Charities in Malaysia: Demarcation of Federal and State Jurisdictions

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Charity is indeed a universal value that all religions highly encourage, subject to rules or customs. Its impact on the socio-economic conditions of society is undeniable. In Malaysia, the laws governing charities are piecemeal. Some charities are governed by the Federal Government, some are exclusively in the hands of the States, and some are concurrently 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 *waqf* and Hindu endowments, are governed by Item 15 (c) of List I (Federal List) of the Ninth Schedule of the Constitution. *Waqf* and other charities concerning Muslims are administered independently by the 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. Charities in Sabah and Sarawak are governed under a shared power arrangement between the Federal and State 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), "non-profit organisation" 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 be designated as either a foundation, trust fund, company limited by guarantee, or as a society or organisation. Some are governed by the Federal Government while others are supervised by the States. Yayasan Pembangunan Ekonomi Islam Malaysia (YAPIEM), National Cancer Council Malaysia (MAKNA), Koperasi Belia Islam Malaysia Berhad, Institute of Strategic and International Studies (ISIS) and IAIS Malaysia are examples of NPOs established under the power of the Federal Government.

State-based NPOs, on the other hand, are established under the relevant State Enactments. These enactments are passed by States by virtue of the Trusts (State Legislatures Competency) Act 1949. The Tok Kenali Trust Fund Enactment 1992 and the State Heritage Trust Fund Enactment are instances of State Enactments that govern the establishment and management of State NPOs, in this case the Tok Kenali Trust Fund in Kelantan and Tabung Pegawai-pegawai Masjid in Terengganu respectively. Islamic charitable acts, such as *zakat* (obligatory giving), *hibah* (gift), *waqf* (endowment), and *nazr* (vow), are also under the care of State Governments through the supervision of their Islamic Religious Councils (IRCs). This is because their subjects are Muslims. It is crucial to mention that the charities governed by the State Governments may vary from State to State since each of the latter possesses exclusive power over these matters. This power is to be exercised without any interference from the Federal Government.

Jurisdictional issues would arise when Islamic charitable concepts (except *waqf*), such as *sadaqah*, *infaq* or *hibah*, are applied within the Federal jurisdiction. This is due to the fact that such concepts may be construed to be governed by both the Federal and State Governments. Fundamentally, *sadaqah*, *infaq* or *hibah* are Arabic terms that connote the general meaning of charity, alms-giving or gifts. Constitutionally, general charities fall within the power of the Federal Government. Tacit exclusions are only made over *waqf* and Hindu endowments, both of which are specifically governed by the States and their relevant governing laws, as previously elaborated. *Sadaqah*, *infaq* or *hibah* shall be governed by State Governments only when the subjects are Muslims, since the States shall only have power over Muslims. This position is clearly stipulated in Item 1 of List II of the Ninth Schedule of the Constitution. But, how would the current law react when a non-Muslim wishes to take part in an Islamic act of charity, such as *sadaqah*, *infaq* or *hibah*?

Generally, Islam allows non-Muslims to participate in *waqf*, *sadaqah*, *infaq* and *hibah*. As far as *waqf* is concerned, however, the express exclusion made by the Federal Constitution via Item 15(c) of List 1 of its Ninth Schedule portrays a clear perception that *waqf* is a matter falling exclusively under the jurisdiction of the States. This means that the Federal Government cannot interfere with the administration of *waqf* under the States, implying that, because the States cannot have jurisdiction over non-Muslims, the latter may not participate in *waqf*. However, other Islamic concepts of charity not explicitly excluded from being under the power of the States could be applied within the ambit of the Federal jurisdiction, especially when the donors or beneficiaries come from various religious backgrounds. Since Malaysia is a multiracial country, it is timely to revisit the current state of our regulatory regime governing charities so that certain Islamic philanthropic concepts can be extended and enjoyed by both Muslims and non-Muslims.

Notes

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