International Journal of Business and Society, Vol. 19 S3, 2018, 368-384

DEVELOPMENT OF THE CLASSICAL ISLAMIC GUARANTEE THROUGH FATWA IN MODERN ISLAMIC BANKING

Suhaimi Ab Rahman[♣]
Universiti Putra Malaysia

ABSTRACT

It was *circa* 749-1850 of the Islamic era that sophisticated rules and principles including the guarantees were developed. This paper is to clarify the application of the classical Islamic law of guarantee, *kafalah*, in modern banking. Important legal texts that include the Qur'an, the Sunnah of the prophet Muhammad SAW and the classical manuals of Islamic law have been examined to understand the nature of classical Islamic law of guarantee. A number of *fatwas* or resolutions of the guarantee were also examined to understand the meaning and the extent the classical law is applicable in modern banking. The results show that the basis of modern guarantee was made upon the rules and principles of *al-kafalah* that have been developed *circa* 1200 years ago. However, the principles of classical Islamic law of guarantee have been expanded and developed to allow for the charging of fees despite the contract is gratuitous in nature. The paper concludes that Islamic law, *fiqh*, is progressive in nature as it is a situational inference to Allah's will; and it is upon interpretation and deduction that the rules in Islamic Shari'ah could be appreciated and developed to suit modern circumstances.

Keywords: Classical Islamic law; Guarantee; Collateral; Fatwas; Islamic banking

1. INTRODUCTION

Philosophically, the existence of Islamic banks was based upon the prohibition of *riba*, transactions that involve *gharar*, *maysir* and non-permissible items, and the making of profits without fulfilling the moral obligation to the public. According to Haron (1997) the main principles of Islamic banking comprise of prohibition of interest [i.e. *riba*] in all forms of transactions, and undertaking business and trade activities on the basis of fair and legitimate profit. However, this does not mean that the banks cannot make a fair profit. In respect to this, Mirakhor (2004) said that it is considered an injustice for Islamic banks if they are unable to make profit and provide sufficient returns to the depositors who entrusted their money to them. Here, the banks will not be able to provide sufficient returns to their depositors if the banks do not make a reasonable profit. Despite the fact that business and profits are also outlined as the main objective of Islamic banks, the banks are expected and encouraged to consider their moral obligations towards the community.[i]

Similar to conventional banking, most of the Islamic bank's profits are made from the full utilization of customers' funds (Kreps & Olin, 1967). These funds are mobilized either in the form of loans (particularly the conventional banks),[ii] financings or investments. It is worth mentioning

♣ Corresponding author, Faculty of Economics and Management & Halal Products Research Institute, Universiti Putra Malaysia, Serdang , Malaysia, suhaimiabrahman@upm.edu.my

at this point that Islamic bank like any other commercial bank, while mobilizing these funds cannot escape from risk of loss. The financing being extended may turn out to be a liability for the bank if the project being financed stumble upon unforeseen problems (Scott, 1984). There is also a possibility that the contractors will not be able to carry out with their projects. If this were to happen, a detrimental outcome could befall the bank, whose duties are not only to make profit but also to keep the customer's monies in safe custody. Thus, due care should be exercised, and therefore it is imperative for the bank to exercise sound financial policies. As such, the bank should consider all aspects of the financing, including the taking of collateral.

2. COLLATERAL FOR LOANS, ADVANCES AND FINANCES

Extension of credit or financing facilities to customers is one of the most important functions of both commercial and Islamic banks. In fact, a cursory glance at a 'Balance Sheet' of a typical commercial or Islamic bank reveals that the single largest asset item consists of loans, advances and finances to customers. At this point, it can be said that the return that is derived from profits on such loans, advances and finances forms the 'bread and butter' of banks. It is thus critical that the banks exercise prudence and care in evaluating the merits and viability of applications for loans, advances and finances and in their credit management and credit control and follow-ups.

There has been a common practice among bankers to have their own guidelines regarding the extension of such loans, advances and finances. According to Haron (1997), the financing practices of Islamic banks are very similar to that of the conventional banks. The 5Cs, i.e., **C**haracter, **C**apacity, **C**apital, **C**ollateral, and **C**ondition, criteria will normally be considered while extending credit or financing facilities to customers. In the United Kingdom, the acronym of 'CAMPARI' has been developed to ensure that the bank will not lose but gain more profit while extending credit facilities. CAMPARI stands for **C**-Character; **A**-Ability; **M**-Margin; **P**-Purpose; **A**-Amount; **R**-Repayment; **I**-Insurance (security) (Ab Rahman, 2005). Insurance becomes one of the most important elements that the banks take into account while extending their credit facilities. Since the real practice of insurance cannot be applied in normal loan transaction, the bank accepts collateral as the banker's insurance against unexpected default.

Collateral is therefore important to cover the risk of loss. The priority of both commercial and Islamic banks is not only making profits but also protecting the welfare of others. In fact, the vast portion of the bank's fund comes from depositors. It is mandatory for the bank to ensure that the monies deposited are in safe custody. Therefore, collateral is perceived as not only useful but also important in the banking lending transaction. It is not surprising therefore that the modern trend of banking businesses is to prefer secured credit to the unsecured credit. At this point, Scott (1994) remarks;

"[A] dramatic increase in the number and size of firms that rely on secured credit as their principal means of financing both ongoing and growth opportunities. Previously, with a few exceptions [sic] secured financing principally had served second-class markets as the 'poor man's' means of obtaining credit. Now, it has come the linchpin of private financing, prompting even large firms to employ leverage buyouts as a means of fleeing public equity for the safe harbors of Article 9".

3. ISLAMIC GUARANTEE AS PERSONAL SECURITY IN MODERN BANKING TRANSACTIONS

As mentioned earlier, the reason for the establishment of the Islamic bank was made upon the prohibition of *riba*, and transactions that involve *gharar*, *maysir* and non-permissible items. Otherwise, the objective of the bank is relatively similar to that of conventional banks, especially in the making of profits. Note however that besides making the profits, the bank has to consider its moral obligation towards the community. The bank has also moral obligations to provide services that conform to Islamic principles. In the case of the Faisal Islamic Bank of Bahrain, for example, among its objectives are (i) to serve the Muslims Islamic financial services and to execute their financial dealings in strict respect of the ethical individual and social values of Islamic Shari'ah without contravening the prohibition of dealing in *riba*, (ii) to serve the Muslims in mobilizing and utilizing the financial resources needed for their true economic development and prosperity within the principles of Islamic justice assuring the right and obligations of both the individual and the community, and, (iii) to serve the Muslims by strengthening fraternal bonds through mutually beneficial financial relationships for economic development and peace.

On a similar note, the Articles of Association of the Jordan Islamic Bank states that the bank aims for meeting the economic and social needs in the field of banking services, financing and investment operations on a non-usurious basis. It is further stated that the objective shall include (i) expanding the extent of dealings with the banking sector by offering non-usurious banking services with special emphasis on introducing services designed to revive various forms of collective social responsibility on a basis of mutual benefit, (ii) developing means to attract funds and savings, and channeling them into participation in non-usurious banking investment, (iii) providing the necessary financing to meet the requirements of the various sectors, particularly those which are not likely to benefit from usurious banking facilities. In Malaysia, the Bank Islam Malaysia Berhad's objectives is to provide banking facilities and services in accordance with Islamic principles, rules and practices, to all Muslims as well as the population of this country. The Islamic principles are essentially those belonging to the body of Islamic principles on commercial transactions, *ahkam al-mu'amalah al-Islamiyah*, pertaining to banking and financing.

If a reference is made to a particular Islamic bank's 'Balance Sheet', one would find that loans and finances rank the second highest of the bank's priority. To mention a few, examples of these loans and finances include benevolent loans, *al-Qardu al-Hasan*, and equity participation such as *al-Mudharabah, al-Musharakah, al-Murabahah, al-Bay' Bithaman Ajil, al-Ijarah*, and *Tawarruq*. Other Islamic bank's services include letters of credit, letters of guarantee and traveler's cheques. As such, an Islamic bank like the conventional is a financial intermediary. It uses its customers' funds to run its business. Hence, it is prudent for the bank, while exercising its right to use the funds, to use it wisely. In other words, prior to the granting of any loans or financing or embarking on any projects the bank should to consider all aspects of loans, financings or the prospective projects. Besides, the bank should also consider security as an important instrument that need to be observed in the banking lending transactions.

In relation to this, the Qur'an has, in numerous occasions, outlined the importance of security while dealing in business transactions. Surah al-Baqarah, verse 283 for example states, "And if you are on a journey and cannot find a scribe, then let there be a pledge taken (mortgaging), *farinanun maqbudhah*; then if one of you entrust the other, let the one who is entrusted discharge his trust

(faithfully), and let him be afraid of Allah, his Lord. And conceal not the evidence for he, who hides it, surely his heart is sinful. And Allah is All-Knower of what you do". In the practice of the Prophet, security has been widely used to cover the credit facilities extended to another. In this context, to mention a few, the Prophet himself surrendered something as security for the credit given to him. In *Sahih al-Bukhari*, it was reported that the Prophet had bought some foodstuff on credit for a limited period and thereby gave his Armour as security for the loan. Abu Hurairah has also reported that the Prophet said, "I am closer to the believers than their own selves, so if a true believer dies and leaves behind some unpaid debt, I am responsible [as a guarantor] for him and if he leaves behind some properties, it will be for his heirs".

Guarantee has been accepted in the modern banking practices as a useful mechanism for security purposes. Being a simple and less expensive form of security management, the guarantee attracts many people to use it as security in loan and financing transactions. The guarantee has also been widely accepted and practiced in the business of Islamic bank; the guarantee is asked by the customers to cover the safe custody of their deposits with the banks, and on the other, the bank also asks the customers to provide the guarantee to safeguard the loans or financings granted to them.

The guarantee that is being practiced in Islamic banks was developed under the concept of *al-kafalah*. Historically, *al-kafalah*, which was practiced before the advent of Islam in 610 AD, was used to secure the performance of future obligation including debts. The instrument was later developed and modified to suit the will of the Islamic Shari'ah. In relation to this, rules that govern the guarantee were modified and developed through general precepts of Islamic Shari'ah that contained in the Qur'an. Thus, the development of *al-kafalah* was made upon two main bases, first, historical development of the guarantee, and second, the basic requirement of the Islamic Shari'ah. When the two are combined, we will encounter a hybridity of law that suggests the guarantee should also emphasize on moral obligation. Thus, instead of being an instrument to secure the performance of future obligation, the guarantee was also intended to help others. The practice of guarantee is considered as a good deed and subservience to Allah and therefore shall be rewarded in the hereafter (Abdullah, 1986). Similar to gift *inter-vivos*, the aim of *al-kafalah* was to assist the people who are in need. Therefore, if a reference is being made to the classical manuals of Islamic law, one would find that the guarantee has been classified as a gratuitous contract; a contract that requires no consideration (Ab Rahman, 2008).

4. *FATWA* ON THE PRACTICE OF ISLAMIC GUARANTEE IN MODERN ISLAMIC BANKING

Generally, the practice of the guarantee in Islamic banks is similar to that of the conventional one, i.e., personal guarantees and bank guarantees. The personal guarantee is a guarantee that is provided by customers to the banks for loans and financings. The bank guarantee includes letter of guarantee as well as shipping guarantee. The letter of guarantee further includes the tender guarantee; performance guarantee; guarantee for advance payment; supply guarantee; guarantee for sub-contract; guarantee for exemption of custom duties and the custom bond. Under Islamic banks these facilities are made based upon the concept of the *al-kafalah* (Al-Salaheen & Aldhala'een, 2013). For business reasons, as we will see in the next section, the banks normally charge fees for the guarantee given to its customers. This has been justified through the use of the concept of *al-wakalah* or contract of agency. Some banks, however, do issue the guarantee without

any service charge. The Faisal Islamic Bank of Sudan, for example, issues letters of guarantees on behalf of its customers based on a profit-sharing concept. On this point Affaki (1997) explains that the bank is remunerated based on the percentage of profit received by customers on the transaction covered by the guarantee.

4.1. Fatwa as a Progressive Instrument for Islamic Legal Development

Fatwa that relates to modern practice of the Islamic guarantees is one of Islamic legal sources in the subject area. In some Muslim countries, like Malaysia, such fatwa has become important rules that can serve as a reliable guideline to the modern practice of Islamic banking. In this context, the role of a *mufti* or other authorized body has become significant in producing a reliable fatwa. Although fatwa has not been regarded as binding in the legal practice, the authority of fatwa making should not be disrespected. It is observed that the process of fatwa making is stringent; the procedure of which should always conform to the general method of Islamic legal research. At this point, it is not an exaggeration to equate the value of *fatwa* with that of a court decision.

Being responsive in nature, *fatwa* serves as a progressive agent for development in Islamic legal thought. It is observed that most practical aspects of Muslim affairs are being treated by *fatwas* rather than legal theories that are embodied in the compendiums of Islamic law. Masud et. al. (1996) said, 'while the more theoretical aspect of the Shari'ah is embodied in the literatures dealing with the 'branches' of substantive law (*furu' al-fiqh*) and the 'roots' of legal methodology and jurisprudence (*usul al-fiqh*), its more practical aspect is embodied in *fatwas* issued by *muftis* in response to questions posed by individuals in connection with ongoing human affairs'. Thus, *fatwa* has an important role in Islamic legal development.

It is suggested therefore that at this point *fatwa* can be a practical mechanism for the introduction of Islamic legal principle in modern banking transactions. In Malaysia, section 30(1) of the Islamic Financial Services Act 2013 and section 33F of the Development Financial Institution Act 2015 stipulate on the establishment of the Shari'ah Committee and these should be considered as a golden opportunity to impart Islamic principles in the business. In this context, the Committee will act as an authoritative body who will officially issue reliable *fatwas* on any questions of Islamic law concerning the business of Islamic banking. To quote the words from Mohamed Ismail b Mohamed Sharil (2001), the director for the Bank Muamalat Malaysia Berhad, 'but it is reasonable to conclude that, since the setting up of a Syariah advisory body is a condition precedent for the granting of a license, the Act [referring to The Islamic Banking Act 1983] envisages a central role for that body in the sphere of the law. It may even be seen as a mini Parliament, entrusted with power to 'enact' laws (by rendering advice to the bank) applicable to Islamic banking'. Thus, *fatwa* should be regarded as authoritative and applied in the business of Islamic banking.

At the national level the Shari'ah Advisory Council of Bank Negara Malaysia (SAC) has been given the mandate to ascertain the Islamic law for the purposes of Islamic banking business, *takaful* business, Islamic financial business, Islamic development financial business, or any other businesses, that are based on Shari'ah principles and are supervised and regulated by Bank Negara Malaysia.

In the recent provisions of the Central Bank of Malaysia Act 2009, the roles and functions of the SAC have been further reinforced whereby the SAC is accorded the status as the sole authoritative

body on Shari'ah matters pertaining to Islamic banking, *takaful* and Islamic finance in Malaysia. While the rulings of SAC are applicable to Islamic financial institutions, the courts and arbitrator are also required to refer to the rulings of the SAC for any proceedings relating to Islamic financial business, and such rulings shall be binding.[iii]

4.2. Fatwa and its Position in Legal Practice

Fatwa literally means the opinion of a jurist on a point of law. The person who proclaims a *fatwa* is called a *mufti* and a person who requests a *fatwa* is called a *mustafti*. The act of giving *fatwa* is called *futya* or *ifta*. Generally, *fatwa* can be regarded as a personal opinion of a scholar with regard to issues that have been forwarded to him. In practice, when an issue has been brought up, a *mufti* will examine the case and consider the relevant legal texts (for examples, *Ijtihad*, *Ihtisan*, *Istislah*, *Talfiq*) to solve the problem. The answer that will be given will be based on these legal texts, which are considered as genuine Islamic legal sources. Hence, it can be said that the opinions or suggestions of a *mufti* are legal opinions, and therefore it should have a legal effect on Muslims.

Fatwa that is made upon a systematic study has a great value. This value of *fatwa* may be compared with that of the classical legal texts. Some writers have even gone further by suggesting that *fatwa* is in fact a mere reflection of legal opinions that have been discussed in the classical legal texts. In this instance, Bakar (1999) said that what has been discussed in the classical texts is actually a compilation of *fatwa* and opinions collected from different sources and jurists. The only difference between the two is that the legal opinion concerning the former is the response to current issues whereas in the latter it is regarded as a compilation of classical legal opinions. In addition, the classical legal texts are normally found in the form of compilations of general issue of Islamic legal problems. In this context, we can see, for example, in the *Majmu' of Imam al-Nawawi*, the issue that has been discussed is not only general in nature but also comprises different opinions from different sources and scholars. This is not the case for a compilation of fatwa, from which we can see that it is more specific, simple, and normally given with reference to only one source.

Fatwa has been considered as one of the Islamic legal sources. Although, *fatwa* does not have a special place in legal practice, in most cases the *fatwa* has served as a useful instrument for legal courts in determining issues of law. Thus, as Masud et. al. (1996) stated that in Iraq, before the drafting of the personal status code, *fatwas* were treated by jurists as a source of established legal rules to guide a court for the outcomes. At this point, a collection of *fatwas* that were 'given at different times, in reference to heterogeneous circumstances' were considered authoritative and were applied in case rulings by Iraqi judges no longer qualified as *mujtahids* competent to carry out their own independent interpretations of the law. This important function of *fatwa* also applies in contemporary Muslim states. In Malaysia, for example, there have been cases where judges in civil courts have constantly referred to *fatwas* in determining issues pertaining to Islamic law in the courts proceedings [iv]. The late Professor Ahmad Ibrahim (1994) suggested that any court other than the Shari'ah Court could request the opinion of a *mufti* on any question of Islamic law, which calls for decision. Thus in *Re Dato Bentara Luar Decd. Haji Yahya bin Yusof* v *Hassan bin Othman & Anor* [1982] 2 MLJ 264, Raja Azlan Shah CJ, stated,

"Whilst we are not bound to accept his fatwa as we are entitled to expound what the Islamic law on a given topic is, we are equally not bound to reject the opinion stated in the fatwa just because Islamic law is the law of the land and the duty to expound this law falls on us. In our view as the

opinion was expressed by the highest Islamic authority in the State, who had spent his lifetime in the study and interpretation of Islamic law and there being no appeal against the fatwa to His Highness the Sultan in Executive Council under the relevant State Enactment, i.e., Enactment No. 48, now re-enacted by Enactment No. 14 of 1979, we really have no reason to justify the rejection of the opinion, especially when we ourselves were not trained in the system of jurisprudence and moreover the opinion is not contrary to the opinions of famous authors of books on Islamic law".

The AAIOFI has made it mandatory for Islamic Financial Institutions to adhere to *fatwa* issued by its respective Shari'ah Supervisory Board. Yasmin Hanani Mohd Safian (n.d) stressed that 'the institution is obliged to follow the *fatwa* once it is issued regardless of whether it meets the satisfaction of the management (of the institution) or not. This obligation holds true when the *fatwa* entails enforcement or prohibition of a certain act'. A similar position is also found in Malaysia when the Islamic Financial Institution and Services Act 2013 provides that the Islamic Financial Institutions need to adhere to the resolutions (*fatwa*) made by their respective Shari'ah Supervisory Board.

This high value of the *fatwa* has made the instrument as a persuasive authority in court proceedings (Bakar 1999). In short, *fatwa* is an important Islamic legal source as the opinions given are modern and up to date. Further, in practice, the opinions that have been given are fresh, in which case the legal court may have not decided the same.

4.3. Shari'ah Supervisory Board and the Fatwa

In Islamic banking, *fatwa* is made in response to the questions posed either from the public or from the bank itself. This *fatwa* is normally known as a resolution. The Shari'ah Supervisory Board in respective Islamic banks is the responsible body to issue such *fatwa*. The members of the Board shall comprise of experts from different disciplines (e.g. Shari'ah, Economics, Finance and Law) but the majority are from the Islamic Shari'ah background. Due to the diverse backgrounds and qualifications, the Board will deliberate Shari'ah issues that have been brought up based upon collective ijtihad, *ijtihad jama'i*, in arriving at certain decision (Hammad 1997).

Hence, as outlines in the memorandum of the International Association of Islamic Banks (IAIB), OIC, the function of the Board includes and not limited (i) to study the *fatwa* previously issued by the religious supervisory boards of member banks, in an attempt to make decisions identical, (ii) to study the previously issued *fatwa* to see how far they conform with the rulings of the Islamic Shari'ah, (iii) to supervise the activities of the Islamic banks and financial institutions and members of the Association to ensure their conformity with the rulings of the Islamic Shari'ah. In addition it has to draw the attention of the concerned parties to any potential violation of these activities. In discharging its duties, the Board has the right to go through the laws and by-laws of member banks and financial institutions and to draw their attention to whatever violation might have been made in this respect. In doing so, utmost confidentiality must be observed, (iv) to issue legal religious opinions on banking and financial questions in response to requests by member Islamic banks and financial institutions, or their religious supervisory boards or the secretariat general of the Association, (v) to study matters relating to financial and banking operations in response to requests for advice from Islamic financial institutions, (vi) decisions and *fatwa* of the Board are obligatory and binding on member banks and financial institutions in cases where these are already approved by all members. However, any member bank or financial institution is entitled to ask for

consideration of any decision. A detail note must then be submitted in cases of disagreement as any bank entitled to follow any course of action in the disagreement unless it is, otherwise, enforced by the Board, and (vii) to clarify legal religious on new economic questions. In line with all these functions, the members of the Board shall not only possess a strong religious background, but are also expected to have knowledge in banking practices, accounting and economics.

In some Muslim countries the establishment of such Board in Islamic banking is a legal precondition to supervise the operation of the bank in accordance with the Islamic teachings. In Malaysia, for example, section 30(1) of the Islamic Financial Services Act 2013 stipulates that a licensed person shall establish a Shari'ah committee for purposes of advising the licensed person in ensuring its business, affairs and activities comply with Shari'ah. A similar provision is also found in the Development Financial Institutions Act 2015 where section 33F of the Act provides a prescribed institution shall establish a Shari'ah committee for purposes of advising the repscribed institutuion in ensuring its business, affairs and activities comply with Shari'ah. With regard to this section 52(1) of the Central Bank of Malaysia Act 2009 stipulates the functions of the Shari'ah Advisory Council as:- (a) to ascertain the Islamic law on any financial matter and issue a ruling upon reference made to it in accordance with this Part; (b) to advise the Bank on any Shariah issue relating to Islamic financial business, the activities or transactions of the Bank; (c) to provide advice to any Islamic financial institution or any other person as may be provided under any written law; and (d) such other functions as may be determined by the Bank. In another example, the Central Bank will not recommend the granting of a license to the Islamic bank unless it is satisfied that there is, in the articles of association of the bank concerned, provision for the establishment of a Shari'ah Supervisory Board. In Egypt such stipulation has been put under Law No. 48/1977 with regard to the establishment of the Faisal Bank of Egypt.[v] The Jordan Islamic Bank for Finance and Investment Law No. 13 of 1978 not only specifies the appointment of Shari'ah Consultant but also describes the procedures for the dismissal of the appointed consultant if necessary. [vi] In Kuwait the establishment of the Shari'ah Supervisory Board was not made under such specific laws but under the Articles or Memorandums of the individual banks.[vii] In other Muslim countries like the Islamic Republic of Iran and Pakistan, the establishment of such a Board is not required as these countries have fully Islamized their financial institutions. Be that as it may, it is stated that in Pakistan banking and financial institutions are bound to Religious Board appointed by the government.

4.4. Selected Fatwas on Islamic Guarantee

A review has been made to selected *fatwas* on Islamic guarantee in selected Islamic banks. The purpose is to understand the process in which the fatwa being made, its progressiveness and contribution to the development of Islamic law particularly the classical Islamic guarantee. It is found that during the process of *fatwa* making, all sources of Islamic law relevant to *al-kafalah* (Islamic guarantee) were referred to. At this point, the classical manuals of Islamic law were consulted in order to understand the classical views on the issue presented. Further, the general method of Islamic legal research was also employed to reach at the desired conclusion. In respect to this, the Qur'an and the Sunnah of the Prophet Muhammad SAW were considered as the primary source in case existing provisions of the classical texts were not available. The other methods of *Ijma', Qiyas, Istihsan, Istislah, Istishab, Maslahah, Talfiq* were also used as the case so requires. The study also shows that *fatwa* plays an important role in the development of the classical Islamic guarantee particularly with regards to the banking practices. Below are some of the fatwas that has

been resolved by the Shari'ah Supervisory Board on the issue of the practice of Islamic guarantee in modern banking transactions (Wardhany & Shaista, 2012).

In the *fatwa* of the Jordan Islamic Bank, for example, the Shari'ah Council of the bank has resolved that the nature of the guarantee is to perform future obligation and this was made upon the Sunnah of the Prophet Muhammad SAW and a legal provision of Jordanian Civil Code. The fatwa reads:- *Al-Kafalah* or the Islamic guarantee is defined under Article 950 of the Jordanian Civil Code as the amalgamation of one's obligation with that of another in respect to perform that obligation when a demand has been made. In one hadith, Abu Dawud and al-Tirmidhi reported that the Prophet (peace be upon him) said; "The guarantor is responsible". This hadith shows that, having agreed to be a guarantor, the person will be held responsible for the extent of what he has undertaken. At this point, it should be pointed out that under a contract of guarantee, a guarantor is regarded as a personal security, and stands to satisfy the rights of another. Therefore, in the event that the person who has the rights is unable to pursue it from its original source, recourse could be made from the guarantor. Since the question is asking for the Islamic legal view pertaining to a guarantee given to perform a legal contract, we resolve that it is valid to the extent the obligation that is stated in the original contract.

(Jordan Islamic Bank, al-Fatawa al-Shar'iyah, vol.1, p.83)

The Shari'ah Council agreed that under Islamic guarantee a person shall have the right to recourse from a guarantor in case if the principal obligor fails. This concept of security is appropriate to be used as an instrument to minimize the risk of non-performance in banking transactions and there is nothing wrong in asking the guarantee as security in loans and finances advanced to customers. (Qatar Islamic Bank, Shari'ah Supervisory Board, Fatwa No.60). On the issue of whether an agent could be a guarantor, the Shari'ah Council of the Kuwait Finance House resolved that as far as the Shari'ah is concerned an agent should not be appointed as a guarantor. According to the Council:-

The reason the jurists are reluctant to allow an agent to become a guarantor is that if it were to be allowed there might be a conflict between the objective of *al-wakalah* and *al-kafalah*. In this context, the objective of *al-wakalah* is trustworthiness, *amanah*, whilst the objective of *al-kafalah* is guarantee, *dhaman*. However, in a collection of Fatawa Qadhi Khan (published in the margin of the *Fatawa Hindiyah* vol. 4, p. 24), the Hanafis has ruled out that, "When an agent for sale have sold something and became a guarantor for the price, such undertaking is not valid. However, if an agent for recovery became a guarantor for the price, such undertaking is valid". This classical text shows that an agent could become a guarantor when there is evidence that he is acting not only as agent for arrangement (sale) but also as agent for recovery.

[Sic] At this point, we should acknowledge that our view is the same as the *fatwa* that has been given by the Shari'ah Supervisory Board of the Qatar Islamic Bank. Apart from that we shall stress that in such situation an agent could not straight away be a guarantor unless there is a breach of stipulations. This principle should be extended to modern Islamic banking practices. However, owing to both religious and professional considerations, an Islamic bank must never put itself in such a position.

Kuwait Finance House, Fatawa Shar'iyah, Question 281, pp. 267-271

The Shari'ah Council for Kuwait Finance House also resolved on the issue of fees to be collected for the guarantee given in banking transactions. According to the Council, the fee is totally based upon the principle of *al-wakalah*. It could be of either an agreed lump sum or it could also be a percentage from the sum total of the deposit (Kuwait Finance House, Fatawa Shar'iyah, Question 281, pp. 267-271).

As far as the resolution is concerned the Council was reluctant to allow fee to be collected in return for the guarantee given in banking transactions. This was referred to the nature of the contract of *al-kafalah* which is considered as gratuitous and the original purpose of the instrument, discussed earlier in the previous section, is to help others who are in need. Hence, it is wrong to impose fees on the beneficiaries. Similarly, on the issue of a guarantee given by an insurance company, the Shari'ah Council of the Kuwait Finance House resolved that it is not permitted to impose any fees on the guarantee. According to the Council:-

This arrangement involves the principle of the Islamic guarantee, *al-kafalah*. In this context, the insurance companies are the guarantors who undertake to perform the obligations of the customers. Further, this guarantee is regarded as a guarantee given in return of premiums. At this point, it seems to us that such a guarantee is not valid and therefore it is not lawful. It is a settled principle in law that to conclude a contract of guarantee, the parties should not be involved with any fee because guarantee is actually a gratuitous contract. Accordingly, this kind of arrangement (insurance) should not be permitted.

As such, if a customer appointed an insurance company as his guarantor, and he pays the premium, it is for him to bear the sin (*al-Ithm*) with Allah. From the religious point of view, this kind of relationship exists only between him and the insurance company. However, for the party to which the guarantee is given, he can benefit from such a guarantee. Even so, we must deplore ourselves from such an arrangement if it comes to our knowledge of such circumstances as if it were to be allowed it could mean that we agree with such a prohibited transaction (*haram*).

Kuwait Finance House, Fatawa Shar'iyah, Question 267, p. 251

In Malaysia *al-kafalah bi al-ujr* (guarantee with fee) is acceptable. The SAC of the Securities Commission Malaysia, at its 36th meeting held on 6 February 2002, resolved that *ujrah* (fees) paid for third-party guarantees in *mudharabah* is allowable on the condition that the investor cannot claim for any repayment from the issuer should there be any losses incurred in the investment. The investor is also permitted to request for collateral from the issuer to cover any likelihood of losses due to gross negligence by the issuer.

This resolution was made based on the opinion of Wahbah al-Zuhaili who was of the view that to charge *ujrah* on *kafalah* is permissible based on *maslahah* and society's need. Syeikh Ahmad Ali Abdullah (1986) was also of the same view when he refer to the fees that are permissible to be collected on utilizing someone's reputation and also on performing incantation using Quranic verses.

The SAC of the Bank Negara Malaysia (BNM), in its 54th meeting dated 27 October 2005, has also resolved that the credit guarantee facility with fee offered by CGC for financing granted by Islamic

financial institutions is permissible. The resolution was made based on the following considerations:-

Some contemporary Shariah scholars, such as Nazih Kamal Hammad (1997), and Shariah Councils, such as the SAC of the Securities Commission Malaysia has resolved that the imposition of *ujrah* on *kafalah* is permissible. A few contemporary scholars further opined that *ujrah* charged on *kafalah* shall be permitted on the basis of *maslahah* and public need because in the current context, it is difficult and impractical to obtain free-of-charge guarantee. Moreover, one of the contemporary scholars, in his presentation to the OIC Fiqh Academy, had expressed his view that *ujrah* charged on *dhaman* (guarantee) is permissible. He is of the view that although originally *dhaman* is a type of *tabarru'*, the condition to charge *ujrah* on the *dhaman* is considered valid. He further reiterated that *dhaman* contract is not considered as *qard* as it falls under *istithaq* contract. Thus, receiving *ujrah* for the guarantee service is not prohibited as *dhaman* contract is different from *qard* contract, and

Qiyas on *akhz al-ajr 'ala al-jah* (to charge fee for someone's reputation) and *akhz al-ju'l 'ala ruqyah min al-Qur'an* (to charge fee on the treatment/medication using Quranic verses). Some classical scholars permitted imposition of fee in both situations and this permissibility could be extended to the imposition of *ujrah* on guarantee as both have similarities in terms of services provided.

The SAC of the Bank Negara Malaysia (BNM)

Similarly, the SAC of the Bank Negara Malaysia (BNM) has also resolved on the issue of fees imposed on the guarantee for the issuance of sukuk. With regards to this the SAC of the Bank Negara Malaysia (BNM), in its 10th special meeting dated 9 April 2009 and 95th meeting dated 28 January 2010, has resolved that:-

The application of *kafalah bi al-ujr* (guarantee with fee) as the appropriate Shari'ah concept for the guarantee facility on the *sukuk* issuance by Danajamin is permissible. Under this concept, Danajamin shall act as the guarantor (*kafil*), the *sukuk* issuer as the guaranteed party (*makful 'anhu*) and the investors as the beneficiary (*makful lahu*); and

Danajamin is allowed to claim back the amount that has been paid to the investors from the *sukuk* issuer through this guarantee facility. The repayment period for the amount claimed by Danajamin from the *sukuk* issuer shall be based on the current market practice subject to obtaining the consent of contracting parties namely Danajamin and the *sukuk* issuer, and it shall take into consideration the size of the *sukuk.*

The basis of the resolution was made in reference to the decisions of the SAC of Securities Commission dated 2002 and the SAC of the Bank Negara Malaysia (BNM) dated 2005.

The SAC of the Bank Negara Malaysia (BNM)

The same resolution has been made on the issue of guarantee on the operation of Islamic deposit insurance. In this regards, the SAC of the Bank Negara Malaysia (BNM), in its meeting dated 7 January 2009, has resolved that the application of *kafalah bi al-ujr* (guarantee with fee) as the

underlying Shari'ah concept for the operation of PIDM in managing Islamic deposit insurance fund is permissible. Based on the concept of *kafalah bi al-ujr*, the premium paid by the member institutions of PIDM offering Islamic banking services is considered as an ujrah or fee for PIDM and thus, belong to PIDM. As premium is considered as fee, PIDM may structure it in the form of absolute or proportionate value.

The basis of the resolution was made in reference to the decisions of the SAC of Securities Commission dated 2002 and the SAC of the Bank Negara Malaysia (BNM) dated 2005.

From the above, it is found that the nature of the fatwa is very progressive and reflects the current needs. As far as *al-kafalah* is concerned, the underlying principles were modified and developed in response to the need of the current business. The imposition of fee on *al-kafalah* has been allowed and this was made on the basis of *maslahah* and to fulfill the need of the current business. In fact, this should also be allowed based on the prevalent practices of the banking business (*urf tijari*) which commonly falls under the legal maxim of *al-adat al-muhakkamah.*

On the issue of whether it is permissible to hold shares in a local project that is being guaranteed by the government to offer a minimum return of at least 6% on the capital invested even though the profits are far lower than that. (The government also guarantees the return of the principal invested). In the event the profits exceed the percentage, the government promises that it will go to the shareholders regardless of how high it might be. The Shari'ah Council of the Kuwait Finance House resolved that:-

I hold the opinion that it is permissible to invest in this project. My opinion is based on these reasons. The government's guarantee of a minimum level of 6% for the profits, even though the profit is far below to this percentage, is the extent to which the government undertakes to fulfill its promise towards investors…..
The basis of this point could be referred to the Qur'anic legal text, where in *Surah* Yusuf, Allah the Almighty says; "He who produces it shall receive a camel's load. I pledge myself to this [The Qur'an; 12:17].

In the Sunnah of the Prophet (peace be upon him), it was reported that the Prophet said; "Whoever kills an enemy [in a war] will assume ownership of his battle gear [horse, saddle, bridle, armor and weapons]". In the hadith, the Prophet has given his commitment towards a person who kills an enemy in a war, and at the time the promise has been made, the person to whom the guarantee is given is unknown. This hadith too indicates the validity of a contract of guarantee even though at the time it was concluded, the knowledge with regard to the person to whom the guarantee is given was unknown.

Moreover, the undertaking is valid based on the contract of *Ju'alah*. In this regard, the government offers a minimum return of at least 6% on the capital invested even though the profits are far lower than that is, to me, a contract of *Ju'alah*. At this point, it should be noted that a contract of *Ju'ala* is acceptable and lawful according to the four schools of law [the Hanafis, Malikis, Shafi'is and Hanbalis], and they have not stipulated that a prior knowledge with regard to the person to whom the promise is given should present at the time the contract is concluded. Thus the government's undertaking is valid and lawful as per the principle of *al-Ju'alah.*

The second issue is about the guarantee that has been given by the government on the capital invested. At this point, I also hold the opinion that the guarantee is valid and lawful even though the nature of the principal obligation or the capital invested is unknown. Having reviewed the classical opinions, I found that the classical jurists did not stipulate that under a contract of guarantee, the knowledge with regard to the nature of the principal obligation should present at the time the contract is concluded. In fact, there was a general concurrence which indicates that the contract is valid be it on the basis of the present of knowledge with regard to the principal obligation or without the present of such knowledge. Under the Hanafis legal thought, for example, we found that the jurists suggest that a contract of guarantee is valid even if it was concluded without the present of knowledge about the principal obligation. The reason behind this was to make the arrangement simple. Therefore, when a person says; "I will stand as a guarantor for whatever you sell to such a person", the contract is valid. At this point of time, the guarantor will be rendered responsible even though the price is higher than what he was expected. In other words, a person is liable to what he has promised. With regard to this, Ashhab, a Malikis' jurist, said; "I have heard that one time Imam Malik [the founder of the Malikis school of thought] was asked about a person who said to his agent, 'Sell and you will not suffer loss from it', where Imam Malik replied that under such an arrangement, the person cannot retract his statement because it is his promise, and when a person has made an unequivocal promise, he cannot withdraw it. To me such a promise is a binding contract".

Kuwait House Finance, Fatawa Shar'iyah, Question 280, p. 265-266

A similar resolution has also been made in Malaysia with regard to the guarantee given for sale price plus profit. With regards to this the SAC of the Bank Negara Malaysia (BNM), in its meeting dated 29 December 2005, has resolved that it is permissible for CGC to guarantee the sale price including the profit margin of an Islamic financing that is based on sale and purchase contract.

The resolution was made on the basis that as the credit guarantee offered by CGC is on debt or financial obligation of an Islamic financing customer, a guarantee mechanism based on the outstanding selling price is reasonable since it is recognized by the current banking practice whereby the outstanding debt is equal to the remaining debt or the selling price after deducting the rebate value (*ibra'*) due to the customer at a certain point of time.

On another issue, the SAC of the Securities Commission Malaysia at its 35th meeting held on 7 November 2001 resolved that a third party guarantee on the capital invested based on the *mudharabah* principle is permissible.

The resolution was made based on decisions by the OIC Fiqh Academy and AAOIFI. The OIC Fiqh Academy in 1998 discussed on the matter of issuance of *sanadat muqaradah* and summarized that *mudharib* guarantee on capital and *mudharabah* profits are not permissible. However, the guarantee may be issued by a third party who has no connection whatsoever with the *mudharib* if it is done by way of *tabarru'* and is not included as a condition in the actual *mudharabah* contract sealed and signed by both parties.

The Shari'ah Council for Accounting and Auditing Organization for Islamic Institutions (AAOIFI) 2001 allowed for third party guarantees other than by *mudharib* or investment agent or business partner towards the liability of investment losses. However, this is on the provision that the

guarantee given is not tied to the original *mudharabah* contract. The basis of their decision is *tabarru'* which is allowed by Shari'ah (Al-Salaheen et al., 2013).
Hussain Hamid Hassan (1988) summarized the basis for the permissibility of third party guarantees based on the views of the Maliki School of Thought which allow *wa'd mulzim* (promises that must be kept). It is further strengthen by *maqasid Shariah* which allow for such practice. As such, a capital guarantee by the *mudharib* is not permissible.

From the above, it shows that the *fatwas* are given in response to either the questions asked by the customers or the questions asked by the bankers themselves. It is also observed that these *fatwas* are being made upon consistent Islamic legal principles. In this context, a reference is always made to the classical Islamic legal sources be that the Qur'an, or the Sunnah, or the classical texts of the classical jurists. Thus, we can see that some of the *fatwas* referred to the Qur'anic legal text while others to the Sunnah of the Prophet Muhammad SAW and the classical legal opinions upon the issuing the *fatwa*. When classical opinion is not available, the method of *maslahah* is employed to reach at the desired decision. *Fatwas* that relate to the fees are the best illustration for this as provision of which is not available in the compendium of the classical texts (Ab Rahman, 2008). Thus, the Board has to employ its juristic effort by patching other Islamic principles to reach at the desired conclusion.

It is also observed that the pattern of the *fatwas* is not consistent. In respect to this, we find that some of the *fatwas* are given in a short and brief whilst some others are long and elaborative. As such, some *fatwas* are not very clear with regard to the legal nature of the Islamic guarantees. In the *fatwa* that relate to the issue of insurance, the *fatwa* was given as a response to the question on the issue of insurance companies as a guarantor. From the *fatwa* given, it is implied that for the Board, insurance can be accepted as a guarantee. The prohibition is however placed upon the premium paid, because this is regarded as accepting fees in the Islamic guarantee. At this point, the *fatwa* is ambiguous because the legal nature of the Islamic guarantees is different from that of the legal nature of insurance (Ab Rahman, 2005). In this context, it should be noted that a contract of the Islamic guarantee is a contract to perform others' obligation in cases where a person defaults. It is a contract to pay the bank if the debtor does not. In contrast, a contract of insurance is a contract to pay in the event of loss. The payment will be made with no regard to the ability of others to make payment. At this point, a contract of insurance might correctly resemble to that of a contract of indemnity. Be that as it may, the effort of the Board should be appreciated, as the fatwa tends to give the intrinsic nature of the Islamic guarantee, i.e. gratuitous in nature. It therefore differentiates itself with the contract of insurance.

With regards to the *kafalah bi al-ujr*, it seems that most of the *fatwas* issued pronounce that it is not allowable to charge fees on the *kafalah* provided except for actual expenses. *Fatwa*-issuing bodies like Kuwait Finance House, Majma' al-Fiqh al-Islami, Dubai Islamic Bank, AAOIFI and Dallah al-Barakah are among those who prohibited fees except for actual expenses. As such, the position is different if compare to Malaysia where both SAC of Bank Negara Malaysia and SAC of Securities Commission Malaysia allow the charging of fees without any condition (Ab Rahman, 2005). This different position was made based upon the principles of *maslahah* and society's need. Such move shows the progressiveness of *fatwa* that witnesses the development of Islamic law particularly the Islamic classical guarantee.

5. CONCLUSION

In Islamic banking, guarantee has been commonly accepted. However, the practice was rather accepted in the form of classical Islamic guarantee, i.e., *al-kafalah*. This is to make the arrangement consistent with the basic philosophy of Islamic banks. As such, it is observed however that not all provisions concerning the guarantee are found in the classical Islamic legal texts. Being archaic in nature, classical Islamic guarantees have been accepted with some modifications. The issue of fees accepted in return for the guarantees given is the best illustration for this. As the issue being considered is recent, no such provision is found in the compendium of the classical texts. Thus, the role of the Shari'ah Supervisory Board was vital. The Board is not only explaining the classical law but also devising a new law or *fatwa* pertaining to the issue. The method being followed while propagating a *fatwa* is stringent. Apart from referring to the provisions of the classical texts, the Board also uses the established method of Islamic legal research. In this context, the Qur'an and the Sunnah of the Prophet Muhammad SAW are the prime source to reach a desired conclusion. At some other times, other methods of Islamic legal research are also being employed, depending on the nature of the case. These other methods include *Ijma', Qiyas, Ijtihad, Istihsan, Istislah, Istishab, Maslahah,* and *Talfiq.*

Although *fatwa* should be treated as having a great value, it is not regarded as binding on the court. At this point, the value of *fatwa* can only be accepted as persuasive. There have been cases where the important role of *fatwa* has been employed in the court proceedings. Throughout early Islamic history, ranging from the era of Andalus, Mamluk and Ottoman Empire, the *fatwa* has been given vantage as persuasive authority in court proceedings. In Malaysia, there have been cases where judges referred such fatwa in court proceedings. *Re Dato Bentara Luar Decd Haji Yahya bin Yusof & Anor* v *Hassan bin Othman & Anor* [1982] 2 MLJ 264, is the best illustration for this. As such, *fatwa* can be a progressive agent for Islamic legal development. Being responsive in nature, the resolutions given do not only represent classical views but also new legal theories. As such, the role of the Shari'ah Supervisory Board is pertinent to ensure that legal mechanism is strengthened through *fatwa* which involves a great deal of juristic efforts.

ACKNOWLEDGEMENT

The conduct of research and writing of this manuscript is funded by a research grant from FRGS/1/2015/SSI10/UPM/02/03.

REFERENCES

The Qur'an

Ab Rahman, S. (2005). *The Classical Islamic Law of Guarantee and Its Application in Modern Islamic Banking and Legal Practices*. (PhD Thesis). Aberystwyth, United Kingdom: The University of Wales.

Ab Rahman, S. (2008). The Influence of Classical Interpretation on the Law of Guarantees in the United Arab Emirates. *Arab Law Quarterly*, 22, 335-358

Abdullah, A. A.. (1986). OIC Fiqh Academy. *Majma' al-Fiqh al-Islami 2*(2), 1146-1147

Al-Salaheen, A. M. M & Aldhala'een, A. (2013). The Role of Shari'a Fatwa and Supervisory Board in the Islamic Banks. *International Journal of Academic Research*, *5* (1), 72-79

Affaki, B. G. (1997). Demand Guarantees in the Arab Middle East. *Journal of International Banking Law*, *12*, 271.

Bakar, M. D. (1999). Instrumen Fatwa dalam Perkembangan Perundangan Islam. *Jurnal Syariah*, *5*(1), 1.

Central Bank of Malaysia Act 2009

Development Financial Institution Act 2015

Haron, S. (1997). *Islamic Banking, Rules and Regulations*. Petaling Jaya: Pelanduk Publication.

Ibrahim, A. (1994). Islam dan Perlembagaan. Ins. Ibrahim, Ahmad (edit). *al-Ahkam. Vol. 4.* Kuala Lumpur: Dewan Bahasa dan Pustaka.

Islamic Financial Services Act 2013 Jordan Islamic Bank, al-Fatawa al-Shar'iyah. Vol. 1. Jordan Islamic Bank for Finance and Investment Law 1978

Kreps, C. H. Jr., & Olin, P. S. (1967). *Money, Banking and Monetary Policy*. 2nd. Ed. New York: The Ronald Press Company.

Kuwait House Finance, Fatawa Shar'iyah, Question 267, 280, 281

Masud, M. K. Messick, B., Powers D. S. (1996). *Islamic Legal Interpretation: Muftis and Their Fatwas.* Cambridege, Massachusetts: Harvard University Press.

Mirakhor, A. (2004). Hopes for the Future of Islamic Finance. Retrieved from http://www.islamic-banking.com/aom/ibanking/a_mirakhor.php.

Sharil, M., Ismail, M. (2001). Islamic Banking: How Developed is it in Malaysia Today? Is the Law Equipped for the Development of Islamic Banking? Juridical and Practical Issues, *Paper presented at the 11th Malaysian Law Conference*. 8-10 November. Kuala Lumpur.

Safian, M., Hanani, Y. (n.d.). Shariah Scholars and Fatwa Making Process in Islamic Finance. Retrieved from http://www.academia.edu/20367500/SHARIAH_SCHOLARS_AND_FATWA_MAKING_PROCESS_IN_ISLAMIC_FINANCE

Hammad, N. K.. (1997). Mada Jawaz Akhzu al-Ajr 'Ala al-Kafalah fi al-Fiqh al-Islami. *Journal of King Abdul Aziz University (Islamic Economics)*, 9, 95-121

Qatar Islamic Bank, Shari'ah Supervisory Board, Fatwa No. 60.

Scott, R. (1994). The Politic of Article 9. Va. L. Rev. 80. as cited in Gerard McCormack. (2004). Secured Credit under English and American Law. *Secured Credit Under English and US Law.* Cambridge: Cambridge University Press.

Shari'ah Advisory Council of Bank Negara Malaysia (BNM)

Shari'ah Advisory Council of Securities Commission Malaysia

Wardhany, N & Shaista, A. (2012). The Role of Shariah Board in Islamic Banks: A case Study of Malaysia, Indonesia and Brunei Darussalam. *Paper presented at the 2nd ISRA Colloquium 2012*. 27 November 2012. Kuala Lumpur.

Endnotes:

[i] In Surah al-Zariyat, for example, the Qur'an reads, 'And in their wealth and possessions (was remembered) the right of the (needy), him who asked, and him who (for some reasons) was prevented'. [The Qur'an; 51:19]. It is upon this principle that the Islamic banks should, while making profits, have to consider the welfare of the community. The Islamic banks are expected to be more sensitive to the needs of society, promote more social programs and activities, and make contributions towards the needy and poor families.

[ii] In Surah al-Maidah, Allah s.w.t. said, "And to Allah belongs the dominion of the heavens and the earth, and all that is between them. He creates what He wills. And Allah is able to do all things". [The Qur'an; 59:7]

[iii] Section 57 of the Central Bank of Malaysia Act 2009 provides any ruling made by the Shari'ah Advisory Council pursuant to a reference made under this Part shall be binding on the Islamic financial institutions under section 55 and the court or arbitrator making a reference under section 56. Section 58 of the same Act provides where the ruling given by a Shari'ah body or committee constituted in Malaysia by an Islamic financial institution is different from the ruling given by the Shari'ah Advisory Council, the ruling of the Shari'ah Advisory Council shall prevail.

[iv] See, for example, *Pesuruhjaya Hal Ehwal Ugama Islam Terengganu* v *Tengku Mariam* [1969] 1 MLJ 110; *Re Dato' Bentara Luar, Si Mati, Haji Yahya bin Yusoff & Ors.* v *Hassan bin Othman & Ors.* [1981] 2 MLJ 352; *Halimatussaadiah* v *Public Service Commission, Malaysia & Anor* [1992] 1 MLJ 513; *Dalip Kaur* v *Pegawai Polis, Balai Polis Daerah Bukit Mertajam & Ars* [1992] 1 MLJ 1; *Tongiah Jumali & Anor* v *Kerajaan Negeri Johor & Ors* [2004] 5 MLJ 40; *Isa Abdul Rahman & Ors.* v *Majlis Agama Islam Pulau Pinang* [1975] Jurnal Syariah (1), 125; and, *Abdul Rahim bin Haji Bahaudin* v *Chief Kadi, Kedah* [1983] 2 MLJ 370

[v] Under Article 3, the Law states; All Bank dealings and activities shall be subjected to the basic principles and rulings of Islamic Shari'ah, particularly as related to the forbidding of riba and the paying of the religiously imposed zakat, with zakat paid by the Bank being considered as part of production costs. The Sheikh of al-Azhar and the Minister of waqf shall ascertain the Bank's fulfillment of its obligation to appropriate the zakat and to expend it in its legitimate channels. A Religious Supervisory Board shall be formed within the Bank to observe conformance of its dealings and actions with the principles and rulings of Islamic Shariah. The Bank Statutes shall determine the process of forming of this Board, the way it shall conduct business as well as its other functions.

[vi] Under section 27, the Law states;

a. The Board of Directors shall appoint, within fifteen days from the date of its election, an Islamic legal consultant who is learned and specialized in the field of practical application of the provisions of Islamic law
b. The consultant so appointed to this post may not be dismissed except on the basis of a Board resolution adopted by a two third majority of the members at least, and giving the grounds for such dismissal.

[vii] In the case of the Kuwait Finance House, for example, article 62 of the Articles and Memorandum of Association of the House states, "The Company shall retain consultative bodies specialized in economic, financial and legal studies. Such specialized body – or bodies – may be composed of a number of experts of international repute. For certain specialties, the Company may retain only one expert or counselor, but appointment of all such experts and counselors shall be effected by decision of the Board of Directors. The relationship between such appointees and the Company shall be limited to such studies as may be assigned to them, and their researches and recommendations shall be submitted either to the Chairman of the Board of Directors or to such Board members as may be delegated by the Board for the purpose".