

**LEGAL THOUGHTS OF MADHHAB AL-SHAFI'I
IN THE IMPLEMENTATION OF ISLAMIC BANKING IN MALAYSIA***

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ABSTRACT

In the era of globalization, all information could easily be accessed just through internet. Globalisation is a phenomenon that involves with a rapid growth of interdependency and connection in the world of trade and finance. The Shafi'i school of jurisprudence is particularly strong in logic and reason. Such unique feature mirrors the relevancy and essence of the madhhab in the contemporary world particularly to Islamic banking sector. Malaysia now has 12 Islamic banking institutions operating under the Islamic Banking Act. There are two full fledged Islamic banking institutions, the 3 new foreign Islamic banking players and 7 Islamic banking windows that have been transformed into subsidiaries and six of them have now commenced operations¹. Majority Muslims in Malaysia practice the teachings of madhhab al-Shafi'i including in the matter of Islamic banking. Hence, this paper discusses the approach used by the Islamic financial institutions particularly to Shari'ah Committee (SC), which normally consists of Shafi'i's fiqh scholars. This paper suggests that with the study on the legal thoughts of madhhab al-shafi'i, it can be an effective mechanism to solve any contemporary issues related to Islamic banking in Malaysia.

1.0 Introduction.

Globalisation is a phenomenon of a borderless world which imposes no boundaries in the acquisition of information as well as in dealing with other people from the rest of the world. In facing the challenges of the globalisation the Malaysian Government has announced a 30-year "Vision 2020" target of making Malaysia a developed nation in various aspects including economic, political, social, spiritual, and cultural.

In term of economy, Malaysia is now being ranked as the 18th largest trading nation, which aspires among others to transform the country to become the "Islamic Banking Hub". Malaysia has regulated a set of legal and shari'ah frameworks for the implementation of the Islamic banking.

* This is an improved version of a working paper which has been presented during International Seminar on Legal Thought of Madhhab Shafi'i held on 19th-20th January 2006 at University of Brunei Darussalam.

¹ Tan Sri Dr. Zeti Akhtar Aziz. *Governor Bank Negara Malaysia's Speech at the Official Launch of AmIslamic Bank Berhad. Menara AmBank. Kuala Lumpur. 18 May 2006.*

Muslims in Malaysia are practicing the *Shafi'i madhhab* in the field of 'ibadah, *shari'ah* and *akhlaq* such as *jinayat*, *munakahat* and *mu'amalat*. *Madhhab Shafi'i* is actually a combination of the *Fiqh* of *Hijjaz* (*Maliki* thought) with that of 'Iraq, (*Hanafi* thought). 'Imam *al-Shafi'i* holds the distinction of being the first imam to systematize the fundamental principles of *fiqh* which he recorded in his book called *al-Risalah*². Therefore, it is very interesting to know the application of the legal thoughts of *madhhab al-shafi'i* in the area of *mu'amalat* particularly the Islamic banking and finance.

This paper is intended to provide a general overview on the legal thoughts of *madhhab al-Shafi'i* in the implementation of Islamic banking in Malaysia with reference to the regulatory and *shari'ah* frameworks of the SC through analyzing the application of the *madhhab* in the current *muamalat* practices.

2.0 Legal and Shari'ah Frameworks.

2.1 Legal Framework.

The SC members consist of *fiqh* scholars, practitioners and academicians in order to advise banks on the *shari'ah* compliance in all aspects of the Islamic banking operations. The legality and Islamicity of any product, its documentation and operation depends on the finding and resolution of the SC. By looking at the organization chart of the Islamic financial institutions, the SC ranks at the same level of the Board of Directors (BOD) or in other words any decision made by the SC could not be overruled by the BOD³.

The establishment of the SC is a statutory requirement to all banks which offer Islamic banking products pursuant to section 3 (5) (b) of the Islamic Banking Act 1983 (IBA) for Islamic banks, section 124 (7) of the Banking and Financial Institution Act 1989

² Abu Ameenah Bilal Philips. 2002. *The Evolution Of Fiqh (Islamic Law & The Mazhab)*. K.Lumpur: Percetakan Zafar Sdn. Bhd. p.81

³ For example, organisation chart of Bank Muamalat Malaysia Berhad. n.a.5th June 2006. <http://www.muamalat.com.my>.

(BAFIA) for Islamic banking scheme banks, and section 16B of the Central Bank Act (Amendment) 2003 (CBA) for Central Bank of Malaysia.

The main objective of the establishment of the SC is to advise the Islamic financial institutions on any *shari'ah* matter and also to ensure compliance with the *shari'ah* tenets and requirements in their operations. Section 3 (5)(b) of IBA provides that the Central Bank shall not recommend the grant of a license, and the Minister shall not grant a license, unless he is satisfied that there is, in the articles of association of the bank concerned, provision for the establishment of a *shari'ah* advisory body. Section 124 (7) of BAFIA provides for the establishment of the SAC to advise the bank relating to Islamic banking business or Islamic financial business. Section 16B (1) of CBA 1958 provides that the Bank may establish an Advisory Council which shall be the authority for the ascertainment of Islamic law for the purposes of Islamic banking business, *takaful* business, Islamic financial business, Islamic development financial business, or any other business which is based on principles and is supervised and regulated by the Bank Negara Malaysia (BNM). Based on those provisions it is understood that the statutory functions of the advisory body are to advise the Islamic financial institutions on *shari'ah* matters and to ensure that their operations do not involve any element, which is not approved by the religion of Islam.

Even though the *madhhab* of the Muslims in Malaysia is *madhhab al-shafi'i* in matters pertaining to *'ibadah*, *munakahat* and etc, it is observed that there is no provision in IBA, CBA and BAFIA which gives clarification to the *madhhab* applicable to the Islamic financial institutions. The tendency is that only *sunni madhhab* will be acceptable and *madhhab Shafi'i* will be the main priority followed by other three *madhahib* ie the *Hanafi*, the *Maliki* and the *Hanbali* schools.

To sum up, the IBA, BAFIA and CBA only provide the regulatory frameworks of the SC. At the moment, there is no substantive law, which provides comprehensive provisions on the application of Islamic banking system in Malaysia. The Islamic financial institutions may involve in any banking business and introduce any product under various concepts provided that it does not contradict to the *shari'ah* principles. In terms of different juristic

approach amongst *madhahib*, the Islamic financial institutions through their SC may follow any *madhhab* and there was no restriction and requirement to practice the legal thought of *madhhab Shafi'i* only. This approach creates flexibility to the banks to offer creative products with the purpose to meet the market and people need. The SAC's approach to the application of *madhhab Shafi'i* will be discussed further in part three and four of this paper.

2.2 Shari'ah Framework.

Shari'ah is a divine law revealed by Allah SWT to the prophet Muhammad SAW. The main sources of *Shari'ah* are *al-Qur'an* and *al-Sunnah*. Muslim scholars classified *Shari'ah* into *jinayat*, *'ibadat* and *mu'amalat*. The main issue here is what are the actual *Shari'ah* frameworks of the SC of each Islamic financial institution in Malaysia? Do they have to advise the banks in all aspects of *Shari'ah*?

The nature of the business of the Islamic financial institutions mainly refers to the Islamic law of transaction classified under the law of *mu'amalat*. Hence, the SC frameworks on *Shari'ah* matter will only confine within the matter under the law of *mu'amalat*. They may give advise to the banks on any matter related with the *mu'amalat* and their decision will determine the Islamicity and permissibility of certain product. That is why the selection of the SC members will be based on the expertise in Islamic law of transaction and *'usul al-fiqh*. The expertise in these two areas are very important so as to ensure the smoothness of making *ijtihad* to any complex issues involved in the Islamic banking and finance.

For example in clause 4 (15) of Bank Islam Malaysia Berhad (BIMB) Memorandum of Association provides that BIMB may carry on the business of buyers, sellers, importers, exporters, manufactures of, and dealers in motor cars, cabs, bicycles and other vehicles. It shows that the core business of the Islamic financial institutions in Malaysia mainly refers to the sale and purchase transaction.

It differs from the conventional banking system as the nature of the business refers to loan transactions. This is based on what Allah says in *al-Qur'an surah al-Baqarah* verse

275:- “Those who live on usury will not rise up before Allah except like those who are driven to madness by the touch of Shaytan. That is because they say: Trading is no different than usury, but Allah has made trading lawful and usury unlawful”.

The basic position in Islam is that money lending or *qard* is a benevolent act worthy of being rewarded highly by Allah the Almighty. Money lending is not allowed for the purpose of profit-making activities⁴. In the conventional banking system, lending is primarily for profit in the form of *riba*’ or interest.

Therefore the SC roles to the Islamic financial institution are to advise bank mainly to the matter in the Islamic law of transaction and this will include various types of syariah principles under the various contracts such as ‘*uqud tamlikat* (contract of ownership), ‘*uqud ishtirak* (contract of partnership), ‘*uqud tawsiqat* (contract of guarantee), ‘*uqud itlaqat* (general contract), ‘*uqud taqyidat* (contract of restriction), ‘*uqud isqatat* (contract of waiver) and ‘*uqud hifz* (contract of deposit)⁵.

In general, the main duties and responsibilities of the SC specifically will confine to the following matters:-

- (a) To advise the Islamic financial institutions on the shari’ah compliance to the concept and structure of new and existing Islamic banking products and services;
- (b) To ensure the documentations used by the Islamic financial institutions meet the Shari’ah requirements;
- (c) To advise the Islamic financial institutions regarding the business operations; and
- (d) General tasks and duties.

2.2.1 Concept and Structure of the Products.

⁴ Hadith narrated by Bayhaqi as the Prophet S.A.W. said: “All benevolent loans which are involved additional is *riba*”.

⁵ Wahbah Zuhaili, 2002. *Fiqh Islami Wa Adillatuhu*, Vol. IV. Kuala Lumpur: Dewan Bahasa dan Pustaka. 2002. pp. 246-247. See also Abdul Nasir Musa Abu Al-Basl. 1999. *Al-Qanun Almadani AlUrduni Annazriah Al-a’mah Lil Aqd.*. Jordan: Dar Annafais. p 41.

The SC will evaluate the concept and structure of the new product and will review the existing products. Islamic banking products can be classified into Consumer Banking Products, Trade Finance Products, Corporate Banking Products, Investment Banking Products, Credit Card and others.

Islamic banking products can be under the various concepts such as *'uqud tamlikat* refers to *al-mu'awadat* (exchange) and *al-tabarru'at* (charity), *'uqud ishtirak* refers to *mudarabah* (profit sharing) and *musharakah* (profit and loss sharing), *'uqud tawthiqat* refers to *kafalah* (guarantee), *rahn* (pawnbroking) and *hawalah* (transfer), *'uqud itlaqat or 'a'mal insan* refers to *wakalah (agent)*, *'uqud taqyidat* refers to *taflis* (bankruptcy), *'uqud isqatat* refers to *ibra'* (rebate), *muqasah* (set-off) and *'uqud hifz* refers to *wadi'ah* (saving)⁶.

2.2.2 Documentation.

The SC will meticulously vet all the documents involved. They will review the documents and will give their comments in order to ensure that they comply with the relevant *Shari'ah* principles. The SC is expected to endorse and validate all relevant documentations and this includes the term and condition, the product manual, marketing advertisement, sales illustration and brochures used to describe the product⁷.

Each Islamic financial institution has its own structure of documentations and it varies according to the products. The SC may give advise to the banks whether the documents are in accordance with the *Shari'ah* principles or they may reject the documents if they are contrary to Islamic law or require the banks to do some amendments so as to meet the *Shari'ah* principles.

2.2.3 Business Operations.

⁶ *Ibid.*

⁷ Section 20 (b) and (c) of the Guidelines on the governance of *Shari'ah* Committee for The Islamic Financial Institutions.

The SC will monitor the Islamic banking operations from time to time. They shall advise the bank on *Shari'ah* matters in order to ensure that the business operations of the Islamic financial institutions comply with *Shari'ah* principles at all times⁸. It includes the procedures for transaction, actual business operations, and system applicable to the banking operations. If the Bank intends to introduce new information system to all its products, they need to clarify with the SC for the determination of the system so as to comply with *Shari'ah* requirements.

2.2.4 General Tasks and Duties.

The SC also will deal with certain general duties and tasks relevant to their job scope and this includes to assist the related parties on *Shari'ah* matter for advice upon request⁹ and to determine the *zakat* policy of the banks. Some Islamic banks pay *zakat* for their depositors while some other banks require their depositors to pay *zakat* by themselves. It depends on the SC's approach to the policy of *zakat*.

2.3 Procedures.

Every Islamic financial institution has its own procedures. There are no standard guidelines for the SC whether to the aspects of management, products approval and etc. The practice is that there will be a *Shari'ah* Secretariat to organize and handle the *Shari'ah* matter. The *Shari'ah* officer in the secretariat will compile and collect any document and issue involved, which are to be presented during the SC meeting.

In terms of technical procedures, the SC will normally convene a meeting once a month depends on which Islamic financial institutions. The SAC will receive all relevant documents, which need *Shari'ah* clarification from respective Islamic financial institutions at least one week before the date for the meeting. The *Shari'ah* officer will record all minutes, the findings and resolutions of the meeting. It will be compiled and distributed to relevant parties, departments and personnel in the banks.

⁸ Section 20 (a) of the Guidelines on the governance of *Shari'ah* Committee for The Islamic Financial Institutions.

⁹ Section 20 (d) Section 20 (a) of the Guidelines on the governance of *Shari'ah* Committee for The Islamic Financial Institutions.

3.0 Application of *Madhhab Al-Shafi'i* in the Islamic Financial Institution.

Islamic financial institutions have guidelines regarding sources and methodology of the esteemed Islamic jurists in the process of issuing any resolutions. It is a requirement under the BNM/GPS 1 or the Guidelines on the governance of *Shari'ah* Committee for The Islamic Financial Institutions issued by BNM in December 2004.

There are no standard and uniform procedures in coming out with certain resolution or *fatwa* in Malaysia. Normally, the manual or guidelines of the SAC for Islamic financial institutions are very general. The process will be referred to the methodology of '*usul al-fiqh*' as prescribed by the *muslim* jurists. In practice they follow the way of previous *fuqaha'* in making *ijtihad* with some modifications and improvements in order to suit with the modern times.

The SC will first look at the *nusus* of *al-Quran* and *al-Hadith*, which must be given priority over all evidences and sources known as primary sources of the Islamic law. This is based what Allah says in *al-Quran surah al-Nisa'* verse 59:- "*O you who believe! Obey Allah and obey the Messenger, and those charged with authority among you. If you differ in anything among yourselves, refer it to Allah (al-Quran) and His Messenger (al-Hadith)*".

In the absence of any verse in *al-Qur'an* and *al-Hadith*, the SC will find out if there is any ruling of *ijma'* or *qiyas* available on the problem at stake in the works of previous *fuqaha'*. All jurists unanimously agreed that *Ijma'* and *Qiyas* are sources of *hukm* or legal rulings. *Ijma'* means unanimous agreement among the *mujtahidun* of the *muslim* community in *shari'ah* rulings imposed during a particular period after the death of the Prophet¹⁰. *Qiyas* refers to likening an original *hukm* having explicit legal text (*nas*) with a new matter having no *nas* but having the same '*illah*'¹¹.

¹⁰ Muhammad Hashim Kamali. 1998. *The Principles of Islamic Jurisprudence*. 2nd Ed. Kuala Lumpur: Ilmiah Publishers Sdn Bhd. p. 169.

¹¹ *Ibid.* p.197.

Madhhab Shafi'i considered *qiyas* as the basis for *ijtihad*. It is regarded as a source of legislation, which has significant contribution in solving new issues that have not been debated. If there is no ruling under *Ijma'* or *qiyas* by the previous *fuqaha'* the SC may attempt to an original *ijtihad* along the lines of *qiyas*. This would entail recourse to *al-Qur'an*, *al-Hadith* and *Ijma'* for a precedent that has 'illah identical to that of the *far'i*.

In the absence of textual basis, the SC may resort to any of the recognized methods of *ijtihad* such as *maslahah*, *istishab*, *sadd al-dhara'i'*, *istihsan* and '*urf*. *Maslahah* means making judgment based on the principle of general benefits or public interest on matters that have no clear *nas*. In general, Islamic jurisprudence applies the consideration of public interest for anything that is beneficial and necessary to the general public in the implementation of a ruling. '*Urf* refers to the norms of the majority of a society whether applied in speech or deed. It is considered as '*adat jama'iyah* and can be used as a legal basis so long as it does not contradict the *shara'*.

Sadd al-dhara'i' refers to the approach used to curtail anything that may cause a Muslim to do the forbidden things. It is considered an early preventive measure to avoid a Muslim from doing what is forbidden by Allah¹². *Shafi'i* jurist do not recognize it as a principle of jurisprudence in its own right on the grounds that the necessary ruling regarding the means can be derived by recourse to other principles such as *qiyas*. However, modern scholar such as 'Abu Zahrah observes that in actual fact the *madhhab al-shafi'i* in the most part is in agreement with the principle of *sadd al-dhara'i'* and it differs only to some issues¹³. In fact, it is contended that 'ulama' of all schools, in principle are unanimous on *sadd al-dhara'i'*.

If we analyze the above procedures, it is observed that it actually refers to the methodology, which is formulated by 'Imam *Shafi'i* in his famous book *al-Risalah*¹⁴. It was stated that, when an incident occurs the *mujtahid* must first check the *nusus* from *al-*

¹² Abu Zahrah. n.d. *Usul al-Fiqh*. Cairo: Dar al-Fikr. p. 268.

¹³ *Supra* note 10 p. 314.

¹⁴ The first book in 'Usul Fiqh, written by Imam *Al-Shafi'i Al-Mutallibi Al-Qurasyi*.

Quran but if he finds none, he must refer to *hadith mutawatir* and then to *hadith ahad*¹⁵. Then he should recourse to *ijma'* or consensus of opinion amongst the *madhahib*. If the *mujtahid* finds nothing on the above sources, he may resort to *qiyas* but in doing so he must pay more attention to the general principles of the *Shari'ah* than to its subsidiary details. If he does not find this possible then he may apply the principle of original absence of liability (*al-bara'ah 'asliyyah*). Here the *mujtahid* may apply any recognised method of *ijtihad* such as *maslahah* and *istishab*.

The above procedures are the basic methodology for the SC in coming out with certain resolution without discussing their approach amidst the different of opinions amongst *madhahib*. In general the SC will normally give priority to the view of *madhhab al-Shafi'i* on any issue involved. They will make reference to the textbooks of *madhhab al-Shafi'i* such as *al-Risalah*, *al-'Umm*, *al-Mughni* and *Mughni Muhtaj*. If the *madhhab al-Shafi'i's* view on certain issue is not so strong in comparison with other *madhahib*, the SC will try to look at those another *sunni* such as *madhhab Hanafi*, *Hanbali* and *Maliki*¹⁶.

As an illustration to the above, we may refer to the status of the controversial *bay' al-'Inah* products as widely practiced by the Islamic banks in Malaysia such as personal financing and credit card. The *bay' al-'Inah* concept is not acceptable by majority *fuqaha'* because it was considered as the *hilah* or legal trick or backdoor to *riba'*. *Madhhab al-Shafi'i* on the contrary viewed *bay' al-'Inah* as permissible if it fulfills the pillars of contract. A contract is valued by what is disclosed and any hidden individual intention was up to Allah. From observation, almost all of the SCs in Malaysia accepted *madhhab al-Shafi'i's* view and allowed such practices.

¹⁵ *Hadith mutawatir* means hadith with continuous testimony and hadith ahad means solitary hadith reported by a single person or by odd individuals.

¹⁶ Section 54 of the Administration of Religion of Islam (State of Selangor) Enactment 2003 provides that in issuing fatwa, the Fatwa Committee shall ordinarily follow the accepted views of the *madhhab Shāfi'i* and if the opinion will lead to situation which is repugnant to public interest, the Fatwa Committee may follow any of the *Madhab Hanafi* or the *Māliki* or the *Hanbali* schools¹⁶.

It is important to note that even though the majority members of the SC in Malaysia consist of *Shafi'is fiqh* scholars¹⁷, they are not fanatic with the *madhhab*. The SC practices liberal approach to the various opinions amongst the school of Islamic jurisprudence (*madhahib*) in making any resolution or ruling. It is very essential to the SC not to stick with *madhhab al-Shafi'i* only in order to guarantee the flexibility and to meet the current needs related with the Islamic banking operations.

For example, the permissibility of *bay'ma'dum* (the purchase of something that does not yet exist)¹⁸. This specifically refers to the issues of warrants and futures contracts on crude palm oil. The *Shafi'is* view pronounced that the subject matter of the sale must be existent at the time of the contract and therefore *bay'ma'dum* is prohibited. This is based on *hadith* whereby the Prophet prohibited a sale of an unborn baby camel and a sale of non-existing object. In this regard the SC takes the *Hanbali's* view. *Madhhab Hanbali* did not require the subject matter to be existed but the most important thing was the contract did not contain element of *gharar*, which is forbidden by *shari'ah*. They interpret the above *hadith* as to refer to the issue of uncertainty. Ibn Qayyim and Ibn Taimiyyah supported this view¹⁹.

Apart from the foregoing procedures followed by the SC, there are other principles, which are also important before they may come out with certain resolution. These include the principles of *maqasid shari'ah*, *siyasah shari'ah*, *ta'wil* and *istiqra*.

Maqasid shari'ah refers to the desired objectives of the *shari'ah* in determining the *hukm* aimed at protecting human *maslahah*²⁰. *Siyasah Shar'iyyah* refers to the area in Islamic jurisprudence that explains the rulings related to policies and approaches taken in organizing the national administrative structure in accordance with the spirit of the

¹⁷ In 1997 to 1999 Dr. Ahmad Ali Abdullah (*Hanbali's madhhab*) from Central Bank of Sudan was one the SAC members of BNM. Prof. Dr Hashim Kamali (*Hanafi's madhhab*) is one of the SC members for Commerce International Merchant Bankers Bhd. The majority of the SC members are shafi'is.

¹⁸ n.a. 2002. Securities Commission of the *Shari'ah Advisory Council Resolutions of the Securities Commission Shari'ah Advisory Council*. Kuala Lumpur: Perpustakaan Negara Malaysia. pp. 23-25.

¹⁹ Ibnu Qayyim. 1995. *'I'lam Al-Muwaqqi'in*. Vol 2. Beirut: Dar al-Fikr. p 8-10.

²⁰ Ahmad al-Raisuni. 1992. *Nazariyyah Al-Maqasid 'Inda Al-'Imam Al-Shatibi*. Herndon: The International Institute of Islamic Thought. p. 7.

*Shari'ah*²¹. *Ta'wil* refers to explanation of *shari'ah* principles through a *dalil* without being restricted by its literal meaning²². *Istiqra'* refers to a meticulous scrutiny on a matter before a conclusive *hukm* is made on the matter²³. This *manhaj* involves examining the applications of general *dalil* on the related branches of the *hukm* and subsequently making exceptions if any.

For example, *siyasah shar'iyah* and *maqasid shari'ah* are applicable in determining the price level in a more systematic way and consistent market conditions. The Central Bank of Malaysia may impose any rule on the rate of financing to each Islamic financial institution for the purpose of public interest and maintain the economic justice. Price control may protect the consumer from being manipulated by the banks.

3.1 The Application of *Istihsan*.

Istihsan refers to the disregarding a *hukm* that is backed by *dalil* and applying another *hukm* that is appropriate than the former based on *dalil* permitting the act in question. Ibn Taymiyyah defined *istihsan* as the abandonment of one *hukm* for another, which is considered better on the basis of the Qur'an, *al-hadith* or consensus²⁴.

Muslim jurists noted that *madhhab al-Shafi'i's* objection against *istihsan* which he considered it as to be form of pleasure-seeking and arbitrary law making in religion²⁵. *Istihsan* according to *Shafi'i* involves personal opinion, discretion and the inclination of the individual jurist, an exercise which is not in harmony with the Qur'an. This is *Imam Shafi'i's* opinion, supported by his followers such as Imam Al-Ghazali.

It is very interesting to refer to the opinion of the contemporary *Shafi'i* jurist such as *Al-Amidi* whereby he states that notwithstanding explicit denunciation of *istihsan* by

²¹ Ahmad Al-Khusary. n.d. *Al-Siyasah Al-Iqtisadiyyah wa Al-Nusm Al-Maliyah fi Al-Fiqh Al-Islami*. Cairo: Maktabah Al-kuliyat Al-Azhariyah. p. 12.

²² *Supra* note 10 pp. 88-120. See also Al-Duraini. n.d. *Al-Manahij al-Usuliyah, Muassasah al-Risalah*. Damascus: Dar al-Fikr. p. 189.

²³ Wahbah Zuhaili, 2002. *Fiqh Islami Wa Adillatuhu*, Vol. II. Damascus: Dar al-Fikr. p.1143.

²⁴ *Supra* note 10. p. 249.

²⁵ *Ibid* p. 258.

Shafi'i he himself resorted to *istihsan*²⁶. *Imam Shafi'i* used a derivation of *istihsan* on several occasions including the ruling in which he said “*I approve (astahsinu) mut'ah at the level of 30 dirhams*”. *Al-'Amidi* draws the conclusion that there is no disagreement on the essence of *istihsan* between *Shafi'i* and *Hanafi*.

In fact modern scholars such as Khallaf, Abu Zahrah and Yusuf Musa agreed that there is no disagreement of jurist on *istihsan*. Yusuf Musa is of the opinion that the juristic differences over *istihsan* essentially amount to no more than arguments over words²⁷. *Imam Shafi'i* raised the objection of *istihsan* may be reflected to the trend of *ijtihad* of his time. In the context of Islamic banking nowadays, *istihsan* has undoubtedly plays a significant role in developing modern *fiqh*.

It can be best illustrated in the SC resolution on the securities borrowing and lending (SBL) that exist in the securities industry based on '*ijarah* concept²⁸. The SC applied the principle of *istihsan* as an exception to the general principle of '*ijarah*. As an illustration for SBL, a lender who owns long-term securities (shares) agrees to lend the securities to a borrower for certain period. The borrower has to return the securities and the lender will impose deposit as one of the securities borrowing conditions. The SC viewed that the selling of borrowed shares to a third party is permissible.

3.2 The Application of *Istishab*.

Istishab is actually the work of *Imam Shafi'i* where he rejected *istihsan* as a source of law. *Istishab* literally means escorting or companionship. Technically it means the maintenance of the previous *hukm* as long as there is no other *dalil* that can change the particular *hukm*²⁹. In other words it refers to the denotation a rational proof, which may be employed in the absence of other indications or in simple words the presumption of continuity. In *surah al-Hashr* verse 7 Allah says which means “so take what the

²⁶ *Ibid* p. 259.

²⁷ *Ibid* p. 260.

²⁸ *Supra* note 18 p. 51-53.

²⁹ *Supra* note 10 pp. 299-301.

Rasulullah assigns to you and deny yourselves that which he withholds from you”. *Istishab* presumes the continuation of positive and negative until the contrary is established by evidence. For example a contract of sale is presumed existed until there is a letter of termination, which is proved the termination of the contract.

Jurist regarded *Istishab* as one of the last grounds of *fatwa* rulings. *Madhhab al-Shafi’i* has relied on *istishab* more frequently especially in the case where *Madhhab Hanafi* resorted to *Istihsan*. To sum up, *Istishab* basically is a belief that Islam did not aim at establishing a new life on earth in all of its dimension and details. It is the basic norm in *shari’ah* that people are deemed to be free of liability unless the law has determined otherwise and that human beings may utilize everything in the earth for their benefit unless the law forbids them³⁰. From observation, the SC of the Islamic financial institutions in Malaysia rarely invokes the principle of *Istishab*.

It is observed that, the SC is following the ordinary methodology used in the traditional Islamic jurisprudence. Having *al-Quran* and *al-Sunnah* as the main sources, the committees, at the same time allow the application of Islamic jurisprudence to be deployed totally without being confined to any specific school of thought. The SC has always taken the balanced approach (*tawazun*) between theories and practices, idealism and reality, strict compliance (*al-salamah al-shar’iyyah*) and economic practicality (*al-kafa’ah al-iqtisadiyyah*). Apart from observing the matters in the Muamalat point of view, the SC takes into account business strategies, marketability and competency of the products as compared to the conventional counterparts.

In extracting the rulings from the *Shari’ah*, there are some other aspects taken into consideration. Firstly; the theory of *ibahah*, which is based on the legal maxim; the originality of things is permissibility. Thus, the attitude of looking at all transactions is permissible at first instance unless there are matters against the *Shari’ah*. Secondly, the theory of freedom in contracting (*hurriyyat al-ta’qud wa hurriyyat al-ishtirat*) as long as they do not contradict to *Shari’ah*. Following the principle that Muslims are abiding by

³⁰ *Ibid* p 308.

their own rules, guided by the *Shari'ah*, it provides a vast area of contracting freedom. Thirdly, adhering to the customary practices in business (*ʿurf*) and lastly, it must be seen to achieve public interest (*maslahah sharʿiyyah*)³¹.

4.0 Madhhab Al-Shafi'i and Globalisation.

In Arabic term, the globalisation is called '*al-ʿawlamah*' or '*al-ʿalamiyyah*'. The word '*al-ʿalamiyyah*' refers to an openness and enthusiasm in knowing other nations around the world³². Allah says in *surah al-Hujurat*, verse 13: "O mankind! We created you from a single pair of a male and a female, and made you into nations and tribes that you might get to know one another".

The impact of globalisation affects a number of key areas including *economic globalisation, technological globalisation and cultural globalisation*. Globalisation in economy happens through development of free-trade system and the acceptance of this system throughout the world. It will give a great impact on the economic system of a country such as drastic development in privatization of companies in the country, deregulating of market system, and the market will be efficient, competitive and controlled by the free-trade regulation³³.

The effect of economic globalisation may increase the numbers of foreign players from all over the world to the Malaysian market business. The coming of these global players will affect the practice of the Islamic financial institutions in terms of various understanding to the teaching of their *madhhab*.

Based on Malaysian experience so far in the implementation of Islamic banking, the problem of different of opinions amongst the *madhahib* is not so significant. However, by referring to the issue of globalisation, Malaysia has granted license to foreign players to

³¹ *Penentuan Hukum produk Perbankan Islam: Pengalaman Bank Negara Malaysia*, Muzakarah ahli-Ahli Majlis Penasihat Syariah Institusi Kewangan di Malaysia, Bahagian Penyelidikan JAKIM. Hotel Pan Pacific. 4-5 Mac 2004. p.11

³² Mohd Salleh, H. & Musa, A. H. 1999. *Gejala globalisasi: Peranan dan Tanggungjawab Institusi Ilmu*. Jurnal Pendidikan Islam. 8 (3). pp. 33-46.

³³ Grzybowski, C. 1st July 2006. *Civil Society's Responses to Globalisation*. <http://www.Corpwatch.org/trac/feature/planet/gr-twn.html>.

set up their Islamic banks in Malaysia. The coming of this foreign bank may affect the Islamic banking operations in Malaysia especially when Kuwait Finance House, Saudi Arabia's Al Rajhi Banking & Investment Corporation and a consortium led by Qatar Islamic Bank Al Rajhi established their Islamic Banks here. All those companies are coming from different countries and they are practicing different *madhhab*. The legal frameworks of the IBA, BAFIA and CBA do not describe which *madhhab* is applicable and the definition of Islamic banking business is too general.

For example, we may refer to the status of *bay'al-'inah* products as widely used by the Islamic banks in Malaysia. The SC in Malaysia decided to accept the *Shafi'i's* view and therefore it is permissible. *Bay'al-'inah* concept is actually not acceptable by many *fuqaha'* and scholars in the Middle East. The implication is that what could happen if these foreign Islamic banks declare that the *bay'al-'inah* product is *haram* in Malaysia? This may lead to many negative impacts and bad image to the development of the Islamic banking in Malaysia.

The application of *bay'al-'inah* in Malaysia based on the view of *madhhab al-Shafi'i* plus principle of *maslahah*. Since Islamic banking is relatively new to the Malaysian citizen it is very difficult to implement the so called true Islamic products such as *mudharabah* and *musharakah*. A big volume of defaulters (Non-performing Financing) scare the banks from offering products in equity financing.

Beside, in order to ensure the flexibility of the Islamic banking products in Malaysia, each Islamic financial institution should be creative enough to introduce new products, which are outside the territorial of *bay'al-'inah* such as credit card under the concept of *al-kafalah* which is acceptable not only by *madhhab al-shafi'i* but also by other *madhahib*. Now there is a movement by Islamic financial institutions to depart from *bay'al-'inah*. The current scenario is that a lot of new products have been introduced under the various concepts in the market.

The technological innovation in the globalisation era allows people to exchange ideas, services as well as products and in the meantime it speeds up the production³⁴. In the era of technological globalisation many Islamic financial institutions introduced a new information technology system in their banking operations. Through this system the banking operations will be more effective, faster, customer friendly and IT savvy.

For example Bank Muamalat Malaysia Berhad (BMMB), the second full fledged Islamic banks in Malaysia introduced a new information technology system to its retail banking operations namely Triton. This system will cover the whole operations of the financing process from offering of the financing facility stage until the process of recovery. It includes process of credit assessment and evaluation, documentation, financing approval, business transactions, default and recovery and monitoring and supervision. By analyzing the system from the *Shari'ah* perspective, the SC of the BMMB has approved the Triton system to be operated to the whole operation of retail banking business with some modifications for the purpose of *shari'ah* compliance.

Facing the trend of information technology system, it could not be denied that the SC could not follow strictly the legal thought of *madhhab al-Shafi'i*. Lenient and liberal approach should be applied in order to meet the current and market needs. For example, offer and acceptance of the financing facility can be done only through internet without verbal agreement. The *Shafi'is* view on the requirement of verbal requirements is no more relevant and suitable in the era of information technology. Here, the SC has a tendency to accept the approach taken by the contemporary *Shafi'is* fiqh scholar whereby they have agreed that the requirements of verbal agreement is not compulsory in sale transaction. The offer and acceptance, which is done through Internet, will be considered as a valid sale contract.

Globalisation also will lead to the invention of more new and innovative products in the market such as derivative futures and option forwards sales, *muqaradah* bond, *'ijarah*

³⁴ Hallak, J. 2000. *Globalisation and its impact on education*. In Mebrahtu, T., Crossley, M. & Johnson, D. 2000. (Eds.). *Globalisation, educational transformation, and societies in transition*.(p.22-24) United Kingdom: Symposium Books.

sukuk and etc. Actually, from this point *madhhab al-Shafi'i* was advanced in their approach and we may see very clearly the strength of *Shafi'i's* reasoning on this matter.

For example, the permissibility of *bay' al-dayn* or sale of debt to a third party. The *Hanafi madhhab* viewed that the *bay' al-dayn* is not permissible because of the risk that cannot be overcome in the context of debt selling. The *Shafi'i madhhab* is of the opinion that selling of the debt to third party is allowed if the debt is guaranteed³⁵ and sold in exchange for goods that must be delivered immediately. When the debt is sold, it should be in cash or tangible assets as agreed. The SC accepted the *Shafi'i* view by looking at the practicality of such transaction in the modern days. Therefore, sale of debt to a third party is permissible such as the products of Letter of Credit for trade finance business.

Another example is the permissibility of *bay' al-salam*. The delivery of the subject matter is not essential to validate the sale of *salam*, whereas it is an essential condition in the normal sale.³⁶ The reason given by the *Shafi'i* in this respect is that the future delivery of the goods is to be authorized in order to facilitate the seller to acquire the subject matter of the sale and deliver it to the purchaser. Therefore, purchase of goods, which is not yet in existence, as practiced by the Islamic financial institutions is permissible under the *shari'ah* principle.

Some Muslims scholars opined that *madhhab al-Shafi'i* is quite strict in their approach in the aspect of *mu'amalat*. It is not relatively true if we are able to understand the actual legal thought of *madhhab al-Shafi'i*. We may refer to the open-minded acceptance by the *Shafi'i's* followers such as *al-Nawawi*, *al-Rafi'i*, *al-'Amidi* and *al-Ghazali* in many aspects of *mu'amalat*. *Imam al-Shafi'i* himself said that "when certain problems is so acute leading to difficulties, please simplify it"³⁷. *Madhhab al-Shafi'i* actually emphasizes on the legal reasoning rather than using sole mental strength in tackling *fiqh* issue.

³⁵ Al-Syirazi. n.d. *Al-Muhazzab*. Vol 1. Beirut: Dar Al-Fikr. p. 262.

³⁶ Razali Nawawi, Dr. 1999. *Islamic Law on Commercial Transactions*. Kuala Lumpur: CT Publications Sdn. Bhd. p.93.

³⁷ Al-Suyuti. 1994. *Al-Asbah Wa al-Naza'ir fi al-Qawa'id Wa Furu' Fiqh Al-Shafi'iyyah*. Muhammad Hassan Ismail Al Shafi'i (edit). Vol 1. Beirut: Dar alKutub al-Ilmiyyah. p. 165.

In fact, *Imam al-Shafi'i* pointed out that he also might be encountered to make some wrong judgments³⁸. The *hadith* scholar *al-Hakim* collected a statement of *al-Shafi'i* in which he has said, “*There is no one among us who has not had a Sunnah of Allah’s messenger S.A.W. elude him or have one slip his mind; so no matter what rulings I have made or fundamental principles I have proposed, there will be in them things contrary to rulings of Allah’s messenger S.A.W. Therefore, the correct ruling is according to what Allah’s messenger S.A.W. said, and that is my ruling.*”

To sum up, it can be said that in facing the challenges of globalisation, the SC of each Islamic financial institution in Malaysia follows the basic *fiqh* methodology laid down by *madhhab al-Shafi'i* before they may come out with certain resolution. This genuine methodology is used in order to ensure the Islamicity and viability of the Islamic banking and finance in the eyes of the *Shari'ah*. Beside that, the SC applies the general approach for making a new *ijtihad* collectively such as *maqasid shar'iyyah* and *siyasah shari'ah*.

5.0 Conclusion.

It is submitted that the SC members of the Islamic financial institutions in Malaysia are not practicing dilute imitation or “*taqlid*” to *madhhab al-Shafi'i* even though majority of them are *Shafi'is*. The SC only follow the methodology of *madhhab al-Shafi'i* in coming out with certain resolutions and they may depart from the *Shafi'is* view if it is necessary to do so. This practice was actually agreed by *Imam al-Nawawi* whereby he stated that it is permissible to practice *madhhab* other than *Shafi'i*. One thing must be remembered, the departure from *Shafi'i* views to another *madhhab* must be done with ethics and not just for the sake of human desire³⁹.

In facing the challenge of the globalisation and its impact to the business operations of the Islamic financial institutions, it is observed that *madhhab al-Shafi'i* provides a very strong basic of *fiqh* methodology. Until now the said methodology is practiced by

³⁸ Ahmad al-Syurbasi. 1988. *Biografi Imam Mazhab Empat*. Kelantan: Pustaka Aman Press. p.182

³⁹ Al-Zarkashi. n.d. *Al-Bahr Al-Muhit Fi Usul Fiqh*. Vol. 6. n.p. p. 325-326.

majority of Muslim jurist. The element of strong in legal reasoning rather than utilizing mental capacity is one of the unique features of *madhhab al-shafi'i*. The impact of globalisation can be solved through studying and applying the legal thought of *madhhab al-shafi'i*.

Based on the foregoing discussion, we may conclude that as a general practice the Islamic financial institutions in Malaysia through the advice of their SC will prefer to the practice of the *madhhab al-shafi'i*. The applicability of *madhhab al-shafi'i* in the aspect of *muamalat* however was not uncritically followed. There were cases whereby the SC has departed from the *shafi'is* view based on various principles such as *maslahah* and *maqasid syariah*.

Beside, in developing the *ummah*, Muslims all over the world including Malaysia must develop a cooperative framework to promote Islamic banking, particularly in mobilizing financial resources to meet the needs of the *ummah*. Even though Malaysia prefers to practice the legal thought of *madhhab al-shafi'i* but the tendency of fanaticism with one *madhhab* should be avoided. *Madhhab al-shafi'i* provides a guideline or methodology to understand *fiqh* Islam which is very wide and flexible. The legal thought of *madhhab al-shafi'i* is still relevant to Islamic banking and finance in the modern times and we strongly believe that its methodology can be an effective mechanism to solve any contemporary issue and consequently will further enhance the growth of Islamic banking industry in Malaysia.

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