Chapter 21

The Practice of Multiple Shari’ah Board Directorship and Fiduciary Duties

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ABSTRACT

This chapter examines the legal paradigm of the application of multiple Shari’ah board directorship practice from the common law context of directorial fiduciary duties. It employs the critical legal studies approach to analyse the principles, legislations, case laws, policies, and guidelines in the United States, European Union, the United Kingdom, Ireland and Germany. This study scrutinises the polarity of views concerning the pragmatic Masyaqqah (necessity) surrounding the practice in discussion: the Masyaqqah that encourages and one that discourages the application of the practice and places these against the two predominant directorial fiduciary duties under the common law system namely, the duty to act bona fide and in the best interest of the company, and the duty to avoid conflict of interest. Whilst the practice has proven to benefit Islamic financial institutions (‘IFIs’), the findings also notice the substantial risks it could inflict on the IFIs’ business operations; some which could seriously damage their Shari’ah compliance assurance.

INTRODUCTION

In our modern life, it is not uncommon for an individual to undertake multiple jobs or responsibilities at the same time – either in a personal, social or professional capacity. This is due to the presence of several enabling factors such as the availability of time, the ability to multitask, contractual obligations, or simply due to personal passion. For instance, a research student who undertakes a part-time job; a politician who normally handles two or more designations – one in his political party and another in the government’s cabinet; or even a man, who practices polygamous matrimonial relationship, illustrate such a phenomenon in our modern world.

DOI: 10.4018/978-1-7998-0218-1.ch021
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A layman who engages in the practice of undertaking multiple obligations in either his personal or professional life may not encounter too much bother. However, the engagement in such a practice by an important figure such as a prime minister, or a board director, who plays a decisive role in their profession, may give rise to several questionable issues from the governance perspective. As much as the subject of interlocking directorship has attracted substantial attention and discussions within the Western corporate governance hemisphere (Chiranga & Chiwira, 2013; Ferris, Jagannathan, & Pritchard, 2003; Fich & Shivdasani, 2006; Jiraporn, Kim, & Davidson, 2008; Sarkar & Sarkar, 2009), the practice, which only became noticeable in Islamic banking in the last two decades, remains a ‘terra incognita’ in the Islamic corporate governance world. In fact, there remains a dearth of references, discussions, case law or empirical research dealing with the subject of interlocking directorates or multiple Shari’ah board directorships; neither within the vast nor specific field of the Shari’ah law such as Fiqh Al-Muammalat (Islamic law of commerce). This renders the study of this subject challenging.

During the early inception of the Islamic banking industry in the 1970s, it was uncommon for a Shari’ah scholar to occupy multiple Shari’ah board directorships across the IFIs. However, it certainly was the case considering the limited collective number of IFIs around the globe and the absence of a formal Shari’ah compliance organ in the form of a Shari’ah board within most of the IFIs’ corporate governance structure at that time (Elasrag, 2014; International Shari’ah Research Academy for Islamic Finance (ISRA) & Thomson Reuters, 2016). As the global demands for Islamic financial products and services increased, so did the number of IFIs. From the modest start-up of the Mit Ghamr Savings Bank of Egypt in 1963, the industry began to witness a global ‘domino effect’ in the formations of IFIs worldwide such as, inter alia, the Tabung Haji of Malaysia (1969), Dubai Islamic Bank (1975), Faisal Islamic Bank of Sudan and Egypt (1977) and Bahrain Islamic Bank (1979). Nonetheless, the robust development of Islamic banking dwarfed the collective supply of Shari’ah scholars with the necessary knowledge and practical experience in Shari’ah law (Rafay & Farid; 2018) and banking respectively to serve as the IFI’s Shari’ah board members, which created a Masyaqqa (a severe or difficult situation) that had prompted the IFIs to share similar Shari’ah scholars as their advisors.

As at 2018, there are approximately 1162 Shari’ah scholars around the world, who occupy Shari’ah board directorships across 52 countries (International Shari’ah Research Academy for Islamic Finance (ISRA) & Thomson Reuters, 2016; Thomson Reuters, 2018). 75 per cent of these directorships concentrated in ten countries, spanning across Southeast Asia, the GCC, and South Asia. Out of this number, 20 per cent (227) occupied two to three Shari’ah board directorships, 6 per cent (72) held four to nine, while two per cent (28) held ten or more Shari’ah board directorships (see Figure 1). Fascinatingly, this figure displays a minor difference, and even corroborates to a large extent, the findings of a previous study in 2018 by (Abd Razak, 2018), who pointed out scholars holding five or more Shari’ah board directorships stood at a similar figure of eight per cent.

It is also important to note that the leading 50 Shari’ah scholars command a significant 73 per cent share and the top three scholars are serving 40 per cent of the available 1162 Shari’ah board directorships worldwide, which also include those within Islamic banking standard-setting agencies such as the Islamic Financial Services Board (‘IFSB’) and the Accounting and Auditing Organization for Islamic Financial Institutions (‘AAOIFI’). As it hypothesises that an average of 16 Shari’ah board directorships per scholar would cause a high concentration risk of Shari’ah board directorships, there arises a reasonable cause for concern in respect of their ability to manage the Shari’ah due diligence and review process. These concerns revolve around issues such as conflict of interest, time commitment, confidentiality and Shari’ah compliance (Majid & Ghazal, 2012; Sleiman & Viszaino, 2013; Wilson, 2009). If the applica-
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