

LIVING A CORPORATE LIFESTYLE: THE APPLICATION OF 'BODY CORPORATE' UNDER ISLAMIC INSTITUTIONS IN MALAYSIA

Ahmad Nasyran Azrae, Zuryati Mohamed Yusoff
& Zainal Amin Ayub

College of Law, Government and International Studies,
Universiti Utara Malaysia

nasyran@uum.edu.my/ zuryati@uum.edu.my/
z.amin@uum.edu.my

Abstract

Businesses are not alien to Islam for it has been the practice of Prophet Muhammad p.b.u.h. The Holy Prophet himself was a successful trader. In Islam, particularly the Arab countries, they refer the entity carrying out the businesses and commercials as 'syirkah' vis-à-vis corporation or company under Western concept. Whilst the Western distinguishes company from partnership, syirkah in Islam refer to both company and partnership. Nevertheless, the different types of these syirkah are reflected in the diversity of their categories, which comprised of al-'inan, al-abdan, mudharabah, wujuh and mudharabah. The essential part of a syirkah is that it is contract-based, where individuals came together and entered into a contract with an agreement to distribute the profits amongst themselves. Individuals are the backbone of a syirkah in Islam. Whereas, a company in the conventional system focuses on the concept of body corporate rather than natural human being, i.e. individuals. In this modern world, the applications of the notion 'body corporate' are also integrated into some of Islamic institutions including those that were established in Malaysia. The Islamic institutions are now leading a corporate way of lifestyle. This paper will highlight some of the Islamic institutions in Malaysia and the analysis of legal provisions which set them up as corporate entities. In the same parallel also, the author will identify the rights and criteria arising from such body corporate – and the Islamic perception on such corporate lifestyle.

Keywords: body corporate, Islamic institution, corporate lifestyle, separate legal entity, Malaysia

Introduction

The implementation of the Islamic teachings and practices in Malaysia gained the strong support from the government, which includes the 'Islam Hadhari' approach introduced by the fifth Premier, Dato' Seri Abdullah Ahmad Badawi. These manifestations of Islamisation in Malaysia can be seen from various aspects, among others, the establishment of several Islamic institutions to run Islamic-based transactions.

An Islamic institution is not judged from its name, since there is no requirement for these institutions to bear the name 'Islam' to constitute Islamic. Nik Mustapha stressed that what is important is that its role must be in line with what required by Islam, i.e. to alleviate the quality of life of the societies¹.

In another view, Taqi Usmani² laid down several elements to constitute 'Islamic' that includes the design of the transactions based on Islamic principles, the outlook of the institution and its staff reflects the Islamic identity, the adherence to the Islamic obligations of worship as well as the ethical norms in the whole atmosphere of an institution, and the necessary for having the guidance of *Shariah* Boards in the relevant area.

Having said of the above criteria, we may infer that there are some institutions in Malaysia which are identifiable as 'Islamic', e.g. Bank Islam Malaysia Berhad, Lembaga Tabung Haji, Syarikat Takaful, etc. Some of these institutions were established based on Islamic principles of *al-inah* (i.e. Bank Islam Malaysia Berhad); some were established to cater the pilgrimage affairs (i.e. Lembaga Tabung Haji); while some were established to preserve the Islamic concept of *ta'awun* (i.e. Syarikat Takaful).

Nevertheless, realizing that wealth is mostly generated within the corporation, the Malaysian Government has attempted to give Islam contemporary relevance. While maintaining and preserving the Islamic principles, these institutions were embedded with the conventional structure of body corporate to give it a corporate status.

What is 'body corporate'?

The term 'body corporate' is used interchangeably with the term 'corporate body' or 'corporation'. Black's Law Dictionary³ defines 'corporation' as an entity (usually, a business) having authority under law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely; or a group or succession of persons established in accordance with legal rules into a legal or juristic person that has legal personality distinct from the natural persons who make it up, exists indefinitely apart from them, and has the legal powers that its constitution gives it.

'Body corporate' or 'corporation' is an artificial person⁴ *vis-à-vis* natural person, i.e. human being. Artificial person refers to an entity created by law and given certain legal rights and duties of a human being; or a being, real or imaginary,

¹ *'Institusi Ekonomi Islam di Malaysia: Satu Analisis Cadangan'* in *Ekonomi Islam dan Perlaksanaannya di Malaysia*, 2002.

² An eminent Hanafi Islamic Scholar and former judge of Shariah Appellate Bench of the Supreme Court of Pakistan.

³ Eighth Edition (2004), at p. 365.

⁴ Sometimes it is referred to as 'juristic person' or 'legal person' or 'fictitious person' or 'juridical person' or 'moral person'.

which for the purpose of legal reasoning is treated more or less as a human being⁵. It comes into being as a result of the operation of doctrine of separate legal entity.

Under the common law system, the earliest case that established the principle of separate legal entity was *Solomon's case*⁶. In this case, Mr. Salomon had incorporated a company of which he and his family members were the only shareholders. When the company's business failed, the value of its assets was insufficient to pay out both Mr. Salomon and the company's other creditors. Thus, the creditors argued that Mr. Salomon should not receive the payment from the company because the degree of control he exercised over the company.

The case was heard before the House of Lords, where it was held that despite Mr. Salomon have the control over the company, it was neither his agent nor trustee. A company was treated as operating the business in its own right, and as being separate from its controller, i.e. Mr. Salomon. Therefore the charge given by the company to Mr. Salomon was valid and he was entitled to be paid his debt even though other creditors of the company would not be paid because the company had insufficient assets to pay all its creditors.

Two points on body corporate that may be concluded here: *Firstly*, 'body corporate' carries with it several distinguishing features, i.e. a persona at law; it has perpetual succession, etc. *Secondly*, a 'body corporate' can do many things a human person can (e.g. to own property), it can do certain things a human cannot do (e.g. issue and allot shares in itself) and also there are some acts which human being can do, but a corporate body cannot (e.g. it cannot marry)⁷.

Legal Provisions underlying the Application of 'Body Corporate' under Islamic Institutions in Malaysia

The Islamic institutions in Malaysia were established under certain legal provisions which spelt out the existence of 'body corporate'. The followings are some of those institutions – followed by the examination of the relevant provisions that conferred upon the Islamic institutions the status of 'body corporate':

a) Islamic Banking Institutions

⁵ Black's Law Dictionary, Eighth Edition (2004), at p. 1178.

⁶ *Aaron Salomon v. A. Salomon & Co. Ltd.* [1897] AC 22.

⁷ Abu Bakar Munir in '*Lifting the Corporate Veil and the Criminal Liability of a Company*' (1994).

Currently, there are 17 licensed Islamic banking in Malaysia⁸, which adopts the principles derived from the Qur'an and the *Sunnah* of the Prophet Muhammad p.b.u.h. In addition, certain existing banking institutions were also allowed to offer Islamic banking services by utilizing their existing infrastructure and branches in order to increase the number of customer using the Islamic banking services. To this effect, the Central Bank had introduced a scheme known as '*Skim Perbankan Islam*' (Islamic Banking System) on March 4, 1993.

There are more than 100 Islamic financial products and services that are being offered by the banks using various Islamic concepts such as *Mudharabah*, *Musarakah*, *Murabahah*, *Bai' Bithaman Ajil* (*Bai' Muajjal*), *Ijarah*, *Qard*, *Istisna'* and *Ijarah Thumma Bai'*. As part of the effort to streamline and harmonize the *Shariah* interpretations among the Islamic banks and *takaful* companies, Bank Negara Malaysia had established the Shariah Advisory Council⁹ for Islamic Banking and Takaful on May 1, 1997. It serves as the highest *Shariah* authority on Islamic banking and *takaful* set up to provide advice on all *Shariah* matters pertaining to Islamic banking and *takaful* in Malaysia¹⁰. This Council shall consist of those persons who have knowledge or experience or both in the *Shariah* and also banking, finance, law or any other related discipline.

The first Islamic bank to be established is Bank Islam Malaysia Berhad (hereinafter referred to as BIMB) where it commenced its operations on July 1, 1983. BIMB is essentially an '*inan* company; a separate legal entity based on the concept of *al-musarakah*. An '*inan* company is made up of a minimum two shareholders with no limit to the maximum number. It is a business entity, formed by having a group of shareholders, electing representatives to manage the company (i.e. board of directors) on the basis of *wakalah*. At the same time the shareholders retain their management control (i.e. voting rights) in the company in proportion to their shareholding¹¹.

BIMB and other Islamic banking institutions are required to be established under Islamic Banking Act 1983 (hereinafter referred to as IBA), which came into effect on April 7, 1983. IBA has repeatedly used the term 'company' to refer to Islamic banks. This are evidenced as follows: *Firstly*, 'Islamic bank' is defined as any company which carries on Islamic banking business and holds a valid license¹². *Secondly*, it is the requirement for an Islamic banking business to be transacted in Malaysia only by a company which is in the possession of a license in writing from the Minister authorizing it to do so¹³.

⁸ Retrieved from

<http://www.bnm.gov.my/index.php?ch=13&cat=banking&type=IB&fund=0&cu=0> on 23/3/2009.

⁹ Section 16B, Central Bank of Malaysia Act 1958.

¹⁰ Section 13A, IBA 1983: The Islamic banks must seek the advice; and the advice so given shall be complied with.

¹¹ Ahmad Tajudin Abdul Rahman in '*Workings of an Islamic bank: case study of Bank Islam Malaysia Berhad*' (2000).

¹² Section 2, IBA 1983.

¹³ Section 3, IBA 1983.

Thus, it can be concluded that an Islamic bank in Malaysia must be a company¹⁴ or corporation¹⁵. Nevertheless, the term 'company' or 'corporation' itself were not defined under IBA. The definition for this however can be found in the Companies Act 1965 (hereinafter referred to as CA), i.e. 'company' means a company incorporated pursuant to the CA; whereas 'corporation' means any body corporate formed or incorporated or existing within Malaysia or outside Malaysia and includes any foreign company¹⁶.

The foregoing definitions reflect that all Islamic banks have to undergo the process of incorporation. This is provided under section 16(5) of CA. The effect of incorporation as underlined under section 16(5) of CA can be simplified as follows:

- i) a company shall be regarded as a body corporate, capable of exercising all the functions of an incorporated company;
- ii) a company is entitle to sue and will be at risk of being sued;
- iii) a company will have perpetual succession, i.e. the state of being immortal and lasts until it is properly wound up or struck off the register;
- iv) a company will have a common seal;
- v) a company possesses the power to hold land (and other form of properties¹⁷);
- vi) members of a limited company shall enjoy the benefit of limited liability.

The status of Islamic banking as a body corporate can be further explained in several decided cases. In the case of *Bank Islam Malaysia Bhd. v. Adnan Bin Omar*¹⁸, an issue which was not reported¹⁹ concerned with the jurisdiction of *Syariah* Court over Islamic banking cases. It was held *inter alia* that BIMB is a corporate body which has no religion, and consequently not within the jurisdiction of *Syariah* Courts. List II (State List) of the Ninth Schedule to the Federal Constitution provides for the jurisdiction of *Syariah* Courts only over persons professing the religion of Islam. Thus, NH Chan, J held that the matter was rightly brought before the civil court because Islamic institutions, i.e. BIMB and Syarikat Takaful are corporate institutions created by statute and do not have a religion.

On another note, the court in *Dato' Hj Nik Mahmud bin Daud v. Bank Islam Malaysia Bhd.*²⁰ was determined to hear an issue on a *Bay' Bithaman Ajil* financing agreement which was entered into by plaintiff and BIMB to develop his piece of land in Kelantan. The land was held under the Kelantan Malay Reservation Enactment 1930, and in particular section 7(i) prohibits any transfer or transmission or vesting of any right or interest of a Malay in reservation land to

¹⁴ Halsbury's Laws of Malaysia, Vol. 14 (2002), at p. 254.

¹⁵ 'Banking corporation' means a licensed bank, a licensed merchant bank and an Islamic bank: Section 4, CA 1965.

¹⁶ Section 4, CA 1965.

¹⁷ Tan Cheng Han in 'Walter Woon on Company Law' (2005).

¹⁸ (1994) 3 CLJ 735

¹⁹ *Bank Islam Malaysia Bhd. v. Adnan Bin Omar* (Kuala Lumpur High Court, Civil Suit No. S3-22-101-91) (unreported).

²⁰ [1996] 4 MLJ 295.

or in any person not being a Malay. The issue arose is whether there is a transfer or a vesting of right or interest involving a non-Malay, i.e. BIMB is a bank with neither a Malay nor a native of Kelantan. However, to reconcile this matter and to enable the bank to register the charge, Schedule D of the 1930 Enactment allow Rulers-in-Council to grant Malay status to a bank for the purpose of registering a charge document.

b) Zakat-Collecting Institutions

In Malaysia, *zakat* is essentially a state subject-matter²¹. It follows that the establishment and operation of the *zakat* institutions varies from one state to another. Normally, there is a Department of Religious Affairs to manage the day-to-day administration, including the collecting of *zakat* and *fitrah*²². For example, *Jabatan Zakat Negeri Kedah Darul Aman*, a state statutory body, is the Kedah state department which responsible for *zakat* collection²³.

However, a more corporate structure of *zakat*-collecting institution was adopted in the Federal Territories. A company by the name of Hartasuci Sdn. Bhd., also known as Zakat Collection Centre, Federal Territory Islamic Religious Council (PPZ-MAIWP) was responsible for collecting *zakat*. Hartasuci Sdn. Bhd.²⁴ is a subsidiary company to the Federal Territory Islamic Religious Council. It was incorporated under the Companies Act 1965.

Following its incorporation, Hartasuci Sdn. Bhd. possesses several features as underlies under section 16(5) of CA:

- i) a company shall be regarded as a body corporate, capable of exercising all the functions of an incorporated company;
- ii) a company is entitle to sue and will be at risk of being sued;
- iii) a company will have perpetual succession, i.e. the state of being immortal and lasts until it is properly wound up or struck off the register;
- iv) a company will have a common seal;
- v) a company possesses the power to hold land and other form of properties;
- vi) members of a limited company shall enjoy the benefit of limited liability.

The corporate structure of *zakat* institution is also being adopted in the state of Selangor in the form of Lembaga Zakat Selangor (MAIS) (hereinafter referred to as LZS-MAIS)²⁵. In contrast with Hartasuci Sdn. Bhd., LZS-MAIS was established and registered under the Trustees (Incorporation) Act 1952. The Act

²¹ List II (State List) to the Federal Constitution.

²² Wu Min Aun in 'The Malaysian Legal System' (2005).

²³ Retrieved from <http://www.zakatkedah.com/pengenalan.asp> on 29/3/2009.

²⁴ It was the first *zakat* office that adopts a corporate method and structure as a way to collect *zakat* – it started its operation on January 1, 1991.

²⁵ Previously, it was run by the *Pusat Zakat Selangor (Majlis Agama Islam Selangor)*, a non-profit entity, i.e. a company incorporated under the CA with the registered name of *MAIS ZAKAT Sdn. Bhd.* Subsequently, the status of '*pusat*' (i.e. centre) has been elevated to '*lembaga*' (i.e. board) to strengthen the role of *zakat* collecting institution in Selangor.

grants the right to any trustee to apply for a certificate of registration of the trustees or trustee of such body or association of persons as a corporate body²⁶. Upon registration, LZS-MAIS shall possess certain characteristics, namely:

- i) it shall become a corporate body by the name described in the certificate;
- ii) it shall have perpetual succession;
- iii) it shall have common seal;
- iv) it shall have the power to sue and be sued in such corporate name;
- v) it shall have the power to deal with movable or immovable property, including right to acquire, purchase, take, hold, enjoy, sell, convey, assign, surrender and yield up, mortgage, charge, demise, reassign, transfer or otherwise dispose of property belonging to;
- vi) it shall have the right to hold the property for the benefit of, such body or association of persons, as such trustee might do.

c) Lembaga Tabung Haji

Lembaga Tabung Haji (hereinafter referred to as LTH) is a worldwide recognized institution for their effort in offering the best services in managing one of pillars of Islam, i.e. the pilgrimage affairs in Malaysia. The functions and objectives of LTH are in line with the *Shariah* principles²⁷. Among others, their objective is to enable Muslim community in Malaysia to save in investments that are in accordance with *Shariah* for the expenditure in performing *hajj*²⁸.

The establishment is provided under the Tabung Haji Act 1995. The effects of its establishment as enshrined under the Act are²⁹:

- i) it is a body corporate by the name of Lembaga Tabung Haji;
- ii) it shall have perpetual succession;
- iii) it shall have a common seal;
- iv) it may sue and be sued in its name;
- v) it may enter into contracts;
- vi) it may acquire, purchase, take, hold and enjoy movable and immovable property, and may convey, assign, surrender, yield up, charge, mortgage, demise, reassign, transfer, or otherwise dispose of, or deal with, any of those property or any interest therein.

d) Takaful Malaysia

An Islamic system of *takaful* was introduced in Malaysia back in 1984 as part of its Islamisation. It operates on two Islamic principles, namely upholding the virtues of cooperation, mutuality and solidarity as embodied in the concept of

²⁶ Section 2 of Trustees (Incorporation) Act 1952 (read together with section 3 of the Trustees (Incorporation) (Amendment) Act 2004).

²⁷ Section 4, Tabung Haji Act 1995.

²⁸ Norhashimah Mohd. Yasin in '*Islamisation/Malaynisation: A Study on the Role of Islamic Law in the Economic Development of Malaysia 1969-1993*' (1996).

²⁹ Section 3 and Paragraph 5 of the Schedule to Tabung Haji Act 1995.

takaful; and the profit sharing principle of *al-mudharabah*. It would give the participants the opportunity to save, invest and earn profits³⁰.

Syarikat Takaful Malaysia Berhad (hereinafter referred to as Takaful Malaysia) is a *takaful* company incorporated on November 29, 1984 and commenced operation on July 22, 1985. It was transformed into a public limited company on July 30, 1996, with BIMB Holdings Berhad as its major shareholder in Takaful Malaysia. Generally, it was set up to avoid from the practices of *riba* (interest), *gharar* (uncertainty) and *maysir* (gambling) that are clearly against the teaching of Islam.

The principal activities of Takaful Malaysia are to provide and manage the Family Takaful Business (Family Takaful Fund) and General Takaful Business (General Takaful Fund). These *takaful* funds are kept separate from the Shareholders' Fund which was originally funded wholly by the paid-up capital. The shareholders or investors will enjoy the return on their investments from payment of dividends if only when the company makes profit. It is a profit-sharing venture between Takaful Malaysia as the operator and the individual members of a group of participants as providers of funds who agree to reciprocally guarantee each other against certain loss or damage that may be inflicted upon any one of them³¹.

In ensuring its business' aims and operations do not involve any element which is not approved by the *Shariah*, the *takaful* operator are required to seek the advice of the Shariah Advisory Council³² on *Shariah* matters relating to its *takaful* business; and such advice must be complied with³³.

The licensing of a *takaful* operator in Malaysia is provided under the Takaful Act 1984. Essentially, there are two types of entity that may carry out *takaful* operation in Malaysia³⁴. *Firstly*, a *takaful* business shall not be carried out in Malaysia by any person as *takaful* operator except by a company as defined in the Companies Act 1965. *Secondly*, a *takaful* business is also allowed to be run by societies registered under the Co-operative Societies Act 1948.

If the *takaful* operator is a company, then, by the operation of section 16(5) of the Companies Act:

- i) it shall be regarded as a body corporate, capable of exercising all the functions of an incorporated company;
- ii) it entitled to sue and will be at risk of being sued;
- iii) it shall have perpetual succession, i.e. the state of being immortal and lasts until it is properly wound up or struck off the register;
- iv) it shall have a common seal;
- v) it possesses the power to hold land and other form of properties;

³⁰ Retrieved from www.takaful-malaysia.com on 25/3/2009.

³¹ Retrieved form www.takaful-malaysia.com on 25/3/2009.

³² It refers to the same Shariah Advisory Council established to advice Islamic banking institutions.

³³ Section 53A, Takaful Act 1984.

³⁴ Section 4, Takaful Act 1984.

- vi) the members of a limited company shall enjoy the benefit of limited liability.

In case of a *takaful* operator run by registered society, section 8 of the Co-operative Societies Act 1948 spelt out the effect of its registration, namely:

- i) a society shall be rendered as a body corporate by the name under which it is registered;
- ii) it shall have perpetual succession;
- iii) it shall have a common seal;
- iv) it shall have the power to hold movable and immovable property;
- v) it shall have the power to enter into contracts;
- vi) it shall have the power to institute and defend suits and other legal proceedings;
- vii) it may do all things necessary for the purposes of its constitution

From the foregoing, we may infer that both forms of *takaful* operator – company and society – shall be of a body corporate.

e) **Majlis Agama Islam**

Generally, there are three bodies responsible for administering the Islamic affairs in Malaysia. *Firstly*, the Majlis Agama Islam or the Council of Islam Religion is the general body responsible for the administration of the Islamic religion³⁵, except in regard to the Hukum Syarak and the administration of justice. *Secondly*, the institution of Mufti is responsible for the determination of the Hukum Syarak. *Thirdly*, the administration of justice is vested in the Syariah Courts³⁶.

Since Islam in Malaysia is a state subject-matter³⁷, it entails that the establishment of these three bodies are also varies from one state to another. In the Federal Territories, the Majlis Agama Islam Wilayah Persekutuan (hereinafter referred to as MAIWP) was established to advise the Yang di-Pertuan Agong in matters relating to the religion of Islam³⁸. Whilst, in Kedah, the Majlis Agama Islam Negeri Kedah Darul Aman (hereinafter referred to as MAIK) was establish to advise Sultan of Kedah in matters relating to the religion of Islam³⁹. Both MAIWP and MAIK are governed by the Administration of Islamic Law (Federal Territories) Act 1993 (hereinafter referred to as AILA (Federal Territories)) and the Administration of Islamic Law (Kedah) Enactment 2008 (hereinafter referred to as AILE (Kedah)) respectively.

³⁵ For examples: to promote, stimulate, facilitate and undertake the economic social development and well-being of the Muslim community; to administer all monies and properties in the *baitulmal*; to be the sole trustee of all *waqaf*; to be the trustee of all mosques.

³⁶ Ahmad Mohamed Ibrahim in 'Recent Developments in the Administration of Islamic Law in Malaysia' (1997).

³⁷ List II (State List), Ninth Schedule, Federal Constitution.

³⁸ Section 4, AILA (Federal Territories).

³⁹ Section 4, AILE (Kedah).

The membership of the MAIWP consist of Muslim⁴⁰, and shall be comprised of a Chairman, a Deputy Chairman, the Chief Secretary to the Government or his representative, the Attorney General or his representative, the Inspector-General of Police or his representative, the Mufti, the Commissioner of the City of Kuala Lumpur; and fifteen other members, at least five of whom shall be persons learned in Islamic studies⁴¹.

Whereas, the membership of MAIK shall consist of a President, a Deputy President, six *ex-officio* members holding the office of the Mufti, Chief Syar'ie Judge, the State Secretary, the State Legal Adviser, the State Financial Officer and Secretary; and also such number of members appointed with the consent of Sultan of Kedah⁴². However, the AILE (Kedah) is silent on the requirement of the religion of each member, except so far the State Secretary must be a Muslim⁴³.

The legal identity of MAIWP and MAIK are spelt out under section 5 of AILA (Federal Territories) and section 5 of AILE (Kedah) respectively. Upon its establishment, MAIWP and MAIK shall possess several characteristics, namely:

- i) it shall be a body corporate;
- ii) it shall have perpetual succession;
- iii) it shall have a corporate seal;
- iv) it may sue and be sued in its corporate name;
- v) it may enter into contracts;
- vi) it may acquire, purchase, take, hold, enjoy, convey, assign, surrender and yield up, charge, mortgage, demise, reassign, transfer or otherwise dispose of, or deal with, any movable or immovable property vested in it as it seems fit and in accordance with Islamic Law (for Federal Territories); or in accordance with *Hukum Syarak* (for Kedah);
- vii) it shall have power to act as an executor of a will or as an administrator of the estate of a deceased person or as a trustee of any trust;
- viii) it shall have such further powers and carry out such duties as may assigned to it by AILA (Federal Territories) or any other Acts (for Federal Territories); or by AILE (Kedah) or any other Enactments (for Kedah).

Thus, we can see that the application of 'body corporate' is incorporated in both MAIWP and MAIK. In the furtherance of the above, both MAIWP and MAIK are given the power to establish corporations or companies (which also a 'body corporate') to carry out, take charge, conduct and manage any project scheme or enterprise or any activity in the execution of their functions, duties and powers⁴⁴.

⁴⁰ Section 10(2) and (4), AILA (Federal Territories).

⁴¹ Section 10(1), AILA (Federal Territories).

⁴² Section 11, AILE (Kedah).

⁴³ Section 11(4), AILE (Kedah).

⁴⁴ Sections 8 and 8A of AILA (Federal Territories); Sections. 8 and 9 of AILE (Kedah).

What corporate lifestyle do Malaysia's Islamic Institutions inherited in a 'body corporate'?

Upon perusal of the legal provisions from various Acts and Enactments, we may conclude that generally all the Islamic institutions listed above living in a corporate lifestyle by possessing the following criteria/rights:

Firstly, the institution is regarded as a body corporate, i.e. an artificial legal person⁴⁵, regardless of its nature: a company (e.g. BIMB, Hartasuci Sdn. Bhd., Takaful Malaysia, etc.); or a trustee (e.g. Lembaga Zakat Selangor); or a society (for *takaful* operators); or others (e.g. Lembaga Tabung Haji and Majlis Agama Islam). Thus, it reflects that these institutions exist in a distinct legal personality⁴⁶.

Secondly, following its 'body corporate', the institution shall have perpetual succession, i.e. it shall have the life of its own and lasts until it is properly dissolved, or wound up, or struck off the register. In *Abdul Aziz Bin Atan v. Ladang Rengo Malay Estate Sdn. Bhd.*⁴⁷, it was held that the corporate entity will continue unchanged despite the changes in the membership. Besides, the court had evenly held that a corporate entity will continue to exist despite the death of all its shareholders⁴⁸.

Thirdly, a body corporate is allowed to enter into contracts. In furtherance to this, the Acts and Enactments require these institutions to have common seal of their own – whereby any contracts entered by the institutions shall be affixed with their respective common seal and shall be signed by a director or any other authorized person.

Fourthly, the institutions were also granted with a wide power to deal with properties. This is necessary giving the situation that they were established with purpose; and the conferring of such powers will ease them to perform their duties. Some of the legislations have make it clear that the power to deal with property cover both moveable and immovable. However, section 16(5) of CA only grants the power to a body corporate (i.e. company and corporation) to hold land⁴⁹. Nevertheless, there are numerous authorities that hold the right of a company and corporation to hold other form of properties⁵⁰.

Fifthly, the law also grants to these institutions the right to bring a claim on its own name; and with the risk of being sued in its entity. Thus, all legal proceedings are carried out in its body corporate. This principle enshrined the 'proper plaintiff

⁴⁵ *Tan Lai v. Mohamed Bin Mahmud* [1982] 1 MLJ 338.

⁴⁶ Example: In case of a company, there are two parties – one party consisting of several individuals and the other consist of a corporation (Lendley LJ in *John Foster & Sons v. Commissioners of Inland Revenue* [1894] 1 QB 516).

⁴⁷ [1985] 2 MLJ 165.

⁴⁸ *Re Noel Tedman Holdings Pty Ltd* [1967] Qd R 561.

⁴⁹ Section 19(1) and the Third Schedule to the Companies Act 1965 and under some provisions of the National Land Code.

⁵⁰ Tan Cheng Han in '*Walter Woon on Company Law*' (2005).

rule' originated in the case of *Foss v. Harbottle*⁵¹, which received its application in Malaysia through several cases, e.g. *Mooney v. Peat, Marwick, Mitchell & Co.*⁵² and *Paidah Genganaidu v. The Lower Perak Syndicate Sdn. Bhd.*⁵³. Normally, the proper organ to commence actions on behalf of a company is the board of directors⁵⁴, since a body corporate cannot appear in person.

Sixthly, in contrast with other legislations, the Companies Act 1965 granted to the members of a limited company to enjoy the benefit of limited liability. 'Limited liability' can be described as liability restricted by law or contract – especially the liability of a company's owners for nothing more than the capital they have invested in the business⁵⁵. Thus, in case of company's winding up, the liability on the part of the member is only to contribute to the assets of the company as provided by the Companies Act 1965 if the company's assets not being sufficient to settle the debts⁵⁶.

Apart from that, other distinguished features of these institutions are that each was established to carry out activities that are in line with the Islamic teachings. Despite being associated with the conventional corporate lifestyle, the Islamic institutions are required to uphold *Shariah* principles either as the provider of Islamic products or the manager of the Muslim affairs.

How Islam perceived the Corporate Lifestyle of the Islamic Institutions?

Some of the Muslim scholars argued that the like institution of *waqaf* and *masjid* possess the right to hold property of their own⁵⁷, which are akin to the above-mentioned Islamic institutions. The individuals who manage the works shall have no right over the property generated on behalf of the *waqaf* and the *masjid*. Nevertheless, there are some scholars that are against the proposed view, e.g. the Mujlisul Ulama of South Africa, who argued that the institution of *waqaf* and *masjid* do not owned any property, but rather, all income generated by the assets of *waqaf* and *masjid* are owned by Allah⁵⁸. In addition, being a fictitious person, a body corporate has no contractual powers⁵⁹.

Islamic way of *syirkah* does not distinguish between a company and its partners, for they are treated as one unit. Thus, unlike the Western concept, if the company is taken to the court, it is the partners, i.e. human being, that are liable⁶⁰. This is because, life and *dhimmah* (i.e. liability) can only be attributable to human being to which they are granted with rights and are capable of performing their

⁵¹ (1843) 2 Hare 461.

⁵² [1967] 1 MLJ 87.

⁵³ [1974] 1 MLJ 220.

⁵⁴ Tan Cheng Han in 'Walter Woon on Company Law' (2005).

⁵⁵ Black's Law Dictionary, Eighth Edition (2004), at p. 933.

⁵⁶ K. Arjunan in 'Company law in Malaysia' (2006)

⁵⁷ Taqi Usmani in 'An Introduction to Islamic Finance' (2002).

⁵⁸ Retrieved from <http://books.themajlis.net/node> on 29/3/2009.

⁵⁹ Ibid.

⁶⁰ Retrieved from <http://www.khilafah.com/kcom/the-khilafah/economy/companies-in-islam.html>. on 29/3/2009.

responsibility. *Dhimmah* are not something which can be transferred to a non-living entity⁶¹. Islam treats human beings at the highest level. They are endowed with '*aql*' and the power of disposition, to which they have the will of their own in performing their duties and obligations.

Nevertheless, in the Islamic form of *mudharabah*, it reflects many similarities with the present model of corporation. For examples: the transfer of shares by one person to another does not dissolve the company; there is a separation of ownership and control, i.e. those who invest money do not take the day-to-day operation of the business⁶². The worker/agent is considered as holding the capital as a trustee-cum-manager to the capital provider⁶³.

Another point which is of concern is the fact of absolution of debt arising from 'limited liability' which is designed to circumvent and deny payment of debt. It is the position in Islam that the liabilities will hang on the necks of debtors even on the day of *Qiyamah*⁶⁴. Human beings are the only entity that being endowed with the life in this world and in the hereafter. Their actions in their lifetime will be carried forward to the Judgment Day. The individuals who have incurred any liability have to pay it – the claims shall remain here and will remain in the day of *Qiyamah*. A partner's liability will not be limited to the amount they have put in. Whilst the profit distribution ratio is decided according to what is agreed, the loss is distributed relative to the amount or shares each partner invests in the business. Thus, there is no limited liability in Islam⁶⁵.

Due to its significance in the present day businesses, the contemporary Muslim scholars, such as Nyazee, advocates certain guidelines for the acceptance of the corporate personality. According to Nyazee, a Ruler may assign a restricted or limited *dhimmah* to a non-human on the following conditions⁶⁶:

Firstly, a body corporate with a fictitious identity will not be expected to observe religious duties – i.e. not to be subject to the *khitab* of *ibadat*, and will not be liable for any religious duty or obligation that may arise from it.

Secondly, a body corporate must be associated to some form of '*aql*'; either individual or group of individual (e.g. board of directors). This is because, in Islam, the *ahliyat al-ada*' will always be associated with the source of '*aql*', and so will the liability for such acts.

And *thirdly*, a concept of dual title of ownership must be associated with a body corporate. It entails, any property held by the body corporate in its own name must be assumed to be held on behalf of the members of the body corporate as a

⁶¹ Nasri Naiimi in '*Peranan Perundangan dalam Merealisasikan Konsep Syirkah dalam Pengurusan Harta Pusaka*' (2007).

⁶² Abdul Rahim Abdul Rahman in '*Corporate Accountability and Morality*' (2001).

⁶³ Zainal Azam Abd Rahman in '*Islam in the Corporate World*' (2004).

⁶⁴ Retrieved from <http://books.themajlis.net/node> on 29/3/2009.

⁶⁵ Retrieved from <http://www.khilafah.com/kcom/the-khilafah/economy/companies-in-islam.html> on 29/3/2009

⁶⁶ '*Islamic Law of Business Organization: Partnerships*' (2002).

result of *khalt* or mingling of capitals. In addition, the body corporate may have the full right of disposal and transaction in the property if so permitted by its members.

Conclusion

Generally, the idea of corporate personality was rejected by the earlier Muslim jurists. But, it does not mean that this concept is totally rejected under Islam. It can still be accepted with certain qualifications. The concept of 'body corporate' may be established under '*urf*' (custom) or usages of people due to the necessity and interest to have a good organized transaction in the society and to suit the changing nature of modern world of trade and business. Furthermore, in Islam, the origin for all creation is *halal*, i.e. lawful and permissible; and there is no prohibition unless there are clear injunctions or authorities which prohibits it.

Nevertheless, the Islamic institutions' corporate lifestyle should not totally follow that of a conventional system. It is importance for justifying and accommodating the legal validity of a fictitious legal personality in a body corporate under *Shariah* law whenever it is clashed. Besides, Muslims are allowed to develop such industries and professions that are essential for the life of the community. Abdul Rahim⁶⁷ shares his view that Islam as a way of life reveals a moral code of behavior that has the potential to be advanced to modern corporations, for Islam is believed to advocate a complete code of human conduct of corporate affairs. There is a need to Islamize the corporate lifestyle of the Islamic institutions.

Bibliography

- Abdul Rahim Abdul Rahman. (2001, September 18). Corporate accountability and morality. *The Star*, 9:1
- Abu Bakar Munir. *Lifting the Corporate Veil and the Criminal Liability of a Company* [1994] 1 MLJ cxlvi.
- Ahmad Mohamed Ibrahim. *Recent Developments in the Administration of Islamic Law in Malaysia*. In *The Administration of Islamic Laws*. (1997). Ahmad Mohamed Ibrahim and Abdul Monir Yaacob (eds.). Kuala Lumpur: Institute of Islamic Understanding Malaysia.
- Ahmad Tajudin Abdul Rahman. *Workings of an Islamic bank: case study of Bank Islam Malaysia Berhad*, presented at the Fourth International Conference on Islamic Economics, Banking and Finance Loughborough, United Kingdom on 13 – 15 August 2000.
- Arjunan, K. (2006). *Company law in Malaysia*. Kelana Jaya: LexisNexis.
- Garner, B.A. et.al (Eds.). (2004). *Black's Law Dictionary (8th Ed.)*. Minnesota, United States: Thomson West.
- Imran Ahsan Khan Nyazee. (2002). *Islamic law of business organization: partnerships*. Petaling Jaya: The Other Press.
- Mohammad Hashim Kamali. (2000). *Islamic laws in Malaysia: issues and developments*. Kuala Lumpur: Ilmiah Publishers.

⁶⁷ 'Corporate Accountability and Morality' (2001).

- Muhammad Taqi Usmani. (2002). *An introduction to Islamic finance*. [The Hague: Kluwer Law International](#).
- Mujlisul Ulama of South Africa. *The concept of limited liability: untenable in the shariah*. South Africa: Young Men's Muslims Association. Available online at <http://books.themajlis.net/node/251> (accessed on 23/3/2009).
- Nasri Naiimi. *Peranan perundangan dalam merealisasikan konsep syirkah dalam pengurusan harta pusaka*, presented at the Persidangan Undang-undang 2007 'Undang-undang dan Etika: Menangani Cabaran Globalisasi, EDC-UUM, Sintok on 18-20 April 2007.
- Nik Mustapha Hj. Nik Hassan. *Institusi Ekonomi Islam di Malaysia: Satu Analisis Cadangan*. In *Ekonomi Islam dan Perlaksanaannya di Malaysia*. (2002). Nik Mustapha Nik Hassan (ed.). Kuala Lumpur: Institut Kefahaman Islam Malaysia.
- Norhashimah Mohd. Yasin. *Islamic Banking: Case Commentaries Involving al-Bay' Bithaman Ajil* [1997] 3 MLJ xcii.
- Norhashimah Mohd. Yasin (1996). *Islamisation/malaynisation: a study on the role of Islamic law in the economic development of Malaysia 1969-1993*. Kuala Lumpur: A.S. Noordeen.
- Tan Cheng Han (ed.) (2005). *Walter woon on company law (3rd Ed.)*. Singapore: Sweet & MaxwellAsia.
- Wu Min Aun. (2005). *The Malaysian legal system (3rd Ed.)*. Petaling Jaya: Pearson.
- Zainal Azam Abd Rahman. (2004, August 31). Islam in the corporate world. *The Star*, 28:
_____ Companies in Islam. (26/09/2007). Available online at <http://www.khilafah.com/kcom/the-khilafah/economy/companies-in-islam.html> (accessed on 23/3/09).
_____ Halsbury's Laws of Malaysia (Vol. 14: Remedies; Syariah Law). (2002). Kuala Lumpur: Malayan Law Journal.

Legislations

- Administration of Islamic Law (Federal Territories) Act 1993 (Act 505).
Administration of Islamic Law (Kedah Darul Aman) Enactment 2008 (Enactment No. 5 of 2008)
Co-operative Societies Act 1948 (Revised 1983) (Act 287)
Companies Act 1965 (Act 125)
Federal Constitution (Act 000)
Islamic Banking Act 1983 (Act 276)
Tabung Haji Act 1995 (Act 535)
Takaful Act 1984 (Act 312)
Trustees (Incorporation) Act 1952 (Revised 1981) (Act 258)
Trustees (Incorporation) (Amendment) Act 2004 (Act A1219)