

PROPOSED WAQF BILL
COMMENTS

By
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I congratulate the authors for putting up the draft. At least we have something solid to look at, to work on and to consider.

Forgive me for giving my frank and honest views on the draft even if they are critical. I do not say that my views are right. All I say is that they are my views unless I am convinced by better arguments.

Given my background, the first issue that comes to my mind, after reading the draft, is the constitutional issue. It appears to me that the bill is intended to be passed by Malaysian Parliament to be made applicable to the whole country as a federal law. The question that arises is: Is it within the competence of the Federal Parliament to make a federal law applicable to the whole country on wakaf (I am using the Malay spelling as used in the Federal Constitution)?

I will not go into lengthy legal arguments on this issue. (The final say rests with the Attorney General as the legal advisor to the Federal Government. The Court intervenes when there is a case before it.) The short answer is List II (State List) of Schedule Nine which places the legislative power regarding wakaf in the State Legislature. Parliament may legislate on it but only for the Federal Territories and in the same way as a State Legislative Assembly may make laws for a State. We may look at it as the "State law" for the Federal Territories.

The purpose of the bill seems to be to establish a body (Commission) to register incorporated wakafs somewhat like the Suruhanjaya Syarikat Malaysia (SSM). The following questions arise.

What is the need for a separate Commission? Registration of a wakaf is an administrative act. The purpose is to give the legal personality to the wakaf, like a company. Why not register it as a company under the Companies Act 1965 with the SSM? We already have complete laws to govern the incorporation, the running, the supervision and winding up of companies. When a wakaf is incorporated under the proposed Waqf Act (if legislated), what follows? What law is applicable to it? The Waqf Act only provide for registration and little else. Eventually, reliance will have to be made on the existing laws applicable to companies. In that case, who will be responsible for the supervision and regulation of the wakafs? The SSM or the Wakaf Commission? Bear in mind that the SSM (and its predecessor the Registrar of Companies) had existed for at least a century, I think. It has the man power and has acquired the experience and the expertise in the job. The Commission will be a small organisation, staffed by a few officers with neither experience, expertise nor capacity to do the work similar to that of the SSM. Most likely, it will have an office only in Kuala Lumpur as how many wakafs could be expected to be registered in a state (what more Perlis) in a year to justify setting up a branch? What it means is that anyone having to deal with the Wakaf Commission will have to go to Kuala Lumpur

or Putrajaya and officers of the Commission will have to operate from Kuala Lumpur or Putrajaya.

One should not expect that once a wakaf is registered, it will work fine because it is an “Islamic” entity. That assumption seems to be prevalent in this country: you do anything in the name of Islam, it will work fine because it is “Islamic” and Allah s.w.t. will grace the effort forgetting that even the Prophet s.a.w. lost the battle of Uhud because of indiscipline of the army. We must remember that even the pious may be inefficient, not very bright and negligent. There may also be the “crooks” who will try to take advantage of the law. Believe me, even the non-Muslims will try to create a wakaf under the Wakaf Act if they see benefits in it. Such benefits could arise from weaknesses in the implementation and enforcement. In whose hand will be the power to investigate, discipline and prosecute be?

I will not elaborate. My fear is that the Commission will face the same problems as the Enforcement Agency Integrity Commission. – see my paper titled “Enforcement Agency Integrity Commission: A Critical Analysis” uploaded on my website <http://www.tunabdulhamid.my> on 20 May 2013.

My view is that incorporation of wakafs should be done under the existing laws. There is nothing un-Islamic about the laws, at least no one has produced a more “Islamic” version. After all Islamic financial institutions and takaful companies are incorporated under the same laws and it works.

Indeed, wakaf has been incorporated under the existing laws. A good example is what JCorp has done. For all intents and purposes, it is a company like any other company subject to the same laws, regulation and supervision. The only drawback is that, under the existing State laws, the moment a wakaf is established, by law, the State Islamic Religious Council becomes the sole trustee. With respect, over the years, the State Islamic Religious Councils have not proved to have the necessary expertise and ability to effectively and efficiently administer the wakafs under their care, not to mention running corporate wakafs. It is not advisable to expect them to supervise all corporate wakafs or to place all corporate wakafs in their respective State under their care and control. Corporate wakafs should be allowed to be established and run independently of the State Islamic Religious Councils. It is for that purpose that law should be made to provide for it.

I have written two papers on it – titled “**Meluaskan Pemakaian dan Perkembangan Prinsip Wakaf di Malaysia**” (31 Julai 2013) and “**Waqf and Islamic Finance in Malaysia: Legal Constraints and the Way Forward.**” (25 September 2013). In brief, I suggested that the respective State Enactments be amended to enable corporate wakafs to be established and run independently of the State Islamic Religious Councils. However wakafs for religious purposes, existing and future, will remain under the Islamic Religious Councils. Corporate wakafs will be incorporated under the existing laws governing companies. Only minor amendments are required.

I realise that it is very cumbersome to get all the states to agree to do it. But, wakaf being a State matter, I do not see any other way of doing it. However, I suggest that we begin with the Federal Territories since it is the Federal Government that decides

whether such an amendment should be made or not. I believe that if it is proved to be successful, other States will follow suit.

Of late, there is a tendency to involve the Rulers when something is apparently going wrong, to strengthen ones position or may be even to escape responsibility. Personally, I do not agree. The drafters on the Federal Constitution had taken great care to separate the powers and functions not only of the Executive, the Legislature and the Judiciary but also of the Rulers. Malaysian Rulers are constitutional Monarchs with powers vested in them as provided by the Constitution. They are not a shadow of the absolute Caliphs of the old days. Indeed such a system is no longer preferable these days. Centuries of experience had developed something even better. There are good reasons why the Rulers are kept away from the politics and the daily running of the government machinery. They should be what and where they should be.

I am attaching the three papers mentioned in this paper for easy reference.

Thank you.

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