

Regulating Charitable Organisations in Malaysia: Challenges and Recommendations

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ABSTRACT

Charities in Malaysia are regulated by a few Acts which has its origins in the English law, whereby the concept and purpose of the charity has its origin in the Preamble to Charitable Uses Act 1601. In England and Wales, the prevailing Act on charity is the Charities Act 2011, in which 12 types of charities are acknowledged. The English Charities Act gives power to the courts and the Charity Commissioners to regulate and enforce charitable purposes in order to prevent abuses. In Malaysia, there is no single regulator or monitoring body that oversees these charitable organisations which has led to rampant abuses reported in charity organisations. This paper proposes a uniform law and procedure relating to charitable organisations and a competent body to deal with matters exclusively related to charities within the purview of local legislation, society and customs in Malaysia.

Keywords: Abuses, charities, English Law, monitoring body, uniform law

INTRODUCTION

The word charity in Malaysia has many different meanings and perception, and it can be viewed from civil and shariah law perspectives. Charity under the civil law is a

direct descendant of the Latin word 'caritas', meaning 'love'. Charity under Islam refers to help given to anyone in need. In addition, there are many charitable acts whose concept is broad compared with legally recognised charities under the civil law.

The charity law in Malaysia is adapted English law, whereby the spirit and intentment of Charitable Uses Act 1601 together with four main charitable purposes as introduced by Lord MacNagthen in 1891 are applied (*Income Tax Special Purposes Commissioners*, 1839). The purposes of the charities are for: relief of poverty,

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advancement of education, advancement of religion, purposes beneficial to the community which is not falling under any of the preceding heads. Under the English Charities Act 2011, charity means any institution which is established for charitable purposes and governed by the law relating to charity. There are 13 charitable purposes laid down by this Act, which can be considered as a huge extension compared with the earlier four principal purposes of charity.

Charitable trust is a trust for specific purposes and its existence is in perpetuity. Having a charitable status, there is no need to identify what are the objects for its existence or who are the beneficiaries. What needs to be proven is the element of public benefit in each charitable purpose (Robert, 2008). More importantly, any trust or organisation which is charitable in nature will be tax-exempted.

The provisions relating to charities in Malaysia can be found scattered in a few Acts and Enactments. The absence of a monitoring body is conspicuous. Therefore, this article discusses the need to have a proper body or mechanism to monitor and regulate charitable organisations in Malaysia while comparing the situation in England and Wales which has the Charity Commission as a regulator and backbone in any matters relating to charitable organisations.

CHARITY IN MALAYSIA

There is no single statute in Malaysia that governs charity and references have been made to English principles of charitable trusts. Under the Ninth Schedule of

the Federal Constitution of Malaysia, matters relating to charities and charitable institutions; charitable trusts and trustees (excluding *wakafs* and Hindu endowments) are within the Federal purview. There are a lot of charitable organisations in Malaysia and these usually come either under the purview of the Registrar of Societies of Malaysia or the Company Commission. There is no single regulatory body that is assigned to monitor the movement or administration of charitable organisations in Malaysia. Thus, the exact number of registered charitable organisations in Malaysia and their purview remain unknown.

Despite not having a single statute on charity, the fiscal advantages relating to charity can be seen in some provisions under the Income Tax Act 1967. Section 34 of the Income Tax 1966 deals with adjusted income from businesses that are tax deductible and this section has laid down several acts that that can be considered charitable although there are no specific provisions. Since matters relating to charities are under the Federal list, section 9(1) of the Government Proceedings Ordinance 1966, which is considered a mandatory provision, (Letcheumanan, 1993) has clearly stated that in case of any alleged breach of any express constructive trust for public, religious, social or charitable purposes or where the direction of the court is deemed necessary for the administration of any trust, the Attorney General or two or more persons having interest in the trust and having obtained consent in writing of the Attorney General may institute a suit or

be joined as a party in any existing suit on behalf of the Government or the public for the purpose of obtaining relief specified in the subsection.

The Attorney General is considered the protector of public charitable trusts (Commissioner of Taxation, 2009). Nonetheless, the office of the Attorney General is not involved in ensuring integrity and good governance of any charitable organisation are fully enforced and monitored.

MONITORING COMMISSION IN MALAYSIA

Does Malaysia need a monitoring commission? There is a need to have a proper monitoring mechanism in order to boost public confidence and at the same time to detect fraud and abuses. Two main bodies are involved in establishing and monitoring any organisation, not necessarily charities, namely The Registrar of Societies and the Companies Commission. Each possesses different mechanism as the focus and purpose of these regulators are different.

Registrar of Societies (ROS)

The establishment of any society or organisation of any nature is under the purview of the Registrar of Societies (ROS) and this is governed by Societies Act 1966. The ROS is a department under the Home Ministry handling non-governmental organisations and political parties. The objective of this department is to ensure growth and development of a healthy and orderly society which is not in conflict with

peace, welfare, security, public order or morals. Under section 2 of this Act, society refers to any club, company, partnership or association of seven or more persons whatever its nature or object, whether temporary or permanent.

There are a few types of societies which are under the jurisdiction of this Act including religious societies, trade related societies including financial institutions, developers or manufacturers and chambers of commerce or entrepreneurs. Besides that, political organisations and societies focused on the environment, consumerism and international friendship fall under this. Though in some categories, the element of charity can be found, it is not the task of the ROS to ensure or declare these societies are charitable in nature. The division in charge of enforcement will have to ensure that all societies registered with the office followed the rules and regulations under the Societies Act 1966. Intelligence works will be carried out to stamp out illegal societies in addition to investigating and coordinating complaints from the public and also other agencies such Public Complaints Bureau, police and others. Currently any decision made by the office of the ROS that relate to the establishment, enforcement and dissolution are subject to judicial review by the courts in Malaysia (Kerajaan Negeri Selangor, 2012).

Companies Commission of Malaysia

Prior to the establishment of the Companies Commission of Malaysia (CCM), the Registrar of Businesses (ROB) and Registrar of Companies (ROC), were the

two government's divisions, which are responsible in managing the system of registration of business and companies. Although these two divisions are independent from each other, both have the same objectives, namely to ensure that the registration of companies and business are done effectively and efficiently. Taking into consideration the rapid growth of business in Malaysia, the Ministry of Domestic Trade and Consumer Affairs proposed the establishment of (CCM), which merged both the ROC and ROB. This Commission has the power to regulate companies and businesses in Malaysia and to administer any law, which confers functions and the powers of the Commission. The intention is to ensure the Commission is managed efficiently and effectively in order to monitor the increasing number of charities which are growing in sophistication and dynamism.

The main powers of the CCM include the power to process, approve and register companies and businesses, and the power enforce respective laws, such as rights to call for information and to conduct inspections and investigations of companies and businesses. It also has the power to undertake proceedings for any offence against the respective laws, and power to enforce and collect fees as an agent of the government under the laws. The CCM reports to and advises the Minister of Domestic Trade and Consumer Affairs on all matters concerning companies, corporations and businesses which are related to respective laws.

The CCM is also an agency to register foundations including foundations that are established for charitable purposes. The foundations shall be registered as a company limited by guarantee and the authorised share capital required is RM1 million. The main difference between a foundation and a corporation is that the former does not have any shareholders. Assets that are held in the name of the foundation are to be used for purposes clearly defined in its constitutive documents. The administration and operation of the foundation are set out in contracts, not fiduciary principles. Foundation can also be created under the 1952 Trustee Incorporation Act.

CHARITY COMMISSION IN ENGLAND AND WALES

In England, charities come under the Charities Act 2011. The Preamble to the English Statute of Charitable Uses Act 1601 laid down the basic foundation or useful guidance as to what can be considered as charitable. One very significant step taken by English Parliament in order to monitor any negligent and mismanagement of charitable funds was the establishment of the Charity Commission under the Charitable Trust Acts 1853, 1855 and 1860. For the past 50 years, following enactments of the Charities Act 1960, 1993, 2005 and the final one in 2011, the monitoring power of the Commission was further expanded and strengthened. The Commission is an independent regulator, and non-ministerial government department which is accountable to the Home Secretary (Hayton & Mitchell, 2005). Its functions are

to promote the effective use of charitable resources by encouraging better methods of administration, advising the trustees and investigating and checking abuses. Its objectives are set out in the statute, namely public confidence, public benefit, compliance, charitable resources and accountability. This is provided under section 14 of Charities Act 2012.

Therefore, a proper monitoring body to regulate matters relating to charities is important. The Commission's objectives to increase public trust and confidence as well as and promote awareness and understanding of the operation of the public benefit requirement and under Part 2 of the Charities Act 2011 are very important. Section 15 of the Act laid down the Commission's general duties which include among others, determining which institutions can be considered charities, and encouraging and facilitating their administration. The latter can be done by giving advice and guidance to charities as the Commission considers appropriate. More importantly, the Commission has a duty to identify and investigate mismanagement in the charity.

In order to ensure proper monitoring, any registered charities which register a gross annual income exceeding £100,000 must submit annual accounts to the Commission. What is so unique about this Charity Commission is that it has the same power as the Attorney General, whereby in case of enforcing any obligation against a default charitable organisation or its trustee, they are allowed to take the case

straight to court. The Commission is also given a restricted concurrent jurisdiction with the High Court to try cases pertaining to charities. This basically covers three matters - first, to establish a scheme for the administration of charity; second to appoint, discharge or remove a charity trustee or trustee for charities or to remove an officer or employee and third, to vest or transfer property to a person entitled to it.

Although the Home Secretary appoints the Commissioners, the former has no power to direct the latter on the exercise of their statutory functions, and no parliamentary questions can be addressed to them in particular cases, as the Commission is only responsible to the courts. (Hayton, 2003). The need to have a regulatory body in England and Wales has been solved by forming the Charity Commission. Nonetheless, reforms are needed due to mounting calls for more transparency and accountability of charities.

CONCLUSION

The move to have a single regulatory body to monitor charitable organisation is encouraging as this has not been widely promoted by the current ruling party in Malaysia. The act of giving is indeed part and parcel of Malaysian society and charitable organisations are allowed to be in existence although in so many different forms. The Registrar of Societies is very concerned with ensuring peace, welfare, security, public order or morals in society. The *Kerajaan Negeri Selangor & Ors* (2012) case clearly showed that although

the decision of the ROS was subject to judicial review, there was a clear need for a single regulator to monitor activities of charitable organisations. The court can go to the extent of deciding whether there is any infringement of legal right and legal interest and the question of integrity and transparency that has no relation with the latter will unlikely produce positive outcomes. The announcement by the Minister in the Prime Minister Department on the need to monitor non-profit organisations (NPOs) in order to ensure there is no profit-making business deals should be viewed seriously. This will come under the Legal Affairs Division of the Prime Minister's Department together with Bank Negara Malaysia and the Inland Revenue Board (LHDN). The minister added NPOs are encouraged to register under the Trustee (Incorporation) Act 1952 and to date, there are 371 NPOs registered under this Act with the number steadily increasing. In 2014, RM 1.3 billion in tax exemption was given to these NPOs ("PM's Department", 2016). This proves the need for monitoring not only for tax exemption purposes but more importantly, to strengthen the integrity of these charitable organisations without which negative impressions can be created as a result of mismanagement of public fund.

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