VALIDITY OF WAKAFS IN MALAYSIA – WHERE LIES THE ISLAMIC LAW?

The case of *Haji Embong b. Ibrahim and others* v. *Tengku Nik Maimunah* [1980] 1 M.L.J. 286 is disappointing as a strong Federal Court missed the opportunity to affirm that Islamic Law is the Law of the land in Malaysia. The case concerned the validity of a wakaf made by Tengku Nik Maimunah in favour of the following beneficiaries –

(1) her brothers and sisters, nieces and nephews and their children;
(2) four adopted daughters;
(3) two persons who were not her blood relations;
(4) religious, pious and charitable objects.

Salleh Abas F.J. in giving the judgment of the Federal Court referred to the definition of wakaf 'am and wakaf khas in section 2 of the Trengganu Administration of Islamic Law Enactment, 1955 and rightly pointed out that the operative words of the definitions are "for religious or charitable purposes recognised by Islamic Law". The expression is not explained in the Enactment, and as rightly pointed out again, as the Enactment does not legislate upon the substance of Islamic Law but deals merely with the administration of Islamic Law, the meaning of the expression must therefore be found elsewhere. "Elsewhere" in the context must surely be the Islamic Law but unfortunately the Federal Court chose to follow its earlier decision in *Commissioner for Religious Affairs* v. *Tengku Mariam* [1970] 1 M.L.J. 222 and in effect held that it should follow the decisions of the Privy Council from India, which held that –

(a) a wakaf for the benefit of the settlor's family, children and descendants and for charity will only be valid if there is a substantial dedication of the property to charitable uses at some period of time or other, *Sheikh Mohamed Ahsanullah Chowdhry* v. *Amarchand Kundu* (1889) 17 I.A. 28.

(b) such a wakaf will not be valid if the primary object is for the aggrandisement of the settlor's family and the gift to charity is illusory either because of its small amount or its uncertainty or remoteness of objective *(Abul Fata Mohamed Ishak* v. *Russomoy Dhur Chowdry* (1894) 22 I.A. 76.

It may be noted that in *Ahsanulla's case* Lord Hobhouse said at p. 36 –

> "Their Lordships do not attempt in this case to lay down any precise definition of what will constitute a valid wakaf or to determine how far provisions for the grantor's family may be engrafted on such a settlement without destroying its character as a charitable gift. – they have not been referred to nor can they find any authority showing that according to Mohamadan Law, a gift is good as a wakaf unless there is some substantial dedication of the property to charitable uses at some period of time or another".

The question therefore in that case was whether there was a valid charity or not and the Privy Council did not have to consider whether the property was dedicated for "religious purposes".

In *Abul Fata's case* Lord Hobhouse again in describing the wakaf in that case said at p. 84 –

> "The motives stated are regard for the family name and preservation of the property in the family. Every specific trust is for some member of the family. The family is to be aggrandised by accumulation of surpluses and apparently by absorption into the settlement of after-acquired properties; and no person is to have any right of calling the managers to account. These possessions are to be secured for ever for the enjoyment of the family, so far as the settlors could accomplish such a result, by provisions that nobody's share shall be alienated or be attached for his debts. There is no reference to religion unless it be the innovation of the Diety to perpetuate the family name and to preserve their property and the casual mention of unspecified religious purposes etc. at the end of the (deed). There is a gift to the poor and to widows and orphans, but they are to take nothing not even surplus income, until the total extinction of the blood of the settlors, whether lineal or collateral".

The effect of the decisions was summed up by Lord Robertson in *Mujibinissa* v. *Abdul Rahim* L.R. 28 I.A. at page 23 as follows:

> "It will be so (i.e. the wakaf will be valid) if the effect of the deed is to give the property in substance to charitable uses. It will not be so if the effect is to give the property in substance to the testator's family".

Again the test is, is there a dedication for charitable uses?

In *Fatuma binte Mohamed bin Salim* v. *Mohamed bin Salim* [1951] A.C. 1, where the Privy Council affirmed its decision in *Abul Fata's* case and held that the scope of the decision was not confined to India only the deed of wakaf named the two daughters of the settlor as beneficiaries and then their children from generation to generation. The deed further provided that on failure of the descendants the wakaf properties should go to his nearest relatives failing which to certain named mosques.

It is a pity that the Federal Court in this case did not attempt to escape from subservience to the Privy Council and apply "the pure Islamic Law and texts". It could have done so because –

(a) it could have distinguished the Privy Council cases as they were concerned with dedications "for charitable uses". According to the legislation in Trengganu however the wakaf is valid if "it is a dedication in perpetuity of the capital of property for religious or charitable purposes recognised by Islamic Law". Even if, following the Privy Council decisions, the dedication was not for charitable purposes" was it not for "religious purposes"?;
(b) it could have distinguished the Federal Court decision, *Commissioner of Religious Affairs* v. *Tengku Mariam* as –

  (i) the views expressed in the Federal Court were *obiter dicta* not being necessary for the decision in that case; and
  (ii) the views were given *per incuriam*, as no reference was made to section 2 of the Trengganu Administration of Islamic Law Enactment;

(c) The Administration of Law Enactment of Trengganu distinguishes between "wakaf am" and "wakaf khas". No attempt was made in the Federal Court to point out the distinction between these two types of wakaf. Is it not the effect of the Privy Council decisions, if applied, that only "wakaf am" is valid and that a wakaf khas can never be valid? Surely the difference is to be found in the words "the income of which is to be paid to a person or persons for purposes prescribed in the wakaf".

(d) on the facts the wakaf in this case and in the case of *Tengku Meriam* can be distinguished from the cases dealt with by the Privy Council.

(e) the Court should have treated with respect the *fatwa* issued by the Mufti of Trengganu, as being the opinion of the highest Muslim Legal Official in Trengganu.

(f) in spite of the views of the Privy Council (where it was stated that the differences existing among the Shafii, Hanafi and other sects have no present significance) there is a difference between the Shafii and the Hanafi views in the matter. It would appear that a Shafii wakaf may be created for the benefit of beneficiaries (as a wakaf khas) without ultimate dedication to charity at all.

(g) Islamic Law is not the same in Malaysia as (it has been interpreted) in India. As Syed Othman J. (as then was) said in *Haji Yahya* v.*Hassan* [1978] 2 M.L.J. 153 at p. 154 the Privy Council was dealing with wakaf according to its interpretation of the Islamic law and not in reference to any special legislation dealing with wakafs.

However the Federal Court chose to ignore the "pure Islamic Law and text" and to follow the law as developed in India. Salleh Abas F.J. said,

> "Reverting to Muslim Law in Trengganu the wakaf Law seems to follow the same course of events as it did in India."

The law could only be corrected by legislation and was so corrected by the Islamic Wakaf Validating Enactment, 1972. That enactment however again did not purport to lay down what the constituent elements of a valid wakaf are. What the

enactment did was merely to declare that a wakaf will not be held invalid merely because among other purposes of the wakaf are the following four objects namely —

(1) that the wakaf is for the maintenance and support wholly or partially of the settlor's family, children or descendants, provided that there is an ultimate gift for the benefits of the poor or any other purposes recognised by Islamic Law (section 2(1)(a));
(2) that in the case of Hanafi sect, the wakaf is for the settlor's maintenance and support during his or her lifetime and for the payment of his or her debts out of the rents and profits of the property, provided that there is an ultimate gift for the benefit of the poor or any other purpose recognised by Islamic Law (section 2(1)(b));
(3) that the ultimate benefits reserved for the poor or other purposes recognised by Islamic Law is small or postponed until the total extinction of the settlor's family, children or descendants (section 2(2)); and
(4) that the wakaf is for the benefit of strangers, i.e. persons other than the family, children or descendants of the settlor (section 2(3)).

The Federal Court rightly said that the constituent elements of a valid wakaf must be determined with reference to the definition given in section 2 of the Administration of Islamic Law Enactment and to the Islamic Wakaf Validating Enactment 1972 and as intended by the Legislature in accordance with pure Islamic Law and text uninfluenced by the concept of charitable trusts and rules against perpetuities in English Law. Having said so, the Federal Court however proceeded to examine again the decisions in India. It seems pure Islamic Law is "expressed in the opinion of learned authors" like Ameer Ali, Tyabji and Fyzee and in the decisions of the Indian Courts. Thus the Federal Court held that a wakaf made in favour of strangers is valid because Ameer Ali, Tyabji and Fyzee say that such a wakaf is valid and because the majority of the decisions in India are in favour of its validity. In the result the Federal Court came to the decision that the wakaf in this case was valid.

It is perhaps a consolation that the Federal Court, with respect, came to a correct decision in this case but it is submitted that the Court should have relied on the Islamic Law rather than the Anglo-Mohameddan Law as developed in the Indian Courts and in the Privy Council.

It is obvious that the basic sources of the Islamic Law are the Holy Quran and the Hadith. It is a pity therefore that the Federal Court in this case made no reference at all to these sources of Islamic Law. No reference was made to the well known hadith recorded in the Sahih of Al-Bukhari to the effect –

> "Narrated Ibn Umar. When Umar got a piece of land in Khaibar he came to the Prophet (Peace be upon him) and said –
>
> > "I have got a piece of land better than which I have never got. So what do you advise me regarding it?"
>
> The Prophet (Peace be upon him) said;
>
> > "If you wish you can keep it as an endowment for charitable purposes".
>
> So Umar gave the land in charity (i.e. as an endowment) on the condition that the land would neither be sold nor given as a present nor bequeathed and its yield would be used for the poor, the kinsmen, the emancipation of slaves, jihad and for guests and travellers".

It is a pity too that no reference was made to the development of the law of wakfs in the Arab Countries, particularly in Egypt. An examination of such law and the views of the Muslim jurists would have shown that there is a difference of opinion among them as to whether wakfs are valid. A minority of the early jurists hold that a wakf is always invalid but the majority of jurists have accepted the view that a wakf is valid, if there has been a proper declaration of the wakf. A minority of jurists too allow a temporary wakf but the majority of jurists regard a wakf as necessarily perpetual.

A minority of jurists again take the view that a wakf is invalid should the founder make provision for it to last longer than the time the first two series of beneficiaries have become extinct or sixty years have elapsed, since the founder's death.

The majority of jurists however on this point hold that the wakf is valid up till the time when the first two series of beneficiaries become extinct or a period of sixty years comes to an end after the death of the founder.

Finally it is sad to note that the civil courts in Malaysia have not given due respect to the views of the Mufti. At least such views deserve the same respect as that accorded to the views of the Privy Council. In this case for example one of the matters submitted was that the wakf was invalid as it was only the income and not the corpus of the property which was dedicated. The very point was dealt with the Mufti in his ruling (see appendix) and some reference could have been made to his views. In the absence of any other reference to the Islamic Law and texts, surely the views of the Mufti deserve respect and consideration.

It is pity that there is no authoritative book in English on the Islamic Law of wakfs. Perhaps the publication of Dr. Mohamed Zain bin Othman's Ph.D. thesis on wakafs will fill this gap.

Ahmad Ibrahim

Appendix

Undang-Undang Pentadbiran Hukum Syara' Tahun 1955 (1375)
(Undang-Undang Trengganu Bilangan 4 Tahun 1955)
Petua-Petua di bawah Seksyen (3) 21

Menurut kuasa-kuasa yang diberi oleh Seksyen kecil (3) bagi Seksyen 21 Undang-Undang Pentadbiran Hukum Syara' Tahun 1955 (1375) maka Duli Yang Maha Mulia Sultan telah menitahkan bahawa petua-petua Syahib Al Fathilah Tuan Syed Yusof bin Ali Al Zawawi, SMT, JP, PJK yang berikut disiarkan di dalam Warta Kerajaan.

Wakaf Chenderong Konsesyen

Setelah meneliti dan menghalusi surat wakaf Yang Amat Mulia Tengku Nik Maimunah Al hajjah binti Almarhum Al Sultan Zainal Abidin sebagaimana salinan yang terkandung di dalam fail ini, maka saya dapati ianya adalah wakaf yang sah, yang melengkapi segala rukun-rukun dan syarat-syarat yang dikehendaki oleh syara'.

2. Adapun sangkaan yang mengatakan surat wakaf itu tidak menyebutkan ain malahan hanya disebutkan menafaat dan hak faedah sahaja maka ini menyalahi kenyataan kerana pada awal-awalnya lagi Yang Amat Mulia Tengku Nik Maimunah Al hajah itu telah menerangkan dengan jelas dan tegasnya bahagian-bahagian yang dimilik oleh beliau daripada tanah Chenderong Konsesyen itu kemudian di perenggan 4 beliau berkata;

> ". . . bahawasanya saya telah mewakafkan dengan kekalnya menghabisi semua hasil dan hak faedah . . ."

Gantinama "nya" pada perkataan "kekalnya" itu tidaklah syak kembalinya kepada bahagian beliau sebanyak 5/8 dalam tanah Chenderong Konsesyen, sebagaimana yang telah diterangkan di sebelah atas surat itu. Bagi menambah jelasnya lagi apa yang sebenarnya diwakafkan oleh beliau ialah tanah Chenderong

Konsesyen maka di muka 5 suratwakaf itu beliau menyebutkan dengan terangnya "tanah Chenderong Konsesyen yang diwakafkan ini".

3. Selain daripada itu Tengku Nik Maimunah Al hajjah tersebut sebelum menandatangani surat wakaf itu berhadapan saksi-saksi yang hadhir, termasuklah saya sendiri salah seorang daripada saksi-saksi yang hadhir itu, telah melafazkan dengan terang dan jelas dengan katanya:

> "saya mewakafkan bahagian saya dalam tanah Konsesyen Chenderong Kemaman dan segala menafaatnya kepada sekelian yang tersebut di dalam surat wakaf ini Allahuwa Taala dengan redza hati saya berkekalan sehingga hari kiamat".

Pada saya tidaklah ada syak lagi bahawa wakaf yang dibuat oleh Tengku Nik Maimunah Al hajjah itu sah pada syara kerana dari segi syara' lafaz itulah yang terutamanya diiktibarkan dalam segala perjanjian (contract) dan pada masa beliau melafazkan wakaf itu ia mempunyai milik yang sepenuh di atas hartabenda yang diwakafkan itu sementerah pula wakaf itu telah masyur di sisi orang ramai seluruh negeri ini selama hampir 10 tahun dan sudahpun dilaksanakan syarat-syarat yang terkandung di dalamnya sepanjang-panjang masa tersebut oleh Tengku Nik Maimunah Al hajjah sendiri sebagai nazarnya di bawah jagaan dan penyeliaan Jabatan Hal Ehwal Agama. Ini semuanya adalah menjadi bukti pada syara' bahawa wakaf itu sebenarnya telah dilakukan oleh orang yang mewakafkan.

4. Wakaf yang dibuat oleh Tengku Nik Maimunah Alhajjah adalah menepati betul dengan takrif atau definasi wakaf yang dimaksudkan dengan syara' iaitu menahan satu-satu hartabenda yang boleh diambil menafaat daripadanya dengan syarat ainnya kekal, kerana satu-satu tujuan yang halal. Dalam wakaf ini menafaat dan ain adalah berhubung rapat dan ada disebutkan dalam surat wakaf ini dengan jelas menurut kebiasaan yang dilakukan di dalam negeri ini dan negeri-negeri Islam yang lain selama-lamanya.

5. Pada hakikatnya surat wakaf ini diperbuat ialah semata-mata untuk menerangkan bahagian-bahagian dan cara-cara

pembahagian yang ditentukan bagi tiap-tiap seorang yang berhak menurut syarat-syarat yang ditetap oleh Tengku Nik Maimunah Alhajah yang membuat wakaf itu menurut hukum syara' yang maha suci.

Saya tidak dapati apa-apa sebab pun dari segi syara' yang mematutkan wakaf ini dibatalkan. Segala percubaan ke arah itu adalah dianggapkan semata-mata mainan bagi mempersenda-sendakan agama yang mana akibatnya amatlah buruk Waliiyaz Billah.

[P.A. (Fatwa) 27/1970
M.B.T.R. (Sulit) 4/1971]

THE HIRE-PURCHASE ORDER 1980

Until 11th April 1968, when the Hire-Purchase Act 1967 came into force, Malaysia did not have any local legislation which regulated this important branch of consumer credit.[1] In the cases dealing with agreements executed before that date the Malaysian courts readily applied the English common law, as they were entitled to do so, under section 3 of the Civil Law Ordinance 1956 (now the Civil Law Act 1956 (Revised 1972)). There were attempts in two cases[2] to argue that English legislation on hire-purchase applied in Malaysia by virtue of section 5 of the Civil Law Ordinance 1956. The facts of both cases did not require the court to make a ruling on this point and the arguments received no favourable response. In one of the cases, *Thambipillai* v. *Borneo Motors*,[3] Gill F.J. (as he was then) said,

> "The common law rules relating to hire-purchase agreements do apply here by virtue of the Civil Law Ordinance 1956 but I have grave doubts as to whether the English statutes modifying the common law automatically apply."

By 1966 hire-purchase trading in Malaysia had become a multi-million dollar business and in June of that year the Malaysian Minister of Commerce and Industry introduced a Hire-Purchase Bill in the Dewan Rakyat. At the same time the Minister invited the public and other interested parties to forward their views on the provisions of the Bill. Numerous representations were received and as a result the Bill was withdrawn for review by its drafting committee.[4] A revised Bill was re-introduced in March

[1] It is pertinent to refer to the [Sarawak] Hire-Purchase Registration Ordinance (Cap 71) which came into existence before the Hire-Purchase Act 1967. This Ordinance provides that an instrument of hire-purchase shall not be valid unless it is registered in the manner prescribed by the Ordinance.

[2] See *Innaya* v. *Lombard Acceptance (Malaya) Ltd.* [1963] M.L.J. 30 and *Thambipillai* v. *Borneo Motors* [1970] 1 M.L.J. 70

[3] [1970 1 M.L.J. 70.

[4] Proceedings of the Dewan Rakyat March 1, 1967, p. 5966.