the SC of IFIs.

Independence of SC of IFIs

The significance of SC's independence is linked to the success of the Shariah governance of the IFIs (BNM, 2010, para 1.2). The independence of the SC in SGF 2010 is described as being *“free from any undue influence that would hamper the Shariah Committee from exercising objective judgment in deliberating issues brought before them. Correspondingly, the Shariah Committee is expected to make sound decisions on Shariah matters independently and objectively”* (BNM, 2010, para 3.1).

Even though the definition or description of 'independence' was not provided in SGF 2010, the independence of SC was dealt with in Principle 3, para 3 of the SGF. Among the elements of independence were:

- a) Direct reporting to the BoD (BNM, 2010, para 3.2).
- b) Right to access to all information needed to arrive to decisions (BNM, 2010, para 3.4).
- c) Report to BoD for any Shariah non-compliant activities (BNM, 2010, para 3.6).
- d) Report to BNM for any ineffective measures of IFIs to solve Shariah non-compliant activities (BNM, 2010, para 3.7).

Some enhancements concerning SC independence within SG 2019 can be observed from few aspects as follow.

Independence from Other Influences

Like SGF 2010, SG 2019 vests the responsibility to secure the independence of the SC on the BoD (BNM, 2010, para 3.1; 2019, para 9.2). In order to do this, SG 2019 highlights the need for BoD to establish a written policy to measure that the SC appointed is independent or free from undue influences that may arise from multiple appointments that the SC member has (BNM, 2019, para 9.3).

Similarly, in BNM (2019, para 10.10), the SC themselves have to ensure that their other professional commitments do not influence their decisions and advices. This independence is linked to objectivity in producing the decision. Thus, the SC must disclose any potential of such conflict of interest (BNM, 2019, para 10.13). In the same vein, para 11.9 requires the SC member to exempt him/herself from attending the Shariah discussion that may cause a conflict of interest. This is an enhanced provision in ensuring the independence of the SC and their decisions from other influences.

Independence in Discharging Duties/ Responsibilities

The key responsibility of the SC of IFIs is to provide decisions and advices on matters that require their reference (BNM, 2019, para 10.2). In order to achieve its objective, the key responsibilities must be discharged independently. Independence concerning responsibilities discharged is dealt with in SG 2019 in few paragraphs. In para 10.5, the SC is responsible for informing the BoD if he/she believes that the IFIs have any Shariah issues that may affect the IFIs' safety and soundness. This shows that SC has an independent right to inform the matter

without prior reference to the other party. In line with SGF 2010, this right that embeds within the responsibility of the SC implies the independence of the SC.

On the other hand, the right of the SC to have access to all information required to arrive to a decision is also stated in both SGF 2010 and SG 2019. However, enhanced provisions were found in SG 2019, where the SC may be granted access to third-party expert opinions in deliberating Shariah matters referred to them (BNM, 2019, para 11.10, 11.11, 11.12).

In contrast to these types of independence, there is no provision found in SG 2019 that describes SC as an independent body. Unlike other Shariah control functions, as described in para 16.6 SG 2019, their independence is described literally as “*the control functions must be sufficiently independent of the business lines and must not be involved in revenue generation activities*”, or in para 19.1, 19.5, and 19.6, the function of internal and external Shariah audit must be “*independent*”. These show that the independence of these functions is secured by the law, SG 2019, while the independence of the SC is secured by the BoD, as stated in para. 9.2 as,

“The board must take reasonable steps to ensure that the Shariah committee is free from any undue influences that may hamper the Shariah committee from exercising its professional objectivity and independence in deliberating issues brought before them.”

These show that the independence of the SC within SG 219 may be conceptualized in the way of how the BoD intends to be. In the same vein, the above analysis of SC rights and responsibilities also indicate that some of the ‘enhancements, e.g., 1) clearer but confined responsibilities, i.e., issuance of advice and decision and 2) stringent measures to ensure compliance to SAC rulings, may have some impacts of how the concept of independence of SC may be drawn. For instance, while the SC is not recognised as an ‘independent body’, SC is required to be independent, e.g., free themselves from conflict of interest that may hinder their objective advice and decisions. However, their independence in issuing advice and decisions is still subject to:

- a) the BoD, i.e., as implied in para 9.2, as to ‘how adequate the BoD has taken reasonable steps to ensure the independence’ and;
- b) the SAC rulings, with the control mechanism as set in para. 10.2, 10.6.

CONCLUSION

This study examines the existing legislation and guideline, particularly SGF 2010 and SG 2019, on the significance, roles, rights, and responsibilities of the SC of IFIs in Malaysia. It was found that the significance, roles, rights, and responsibilities of the SC have been adequately outlined in the legislation and guideline. Employing summative and comparative analysis on relevant laws, particularly SGF 2010 and SG 2019, indicate that some enhancements have been included in the latter. These enhancements were in line with the initial objectives of the amended law, i.e., to include “enhanced requirements for the Shariah committee in providing objective and sound advice to Islamic financial institutions, in line with the Islamic Financial Services Act 2013 (IFSA)” (BNM, 2017). Based on the findings of this study, the enhancements are evident. However, the enhancements also have reconceptualized the independence of the SC of the IFIs. On the bright side, it may be the original intention of BNM, perhaps to ensure standardization and reduce legal risks within the practice of Shariah compliance. On the other side, it is not clear how the SG 2019 has and will mould the decision-making minds of the SC members within IFIs.

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