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The Islamic Financial Services Bill 2012 - Shariah Governance (Part 1)

(Part 3 of 4)

By Gopal Sundaram
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Islamic finance has an additional governance feature and level of scrutiny which is not found in conventional finance i.e. the Shariah committee. The approach taken in the original 1983 Islamic Banking Act and the 1984 Takaful Act was that Islamic banks and takaful companies would be regulated like conventional banks and insurance companies except that the governance, business and operations of these institutions should not contain any element which is repugnant to the religion of Islam. It was also a statutory requirement that a Shariah Committee should be set up in each institution licensed under these legislation which would have the role to ensure that the governance, business and operations of the institution were consistent with the Shariah.

This simple formulation without fully catering for the specificities of Islamic finance has aided the uninterrupted growth of the Islamic banking and financial system for the past thirty years. Admittedly, there have been some setbacks in the development of the Islamic finance in Malaysia. But generally the trend has been one of steady and robust expansion and deepening. In contrast, a number of Islamic banks set up elsewhere in the world have gone through difficult straits and some have closed down.

However, with the internationalisation of Islamic finance and the growing sophistication and complexities of customer demands, the original simple formulation of the 1983/84 legislation in Malaysia was simply not adequate. The new Islamic Financial Services Act 2012 provides a more granular and contextualised regime for supervision and regulation of Islamic finance. In particular, the Act sets out a clearer and more comprehensive set of provisions for Shariah governance for institutions licensed under the Act.

As before, a statutory duty is placed on such institutions to establish a Shariah committee for the purposes of advising the institution in ensuring its business, affairs and activities comply with Shariah. However, taking cognition of financial conglomerates in the system, the Act adopts a more pragmatic and realistic approach in that it permits a financial group which has more than one licensed institution in the group, on approval of the regulator, Bank Negara Malaysia, to establish a single Shariah committee for the financial group if the regulator is satisfied that the Shariah committee so established is capable of ensuring compliance with Shariah by all licensed persons within the financial group.

The new Act vests the regulator with wide ranging powers to issue binding standards relating to Shariah governance matters. These standard setting powers include a power to specify the functions and duties of the board of directors, senior officers and Shariah committee members of the institution in relation to Shariah compliance. The standards may also detail the fit and proper requirements or disqualifications of Shariah committee members. The regulator in these standards may also detail the internal Shariah compliance functions pertaining to Shariah governance.

The standards issued by the regulator are binding upon the institution, its directors, chief executive officer, senior officers and Shariah committee members. In addition, the Act provides that internal policies and procedures adopted by the institution to implement the standards specified by the regulator are binding upon every director, officer or Shariah committee member of the institution. A failure to comply with the standards issued by the regulator in respect of Shariah governance is an offence under the Act and carries with a maximum penalty of 8 years imprisonment or a fine of RM25 million ringgit or both.

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Gopal began his highly distinguished career in Bank Negara Malaysia (BNM) in 1982, pursuant to graduating from University of Malaya on a Bank Negara scholarship. He was appointed as Assistant Governor in 2006. As Assistant Governor he was responsible for the Legal Department, Finance Department and the IT Services (Computer) Department as well the Money Museum and the Art Gallery. During his tenure, he was a member of various committees chaired by the Governor, inter alia, the Management Committee, the Monetary Policy Committee, the Financial Stability Committee, the Budget Committee, the Risk Management/ Committee and in attendance at the Malaysia International Islamic Financial Centre Executive Committee (MIFC), a multi-agency committee appointed by the Prime Minister.

Upon his retirement in 2011, he was appointed as Project Advisor to BNM to advise and supervise the drafting of an omnibus legislation for banking, insurance, payments systems and exchange control as well as an omnibus Islamic legislation for Islamic banking, takaful, payment systems and exchange control proposed to be tabled in Parliament later this year.

Gopal is the only member of the International Monetary Law Committee of the International Law Association (MOCOMILA) from Malaysia. He is also in the Executive Committee of the Malaysian Chapter of ASIL (Asian Society for International Law). Gopal sits on the Board of Directors of Kuwait Finance House (Malaysia) Berhad, the Board of Management of Methodist College Kuala Lumpur, the Council of Education, Methodist Church in Malaysia and the Judicial Council, Methodist Church in Malaysia.

He is a leading adviser on the new Financial Services Act (FSA) and Islamic Financial Services Act (IFSA).
