



Legal and governance issues of donations based crowdfunding: an appraisal

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ABSTRACT

Donation-based crowdfunding is now common in many countries in the world. It has been increasingly important, particularly during Covid-19, and is viewed as one of the strategies for addressing financial challenges in some segments of society. Government and non-governmental organizations. However, the scammer activities via crowdfunding are increasing and Malaysian laws are only regulated the Equity Crowdfunding (ECF) and Peer to Peer Financing (P2P) This paper will focus the discussion of Malaysia's legal framework for crowdfunding. The paper investigates the issues surrounding donation-based crowdfunding in Malaysia. This paper employs qualitative methodology and phenomenology as a case design. Data will be gathered from statues, journals, and other written materials. Thematic and content analysis will be used to analyse the data. This paper discovered that there are issues with donation-based crowdfunding conducted by individuals or non-governmental organizations. This paper concludes that there is a pressing need to regulate donation-based crowdfunding in Malaysia in order for it to achieve the donor goals and Maqasid Syariah.



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INTRODUCTION

Crowdfunding through the collection of donations is now normal practice in many nations all over the world. It is seen as one of the techniques for tackling financial issues in some sectors of society, and its significance has been growing steadily, notably during COVID-19. governmental bodies in addition to non-governmental groups. However, there has been an increase in fraudulent activities involving crowdfunding platforms, and the laws of Malaysia exclusively govern equity crowdfunding (ECF) and peer-to-peer finance (P2P). Crowdfunding refers to an individual's or group's efforts to raise business funds through small donations from many online parties without the use of traditional financial intermediaries (Mollick, 2014). Crowdfunding is a method of raising funds through small contributions from a large number of investors through the use of an internet platform (Bradford, 2012). Crowdfunding has evolved into a method of assisting communities in their daily survival. Citizens can benefit from a variety of crowdfunding platforms available in Malaysia and around the world (Amin, 2021).

Crowdfunding is classified into several types, including donation crowdfunding, equity crowdfunding, Debt Crowdfunding and Reward Crowdfunding (Nor et al., 2021); (Mohd Thas Thaker & Allah Pitchay, 2018). Donation-based crowd funding occurs when a funder makes a donation with no expectation of receiving anything in return, such as for a social cause (Abdullah & Oseni, 2017). Example of equity crowd funding platforms in Malaysia include CrowdPlus.Asia, Pit, and Pitchln. Pitchln is a reward-based crowdfunding platform. Debt-based crowdfunding is demonstrated by

Funding Societies. It is important to note that donation-based crowdfunding platforms such as Kitafund, GiveAsia, and GoFundMe exist (Haniff et al., 2020).

Sodoqah, waqf, zakat could be regards as crucial elements of social based crowdfund (Mulyani & SH, 2021). However, Securities Commission of Malaysia only regulates Equity Crowdfunding (ECF) and Peer to Peer Financing (P2P) (Suruhan Jaya Sekuriti, 2021) and donation based is not under the its regulatory framework. In addition, there are also an increasing number of illegal investment scheme via social media during pandemic (Aisyah, 2020); (Shaharuddin, 2020).

Zhao et al. (2019) research indicates that the absence of regulations in donation-based crowdfunding and reward-based crowdfunding can create opportunities for fraudulent activities and unethical behavior. This paper will focus the discussion of Malaysia's legal framework for crowdfunding.

RESEARCH METHODS

This paper utilizes qualitative methodology and phenomenology as a case design. Phenomenology, a specific qualitative methodology, is a research approach that centers on investigating and comprehending the lived experiences, perceptions, and subjective meanings of individuals regarding a specific phenomenon (Neubauer et al., 2019). Information will be collected from statues, journals, and other written sources. The data will be analyzed using thematic and content analysis techniques. This study has identified problems associated with donation-based crowdfunding carried out by individuals or non-governmental organizations. This paper asserts that there is an urgent necessity to establish regulations for donation-based crowdfunding in Malaysia in order to effectively fulfill the objectives of the donors and Maqasid Syariah.

RESULTS AND DISCUSSION

1. There is no specific law on donation based crowdfunding by individual or non-governmental bodies under malaysian crowdfunding legal framework

Laws governing crowdfunding can be found in a number of Malaysian statutes. Financial Services Act 2013 (Act 758) ("FSA 2013"), Islamic Financial Services Act 2013 (Act 759) ("IFSA 2013"), and Capital Market Securities Act 2007 are among them (Act 671) ("CMSA 2007"). In general, to raise funds through crowdfunding permitted by law in Malaysia, it must be done through a Malaysian-registered organisation. Individual fundraising, particularly the channeling of crowdfunding funds to an individual's account, is illegal under the law. Individuals who do not have a license as defined in section 10 of the act are not permitted to receive money, including for crowdfunding purposes, according to section 137 (1) of FSA 2013. Individuals who commit such an act commit an offence under section 137 (2) of Act FSA 2013, with the penalty of imprisonment for up to ten years or a maximum fine of RM50 million, or both.

Deposits, which also include crowdfunding, are to cover money or any precious stones or precious metals, or anything and any article, as specified in section 136 (1) of FSA 2013. Terms of repayment or refund in instalments, with or without interest, or any other consideration, where the consideration covers the situation now or in the future. It does not, however, include payments made in good faith. A genuine situation occurs when the service or property in question is not rented, sold, or otherwise provided. It also includes collateral for the performance of a contract or collateral for losses resulting from a contract that cannot be performed. The return or surrender of any property, whether for repair or otherwise, is not limited to collateral. It also includes any other circumstances, or by or for another person, as specified in Act FSA 2013's Second Schedule.

The same is true for Islamic crowdfunding. Individuals who do not have a license under section 10 of the act are not permitted to accept Islamic deposits, including for crowdfunding purposes, according to section 149 (1) of IFSA 2013. Individuals who commit such an act commit an offence under section 149 (2) of Act IFSA 2013, with the penalty of imprisonment for up to ten years or a maximum fine of RM50 million, or both. According to section 148 (1) of Act IFSA 2013, Islamic crowdfunding includes money, precious stones or precious metals, or anything and any article for which there is an agreement to be accepted, delivered, or paid in accordance with Shariah. It encompasses the terms of repayment or refund in instalments, without earnings, rentals, dividends, profits, or benefits, including gifts or fees, or any other consideration, where the consideration covers current or future circumstances. Otherwise, it also covers the estimated revenue to be paid a sum of money or goods of

value specified in the act that is not less than the amount of money or goods of value specified in the act.

It does not, however, include payments made in good faith. Such a genuine condition is money paid for the advance or partial payment of a contract of rental, sale, or service or provision of property, where the repayment is actually the absence of rental, sale, service, or provision of the property in question. It also includes collateral for the performance of a contract or collateral for losses resulting from a contract that cannot be performed. The return or surrender of any property, whether for repair or otherwise, is not limited to collateral. It also includes any other circumstances, or by or for another person, as specified in Act IFSA 2013's Second Schedule. Not only is it illegal to collect crowdfunding, but it is also illegal to advertise and publish crowdfunding offers and invitations. It is stated in Section 138 (1) of FSA 2013. This is an offence under Section 138 (3) of Act FSA 2013, and the penalty is imprisonment for up to five years or a fine of up to RM10 million, or both.

The same is true for Islamic crowdfunding. Individuals are not permitted to advertise or publish offers or invitations for Islamic crowdfunding. Section 150 (1) of Act IFSA 2013 states it. This is an offence under Section 150 (3) of Act IFSA 2013, and the penalty is imprisonment for up to five years or a fine of up to RM10 million, or both.

Section 34 of Act CMSA 2007 states that only recognised registered market operators are permitted to operate in the capital market. As a result, Guidelines on Market Regulation have been established under Section 34 of CMSA 2007. Equity crowdfunding provisions are set out in Chapter 11, Part E of the Regulation. According to Chapter 11.13, only Malaysian-incorporated private companies are permitted to engage in equity crowdfunding. To operate equity crowdfunding, the operator must be registered with the Securities Commission as a venture capital company, have a set investment objective, and raise funds only from angel investors and sophisticated investors, according to chapter 11.16. Unauthorized participation in crowdfunding is also defined as fraud in section 179 of Act CMSA 2007. Individuals cannot participate in equity crowdfunding due to the aforementioned circumstances.

Concerning unauthorised crowdfunding, which is classified as fraud, an offence under Section 420 of the Penal Code, namely cheating fraudulently inducing the surrender of property, is relevant. Penalties under this provision include a minimum of one year in prison and a maximum of ten years in prison, as well as whipping and fines.

The provisions discussed above are classified as serious offences in the Anti-Money Laundering, Anti-Terrorist

Financing, and Proceeds of Unlawful Activities Act 2001's (The "AMLATFA 2001") Second Schedule ("AMLATFA 2001"). Section 4 (1) of Act 613 provides for imprisonment for up to 15 years and a minimum fine of five times the value or total proceeds from the activity, or RM5,000,000.00, whichever is greater.

To summarize, there is no specific law that governs donation- based crowdfunding by individuals or organizations. In this regard, there is an urgent need to regulate it in order to reduce the risk of money laundering, fraud, and other criminal offences.

2. The legality of fund collected via donation based crowdfunding by individual or non governmental agencies

Despite the fact that some donation-based crowdfunding operators are established under the Companies Act 2016 and are subject to Companies Commission of Malaysia (SSM) requirements, the accounts are audited and are carried out in a transparent manner, they are not subject to the Securities Commissions of Malaysia or the Central Bank of Malaysia requirements as of yet. Because this activity involves the collection of money from the general public, it is critical that it be regulated by the Securities Commissions of Malaysia or the Central Bank of Malaysia. Kitafund is an example of donation-based crowdfunding, and it only takes 5% of the donation amount. They had already received 14 million from 166k donors as of 30th June 2021, and they are not subject to Securities Commission of Malaysia (SC) Requirements (Anis Amira Amin, 2021). In short, donation-based crowdfunding by individuals and non-governmental organizations is not regulated and subjects to Central Bank of Malaysia (CBM) and SC requirements. The question here is whether the donation-based crowdfunding could be recognized as "recognized market" under section 49 of the Capital Markets and Services (Amendment) Act 2015("CMSA 2015") and the Guidelines on Recognised Market 2016.

3. Uncertainty of the shariah-based contract governing the relationship between the donor, crowdfunding operator, and recipient, as well as the donor's intention

There appears to be no clear Shariah underlying contract governing the parties' relationship as to whether the concept of wakalah principles could be invoked, given that the crowdfunding operator, in the case of Kitafund, takes a 5% management fee from donors. Furthermore, the donor's intention is critical in determining whether the donor is giving sodoqah, zakat or waqf because each has different rules and principles requirements.

There is no legal provision regarding donation, based on the reference to the act for the Federal Territories and the enactments in the states mentioned above as examples. Donations involving Muslims made in connection with Islamic institutions, on the other hand, are a matter between Muslims. As a result, the provisions pertaining to Islamic affairs apply to the money or property donated.

Article 74 of the Federal Constitution of Malaysia 1957 divides legislative authority in Malaysia between the Federation and the states. Islamic law and personal and family law for Muslims are placed in List II, which is a list of states where the matter is under state jurisdiction, except for the Federal Territories. It also includes matters relating to religious and charitable permanent donations, as well as related institutions, under item 1 of List II of the Federal Constitution of Malaysia 1957.

A Muslim making a contribution to the construction, development, and operation of a mosque is an example of a donation that falls within the above scope. Because the mosque is a religious institution and a matter of Muslims, it is included in the meaning stated in article 1 of List II of the Federal Constitution of Malaysia 1957.

The Federal Territories Islamic Religious Council (MAIWP) is in charge of managing Muslim property in the Federal Territories, and the state Islamic Religious Council (MAIN) is in charge of managing Muslim property at the state level. The MAIWP was established in accordance with Section 4 of the Administration of Islamic Law (Federal Territories) Act 1993. (Act 505). While MAIN was established in accordance with the legislation in their respective states.

As previously stated, zakat is only required of Muslims. As a result, it naturally falls within the scope described above. Zakat is also related to Baitulmal, which is an institution that collects and distributes zakat to qualified individuals. It is included in the stated definition because it is an institution related to Islam and a matter of Muslims, and it is stated in item 1 of List II of the Federal Constitution of Malaysia 1957. As previously discussed, Muslim property management falls under MAIWP for Federal Territories and MAIN for state levels. Similarly, a Baitulmal established under section 60 of Act 505 for the purpose of a fund consisting of money and property covering movable and immovable property is vested in MAIWP and MAIN, who will administer the money and property in question. In the Federal Territory, the issue of zakat is only addressed in Section 16 of the Syariah Criminal Offences (Federal Territories) Act 1997 (Act 559), which addresses the offences of failing to pay zakat and failing to pay zakat to an amil or an unauthorized person appointed by MAIWP.

As a result, it is illegal for an individual crowdfunding operator to collect funds based on zakat or waqf without MAIN's approval. MAIN must appoint the crowdfunding operator as mutawalli before they can legally collect funds.

4. Transparency and other related issues

The issue of transparency also arises in crowdfunding-based donations in terms of the exact amount received by the designated recipient, the exorbitant amount of management fee, transparency disclose the collection and expenditure of funds, and manipulating the established company or non-governmental agency for personal gain, such as creating its own business under the guise of charity. (Ulya, 2018). As a result, it is critical that the account of NGO donation-based crowdfunding be audited and all data be made public. This is critical for ensuring the credibility, transparency, and long-term viability of donation-based crowdfunding activities which includes donations, waqf, and zakat, can both contribute to and generate an economy in the community (Mirza et al., 2021). It has the potential to alleviate the burden of government duties in terms of community development. Furthermore, it can assist the government in identifying those who require assistance as a result of the giver's information, particularly when the grant is announced in the media. Announcement through the media is a common practise nowadays among donors, waqf, and zakat. It is done for publicity so that more people channel

donations to them (especially non-governmental organisations) and to show the donors that their contribution has reached the target group. Furthermore, it is to demonstrate the activities of the bodies. The government can use the data and information to carry out its duties, such as taking action against those in need.

CONCLUSION

The issue of crowdfunding in relation to donation, waqf, and zakat must be addressed as thoroughly as possible. It entails jurisprudence, statutory legislation, and public perceptions. The purpose of the enacted statutory legislation is to facilitate administrative matters while also protecting the public interest. Its purpose is also to prevent illegal activities. Responsibility and accountability are important aspects of legal and Islamic compliance that are emphasized during implementation and monitoring. It is capable of ensuring that donation, waqf, and zakat activities are on track. At the same time, it is important to respect the wishes of the community members who wish to contribute directly to the recipients for their respective considerations and purposes.

Malaysia is serious about addressing crowdfunding activities, particularly those involving donations, waqf, and zakat, in developing the economy of the community and the country, based on the statutory provisions and approaches that have been implemented. It also provides a good way for the community to raise funds for their respective businesses or organizations. It is critical to regulate donation-based crowdfunding by individuals and non-governmental organizations. Because crowdfunding based on waqf or zakat falls under the purview of MAIN, they must first obtain approval from MAIN. It is past time for Malaysia to establish a national welfare commission. This issue must be brought into balance and it is an urgent need to regulate donation-based crowdfunding on account of the fact that it may trigger legal and governance issues like illegal deposit taking, money laundering, scammers, criminal breach of trust and the like.

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