

ISLAMIC INTERVIVOS LAW CHALLENGES IN MALAYSIA

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ABSTRACT

The effects of unclaimed inheritance estate problems lead to the expansion of transfer during lifetime practice or hibah (Islamic inter vivos). Hibah enables the heirs to acquire donor's wealth and it is not subjected to inheritance estate management after the death of donor. The practice of hibah has evolved from the traditional method of giving which is a direct transfer through Form 14A at the land office to contemporary methods of giving via trust hibah. However, due to limited Malaysian legislation regarding the hibah practice, there are numerous disputes among heirs or related parties. Hence, this study proposes a comprehensive hibah law to explain substantive jurisdictions strengthen Syariah Court and act as references to the Islamic estate planners.

Keywords: *Hibah, Islamic Inter Vivos, Malaysian Legislation, Comprehensive Hibah Law.*

INTRODUCTION

The issue of unclaimed inheritance estate is a dire problem as it is worth approximately RM. 60 billion in 2016 (Aziz, 2016; Harta pusaka tidak dituntut mencecah angka RM.60 bilion, 2016). It leads to the difficulties among legal heirs to acquire the transfer of wealth and develop it. As such, there are many researchers such as Abdul & Ahmad (2013), Hasbullah & Daud, (2015) and Muhamad & Hussain (2014) suggest that estate planning such as *hibah* (Islamic inter vivos) should be made.

Inter vivos practices aim to assist children with poor economic conditions. This demonstrates donor's concern of donee's welfare (McGarry, 2016; Wu & Li, 2014). The underlying motive of this transfer is altruism motive. For an example, a child starts to live with his/her own family. In this case, the parents will provide the needs of their children's marriages such as dowries, financial assistance, renting or purchasing home (Halvorsen & Thoresen, 2011; Shenk et al., 2010). The support can be seen as an effort from parents to ensure the stability of their children's life after living separately from them as a new couple.

LITERATURE REVIEW

Hibah or Islamic inter vivos is a long-term practice among Muslim communities in Malaysia particularly *hibah* to the immediate family members. However, the practice does not apply systematically as donor transfers directly to done(s) or legal heirs by changing the registered ownership through Form 14A at the land office without any concern about the implications of the practice (Abdul & Yaakub, 2010; Ahmad et al., 2017; Buang, 2003; Ismail, 2015). Among the earliest recorded case in Malaysia regarding to *hibah* dispute is Kiah v Som (Mujani et al., 2011). *Hibah* related cases mostly occur among the immediate family members who are also donor's legal heirs. Table 1 illustrates several examples of such cases.

Table 1 LIST OF <i>HIBAH</i>-RELATED CASE TO LEGAL HEIRS			
Type of <i>Hibah</i>	Example Cases	Issues	Court
Parents to children	Abdul Wahid Bin Dato Haji Abdul Rahim Gulam Rasool Shaik & Others v Shariahbibi Binti Ibrahim Mysoory & Others 2 MLJ 211.	Death sickness (<i>maradhul mawut</i>) gift	High Court, Kota Bharu
	Tengku Hj Jaafar Tengku Muda & Anor v Government of Pahang 2 MLJ 74.	Giving a piece of land to two daughters	Supreme Court, Kuala Lumpur
	Muhammad b. Awang & Anor v Awang b. Deraman & Others 2 JH 165.	Giving to specific children only	Syariah Appeal Court, Kota Bharu
	Ibrahim Yusuff v Eshah Hj. Ishak & Others 2 JH 158.	Transfer registration only to one children	Syariah Appeal Court, Kelantan
Husband to wife	Roberts @ Kamrulzaman v Umni Kalthom 1 MLJ 163.	Conflict between <i>hibah</i> and joint-acquired property	High Court Malaya, Kuala Lumpur
	Wan Mahmud b. Wan Abdul Rahman & 3 Others v Aminah bt. Hj. Taib & 2 Others 2 JH 331.	<i>Hibah</i> without transfer ownership	Syariah Appeal Court, Kota Bharu
Grandparents to grandchildren	Ibrahim b Hj. Abu Bakar v Mohd Sah b. Mohd Ali & Others 2 JH 279.	<i>Hibah</i> validation	Syariah Appeal Court, Kuantan
	Ibrahim bin Salleh v Zainuddin bin Idris dan 5 Others 1 JH 113.	<i>Hibah</i> validation	Mahkamah Rayuan Syariah, Kota Bharu

Table 2 LIST OF <i>HIBAH</i>-RELATED CASE TO NON LEGAL HEIRS			
Type of <i>Hibah</i>	EXAMPLE CASES	Issues	Court
Parents to step-children	Abu Talib@ Musa bin Muda lwn Che Alias bin Che Muda 2 JH 191.	<i>Hibah</i> validation	Syariah High Court, Kuala Terengganu
Parents to adopted children	Eshah bt. Abdul Rahman v Azuhar b. Ismail 2 JH 219.	<i>Hibah</i> revocation	Syariah High Court, Terengganu
	Salmiah bt Che Hat v Zakaria b Hashim 1 JH 79.	<i>Hibah</i> validation	Syariah Court, Bukit Mertajam

Meanwhile, *hibah* disputes also occur among non-legal heirs of the family as shown in Table 2. For instance, *hibah* practice leads to the conflicts between Civil Court and Syariah Court such as *Latifah bte Mat Zin v Rosmawati bte Sharibun & Ors MLJ 101* and *Jumaaton and Ors v. Raja Hizarrudin Nong 6 MLJ 556*. The main conflict is to determine the jurisdiction of the court to discuss cases related to *hibah* after the amendment of 121(1A) Malaysia Federal Constitution. This amendment has stipulated that the Civil High Court and the courts thereunder have no jurisdiction in matters within the jurisdiction of the Syariah Court (Abdul & Yaakub, 2011).

These facts indicate that *hibah* is a long-practiced instrument among Muslim in Malaysia and become an important inheritance estate planning mechanism (Buang, 2009). Nonetheless, *hibah* should not only focus on *hibah* practices but should also emphasize to link the principles of *hibah* in Islamic jurisprudence and current financial system (Muda, 2009). In this regard, *hibah* has been practised in Takaful, Islamic banking, capital market and estate planning industry (Ali, 2015; Azhar et al., 2014; Azhar & Ishak, 2011; Ismail, 2009; Megat et al., 2013; Muhamad, 2010; Salman & Htay, 2013). Based on these developments, this study aims to identify the requirements of *hibah* law in Malaysia to ensure the *hibah* practice can be implemented successfully.

METHODOLOGY

To indicate the requirement of *hibah* law in Malaysia, this study determined relevant materials such as Malaysian Federal Constitution, National Land Code 1965, Islamic Religious Administration Enactment and Syariah Court Enactment. This study also analysed several cases related to *hibah* to understand current legal issues and practices.

DISCUSSION

Although in terms of Malaysian legislation, *hibah* is stipulated under State List (Federal Constitution which empowers legislative bodies at the state level to enact *hibah* law), to date, there is no specific and substantive *hibah* law is formed or enacted in the scope provided by the Federal Constitution. The related laws are only the general provision of Syariah Court jurisdiction to hear relevant cases of *hibah* such as stipulated in the Islamic Religious Administration Enactment and Syariah Court Enactment at the state level. Most of the cases concentrate on the validity of *hibah* and its related jurisprudence (Disa, 2009; Muda, 2009; Harun, 2009). Based on that reality, references to the validity of *hibah* and its related jurisprudence are merely referring to the Islamic jurisprudence books and not directly to the statute. Referring directly to Islamic jurisprudence books is the right action, but the provision statutory is crucial as it is seen as main reference in any disputable matters in Syariah Court. Thus, there is possibility that the Judges refer to only certain scholars' views depending on the particular current needs. This will affect many different court decisions (Harun, 2009).

For private estate planner operators who intend to develop *hibah* products, in the absence of clear *hibah* law, they need to refer to the views or approvals from *fatwa* bodies or Shariah Advisors. However, this step is just a short-term solution because the *fatwa* that are issued only to fulfil the demands of these operators and could not be extended to the decision of other states

as each state in Malaysia has a separate *fatwa* body. As a result, the Muslim community fails to understand the matters related to *hibah*.

In this context, a comprehensive and uniform *hibah* law among states in Malaysia needs to be established. This recommendation is in fact not very difficult, as some states in Malaysia have established several laws related to *waqf* (endowment) and will. The proposal to enact *hibah* law has been raised since 2004 in numerous workshops and seminars that organized by many parties, but until now the law has not yet to be realized.

Comprehensive and uniform *hibah* law among states in Malaysia will also beneficial in some cases. Firstly, the *hibah* law is important to clarify substantive law related to *hibah* such as *hibah* contract (*ijab* (offer), *qabul* (acceptance) and *qabd* (actual possession), conditions of *hibah* (donor, donee and condition of wealth), types of wealth and revocation of *hibah* so Syariah Court in determining the validity of *hibah* can refer that it. Even though current practices show that Syariah Court only refer to Islamic jurisprudence books, the amendment of *hibah* law is advantages for judges to be used as references particularly when there are disputes issues among Muslim scholars. These issues are including *qabd via* representatives, conditional *hibah*, *hibah* wealth usufruct and *hibah* done secretly (Abdul et al., 2013; Azalan & Said, 2016; Buang, 2007; Othman et al., 2017)

Secondly, *hibah* law could clarify the position of Syariah Court against *hibah* cases, especially cases involving *hibah* through trust or trust *hibah*. This is in line with the jurisdiction of Syariah Court to hear cases of *hibah* as stipulated by Syariah Court Enactment or Islamic Religious Administration Enactment, Article 121(1A), Federal Constitution and Section 421(A) National Land Code 1965. Nevertheless, the current situation indicates that disputes in the jurisdiction between the Syariah Court and Civil Court against the *hibah* cases are still unending. Although the jurisdiction of the Syariah Court is certified in the appeal of the Federal Court, *Latifah bte Mat Zin v Rosmawati bte Sharibun & Ors* MLJ 101, but in the Kuala Lumpur High Court decision involving *Dato'Kadar Shah bin Tun Sulaiman v Datin Fauziah binti Harun* 7 MLJ 779 shows otherwise. Based on this situation, *hibah* law is very significant in the context of determining the jurisdiction of the court for *hibah* by Muslims in Malaysia.

Thirdly, *hibah* law also can be referred by Islamic estate planning operators to develop and provide *hibah* product to comply with the law requirement. For an instance, in the context of conditional *hibah* like *umra* and *ruqba*, the operators have practised different approaches in applying these two instruments. By having a recognized *hibah* law, it will provide guidelines to the operators (Azalan & Said, 2016; Muhamad, 2012; Othman et al., 2017). This is supported by the decision of Federal Territory Consultative Committee Meeting the 5th which allowed the placement of conditions in *hibah* (Azhar & Ishak, 2011; Muda, 2009).

Fourthly, about the economic impact, the introduction of *hibah* law could encourage the donors to transfer his/her wealth during lifetime without undergoing estate management process. This could reduce the number of the unclaimed and abandoned estates. If the estates have not yet been managed, it is difficult for the heirs to develop the lands for agricultural and industrial purposes. Furthermore, heirs will have difficulty to seek assistance from the authorities, financial institutions and government linked companies due to inheritance problem (Manaf & Ismail, 2011; Kamarudin & Abdullah, 2016). On the other side, the government will suffer losses in land tax collection because the heirs refuse to pay the deceased's land tax (Harun et al., 2013; Taha et al., 2015; Wook et al., 2017).

Lastly, when the practice of giving is simplified, then parents could assist their children. According to McGarry, (2016), parents transfer will lessen the burden on the government's expenditure through the public transfer and smoothen the children's consumption. When parents transfer their wealth as a reward for children's care and services, then the government could also reduce the long-term allocation to elder parents. As the result of this, there are even some countries such as Austria, Denmark, France, Germany, Spain and Sweden which have cut down long-term care expenses (Jiménez-Martín & Prieto, 2015).

CONCLUSION

Unclaimed inheritance estate stimulates the positive development of Islamic estate planning industry in Malaysia. Inarguably, *hibah* is the most effective Shariah contract for the Islamic estate planning and wealth distribution. Reflecting on this situation, various mechanisms have been applied to adapt the *hibah* principles as stipulated by Syariah to meet the current needs and situations. This development can facilitate the Islamic estate planning services to utilize *hibah* as one of the solution for unclaimed inheritance estate, which includes abandoned inheritance land that is worth approximately billions of Ringgit. Extensive *hibah* applications require a form of legislation that regulates and coordinates all *hibah* activities in Malaysia. It is time now for a uniform and substantive comprehensive law to be enacted and enforced not only to meet the need of the industry but also for the entire Muslim community

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