10TH KUALA LUMPUR ISLAMIC FINANCE FORUM (KLIFF 2013)
KLIFF ROUNDTABLE WAQF AND ISLAMIC FINANCE
25th September 2013

WAQF AND ISLAMIC FINANCE IN MALAYSIA: LEGAL CONSTRAINTS AND THE WAY FORWARD

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Even during the period of British intervention of the Malay States, matters pertaining to the religion of Islam were left under the jurisdiction of the Malay Rulers. So it was natural that, after independence, legislative powers regarding Islam remained with the States and that the Ruler of each State was recognized as the head of the religion of Islam in his State. Thus, in regard to waqf, List II (State List) of the Ninth Schedule of the Federal Constitution, inter alia, provides:

".....Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; ....."

What it means in brief is that the power to make law regarding waqf lies with the State Legislature.

Thus, the relevant State Enactments contain provisions regarding waqf. Two such provisions are as follows:

1. *"Notwithstanding any provision to the contrary contained in any instrument or declaration creating, governing or affecting the same, the Majlis shall be the sole trustee of all wakaf, whether wakaf 'am or wakaf khas, of all nazr 'am, and of all trusts of every description creating any charitable trust for the support and promotion of the Muslim religion or for the benefit of Muslims in accordance with Islamic Law, to the extent of any property affected thereby and situated in the Federal Territories and, where the settlor or other person creating the trust, wakaf or nazr 'am was domiciled in the Federal Territories, to the extent of all properties affected thereby wherever situated."* – Section 61 Administration of Islamic Law (FT) Act 1993.

2. *"All properties subject to the provisions of section 61 and situated in the Federal Territories shall without any conveyance, assignment or transfer whatsoever, and, in the case of immovable property, upon registration under the relevant written laws relating to land, vest in the Majlis, for the purposes of the trust, wakaf or nazr 'am affecting the same*." – Section 62(1) of the same Act. See G

It appears that the effect of these provisions is that no waqf could be created and administered independently of the Islamic Religious Council.

Actually, the reason why the law was written that way is understandable. In 1950's when the Federal Constitution was being drafted by the Reid Commission

waqf was understood to refer to waqf for religious purposes like waqf for the construction of mosques, religious schools and Muslim burial grounds. So, it was natural that they be placed under the trusteeship and administration of the Religious Council.

Now we are talking about the use of the waqf principles in Islamic banking, Islamic finance, takaful and also in what is becoming popularly known as "corporate waqf" as what JCorp has done. Certainly, it is neither practical nor desirable that all banking and financial products and all corporate waqfs come under the administration of the Religious Council. With respect, I do not think the Religious Councils have the expertise and the ability to do so.

So, we are trying to find a way to do so outside the control of the Religious Council. That is the challenge.

First, it may be argued that the waqf mentioned in List II of the Federal Constitution refers only to waqfs for religious purposes and not to the application of waqf principles in Islamic banking, Islamic finance, takaful and corporate waqfs. Unfortunately, the wording of the provision of the constitution and the relevant laws do not clearly point to this conclusion even though they do lend some support to such an argument. But, the argument could be supported by the fact that that was what waqf was understood to be when the Constitution was drafted. At that time there were no Islamic banking, Islamic finance, takaful, "corporate waqf" as we know them today. Indeed, until today waqfs administered by the Religious Council are waqfs for religious purposes as I have mentioned above. If this argument is accepted, then "corporate waqfs" and the application of waqfs in Islamic banking, Islamic finance and takaful would fall outside the jurisdiction of the State and the religious Council.

Secondly, it may be argued that we are only applying the principles of waqf the way we apply the principles of *murabahah*, *ijarah* etc. in Islamic banking and Islamic finance. The subject matter is banking and finance, both of which are Federal matters. But the difficulty is that you can only apply the principles of waqf, to something. There has to be a waqf in existence. In other words a waqf is created. The moment a waqf is created (unless the first argument prevails) the provisions of the law which I have read earlier take effect: the property vests in the Religious Council and the Religious Council automatically becomes the sole trustee. It is different in the case of murabahah, for example in which you apply the principles to contracts and, contract is a Federal matter.

I will leave this issue as a moot point for the time being.

In case the first and the second arguments fail, there is one way of solving this problem: amend the Constitution. Waqf for religious purpose will remain under the State's jurisdiction. However, the creation of waqf and the application of waqf principles in banking, finance, takaful and corporate waqf should be placed under the Federal List. However, this is easier said than done. It requires a two third majority in Parliament and the present government does not have it. In Malaysian political culture, we cannot expect the opposition to support such an attempt.

My last bet is this. Since the (State) laws in the Federal Territories are made by the Federal Parliament, the Federal Parliament could amend the Administration of Islamic Law (FT) Act 1993 similar to what I have said earlier. Only a simple majority is required and the current Government has it. Of course, it is a “State law” so to speak and is in force only in the Federal Territories. It does not matter. Do it in the Federal Territories first, let it take effect, implement it and let it be applied and resorted to by banks and corporations. We’ll see the results. May be, some States may even voluntarily follow suit when they see the success of its implementation.

I think it is easier to adopt the last option. After all, the Bill to replace the existing Act is pending in Parliament. Just add a few more provisions. I am prepared to assist, if required.

Thank you.

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