

Revisit regulatory regimes governing charities

Published in: New Straits Times, Friday 12 May 2017

By Apnizan Abdullah

Source : <https://www.nst.com.my/opinion/columnists/2017/05/238467/revisit-regulatory-regimes-governing-charities>

Charity is indeed a universal value that is highly encouraged by all religions, subject to rules or customs. Its impact on socio-economic conditions of society is undeniable. In Malaysia, the laws governing charities are piecemeal. There are charities governed by the Federal Government, some are exclusively in the hands of the states and some are regulated by both the federal and state governments. This jurisdictional demarcation is stipulated in Article 74 of the Federal Constitution and its Ninth Schedule.

Primarily, the general laws on charities, except for waqaf and Hindu endowments, are governed by Item 15(c) of List I (Federal List) of the Ninth Schedule of the Constitution. Waqaf and other charities concerning Muslims are administered independently by state governments as prescribed by Item 1 of the List II (State List) in the same Schedule.

Hindu endowments, on the other hand, are governed under a pre-independence law, known as Hindu Endowment Ordinance 1906, while charities in Sabah and Sarawak are governed by a shared power between the federal and states governments as stipulated in Item 15 of List IIIA (Supplement to the Concurrent List) of the Ninth Schedule.

Charities in Malaysia are mostly executed via the establishment of non-profit organisations (NPOs). According to the Financial Action Task Force (FATF), NPO refers to a “legal person or arrangement or organisation that primarily engages in raising or disbursing funds for charitable, religious, cultural, educational, social or fraternal purposes or for the carrying out of other types of good works”.

NPOs may either be called a foundation, trust fund, company limited by guarantee or society or organisation. Some are governed by the Federal Government while others are supervised by the states. Yayasan Pembangunan Ekonomi Islam Malaysia, National Cancer Council Malaysia, Koperasi Belia Islam Malaysia Berhad, Institute of Strategic and International Studies and International Institute of Advanced Islamic Studies Malaysia are examples of NPOs established under the Federal Government.

State based NPOs, on the other hand, are established under the relevant states' enactments. These enactments are passed by the states by virtue of the Trusts (State Legislatures Competency) Act 1949. Tok Kenali Trust Fund Enactment 1992 and State Heritage Trust Fund Enactment are instances of states' enactments that govern the establishment and management of Tok Kenali Trust Fund in Kelantan and Tabung Pegawai-Pegawai Masjid in Terengganu respectively. Islamic charities, such as zakat (obligatory giving), hibah (gift), waqaf (endowment), nazr (vow) and other charitable endowments concerning Muslims are also under the care of the states through the supervision of their Islamic Religious Councils since the subjects are Muslims. It is crucial to mention that, the charities governed by the states may

vary from one to another since each of them possesses exclusive power over the matter. This power is to be exercised without any interference from the Federal Government.

A jurisdictional issue would arise when Islamic concepts of charities (except waqaf), such as sadaqah, infaq or hibah, are to be applied within the federal jurisdiction. This is due to the fact that such concepts could be construed to be governed under either federal or state governments. Fundamentally, sadaqah, infaq or hibah is an Arabic term that connotes the general meaning of charities, alms-giving or gift. Constitutionally, general charities fall within the power of the Federal Government. Tacit exclusions are only made over waqaf and Hindu endowments matters that are specifically governed by the state and relevant governing laws as previously elaborated. Sadaqah, infaq or hibah shall be governed by the states only when the subjects are Muslims since states shall only have powers over Muslims. This position is stipulated in Item 1 of List II of the Ninth Schedule of the Constitution. How would the current law react when a non-Muslim wishes to take part in such Islamic concepts of charities such as sadaqah, infaq or hibah?

Generally, Islam allows non-Muslims to participate in waqaf, sadaqah, infaq and hibah. As far as waqaf is concerned, the express exclusion made by the Federal Constitution via Item 15(c) of List 1 of its Ninth Schedule portrays a clear position of waqaf as an exclusive matter under state jurisdictions. This means that Federal Government would not interfere with the administration of waqaf under states.

However, other Islamic concepts of charities that are not explicitly excluded under state power could possibly be applied within the ambit of federal jurisdiction, especially when the donors or beneficiaries come from various religious backgrounds. This is because, states would never have jurisdictions over the non-Muslims. Since Malaysia is a multiracial country, therefore it is timely to revisit the current state of our regulatory regimes governing charities so that certain Islamic philanthropic concepts could be extended and enjoyed by both Muslims and non-Muslims.

Apnizan Abdullah is a Research Fellow at the International Institute of Advanced Islamic Studies Malaysia