

## A NEED FOR LEGAL FRAMEWORK OF GIFT *INTER VIVOS* (*HIBAH*) IN MALAYSIAN ESTATE PLANNING

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### ABSTRACT

The distribution of the Muslim's property through *farāid* may sometimes lead to some problems if it is not properly administered and truly understood. It is estimated that, the distribution of estates of the Muslim in Malaysia worth about RM42 billion are still remain unsolved. The risk of failure of settlement of the estate may cause a variety of negative implications from the legal, economics, religious and social aspects. The previous findings showed that people in this country lack the inclination to plan carefully the distribution of wealth, especially in planning ahead. As a result, they become fully dependent on the inheritance system of division of property after death that is *farāid*. Thus, the public perception that the property can only be distributed through the *farāid* must be promptly corrected. Instead, planning the distribution of property during one's lifetime through *hibah* (gift *inter vivos*) must be enhanced in order to avoid this problem because it is clearly detrimental to the Muslim community. In order to achieve the said objective, the authors find that there is important need to enact a specific and comprehensive law pertaining *hibah*. This legal framework is not merely meant for ensuring the smooth running of the implementation of *hibah* in Malaysia, but also must be outlined to overcome some statutory, non statutory as well as the practical impediments for the implementation of *hibah*. This article is based on a qualitative study and the approach to be applied is a content analysis methodology. Content analysis is a type of secondary data analysis used to analyze text, including, books, manuscripts, interview transcripts, newspaper and Web sites.

**Keywords:** *farāid*, *hibah*, distribution of estates

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### INTRODUCTION

The administration of Islamic property in Malaysia is governed by rule of *farāid* (Ibrahim bin Lembut. 2003; Pawancheek Marican. 2004). However, it has to certain degree created harm to well being of the community (Ahmad Hidayat Buang. 2008). This can be seen from the statistic revealed by the relevant department which shows that estimated about 42 billion of Muslim estates in term of movable and immovable property failed to be distributed to the legal heirs. This phenomenon invites anxiety because it gives bad implications to the society and the nation (Wan Kamal Mujani et.al. 2011). Many factors contributed to this failure. The delay in the distribution of the property by the heirs and the lack of understanding in the rule of *farāid* are amongst the identified reasons. In addition, the weakness in the administration of the estate division management in Malaysia is another contributing factor (Wan Kamal Mujani et.al. 2011).

The increasing number of cases of unsolved Muslim's inheritance property call for a need to introduce an alternative mechanism in distribution of Muslim's estates. Thus, some writers and scholars viewed that the implementation of estates planning distribution which is made during the property owner's lifetime is very crucial. Islamic law recognizes transactions which transfer property from one individual to another, without any payment or consideration. In this regards, the management of estate planning by way of gift *inter vivos* or *hibah* is really recommended eventhough there are a variety of other legal techniques that a person may deploy as a form of estate planning. The donor may make such a gift (*hibah*) during his or her lifetime even to someone who will be amongst the donor's heirs under the Islamic principle of *farāid*. This method provides, therefore, some opportunities for estate planning for those persons who are concerned about the distribution of their property after death (Siraj Saith and Hilary Lim. 2006). Looking at the experience from other Muslim country, *hibah* was used to achieve several aims which other methods of distribution of estates could not do (Ahmad Hidayat Buang. 2008). In Indonesia, this method was regarded widely as not only socially legitimate, but also wholly appropriated. It is used as a means of giving girls 'compensation' for what is customarily regarded as their disadvantaged position under the *farāid* (Siraj Saith and Hilary Lim. 2006).

### WHAT ARE THE BENEFITS OF *HIBAH*?

The administration of property through the law of succession (*farāid*) in some situation could be less effective due to the current living trend where most of people are busy with their own chaos. They often ignore the responsibility to make the distribution of the deceased's estate because the process must go through several stages that involve several jurisdictions. For this reason, the use of *hibah* can be one of the best mechanisms to be considered as part of Islamic estate planning in Malaysia. Furthermore, the ignorance of the true concept of *farāid* has caused many problems. Thus, the implementation of *hibah* will not only ensure the distribution of property to the heirs is in accordance with donor's wishes but also to reduce the number of unsolved cases in

distribution of Muslim's property through *farāid*. This is because the distribution of property through *hibah* does not have to go through the administrative process as necessary to be through *farāid*.

The other purpose of implementation of *hibah* is to solve the problem when the division of property fails to run properly. This is because the distribution of estate cannot be considered complete if the proportion of each beneficiary cannot be used or fails to give any benefit to the recipient. In the Muslim estate distribution, the legal heirs are entitled to a certain amount of portion as governed under the rule of *farāid*. It does not differentiate between the distribution of movable and immovable property. The distribution of movable property is not an issue. But when it comes to immovable property such as land, there is a lot of problem to be faced. The ignorance in application of the spirit of *farāid* will lead to the fragmentation of land which would lead to small division of land. Property which is divided in the conventional way by placing the names of all beneficiaries in each plot of the inherited land will not bring any benefit from economic point of view (Abdullah. 2005). It will also cause difficulty for subsequent transactions. Section 15(5) of Small Estate (Distribution) Act 1955 actually provides guideline to the Administrator in issuing the order of the division. This section allows that the distribution of the estate could be held by way of consensus. In line with this, the Federal Court judge in the case of *Re Mamat bin Dat San & Anor; Mek Som v Awang bin Senik* decided that, the order of distribution made by way of consensus (consent) is valid and binding on the heirs. This decision clearly upholds the principle of Islamic law which allows the division of property by way of mutual consent. Unfortunately, looking from the practical point of view, the division of property through this mutual consent is rarely observed and followed (Abdullah. 2006). Malaysian people, especially in rural areas still prefer to distribute the estate left by the deceased person through putting all the name of beneficiaries on all titles. This means that, if the deceased leaves five titles with ten beneficiaries, each title will contain the names of all the heirs. This will lead to fragmentation of land which end up with multiple ownership by many individuals with very little portion. The difficulty arises when the land is to be developed because it requires the consent of all the owners. As a result, certain lands that have high commercial value to the country as found in Kampong Baru, Kuala Lumpur cannot be developed.

The transfer of property by way of *hibah* enables the property owners to decide for themselves as to who the property is to be given (Sheikh Burhanuddin Abi Al Hasan Ali Marghinani. 2005; al-Nawawi. 1977). They also have rights to determine the amount and proportion of property to be distributed with due regard to its suitability in terms of the beneficiary's need and his or her economic status. Here, the giving of property by way of *hibah* could be used to remedy the situation. Depending on the beneficiary's capability in term of wealth and his or her responsibility towards the family, there may be situation where a daughter is entitled to be given more than a son. However, if the property is to be divided by way of *farāid*, the daughter will only get half portion of the son (Ibn Rusd. 1996).

Whilst the purpose of transfer of property by way of *hibah* is aimed to benefit the beneficiary (Mohd Zamro Muda et.al. 2006), the donor in certain situation quite hesitate to surrender all or part of their property during their lifetime for fear or worry about being neglect after all the property being distributed. By this reason, *Hibah Amanah* is introduced by certain financial institution (for example, Bumiputra Commerce Trustee Bhd) to have turned out to be an instrument of trust property which will only be transferred to the beneficiary upon the death of the donor (Othman Yaacob. 2006). During his or her lifetime, the donor retains complete control and enjoyment over the trust property. After the death of the donor, the property will pass to the beneficiary and consequently the other legal heirs cannot claim to be entitled to the property anymore (Naziree bin Md Yusof. 2006).

Islamic law of succession by way of *farāid* would in certain circumstances, limit the person's freedom of choosing their own successors and may produce inappropriate distribution of their estate. Hence, *hibah* can be one of alternatives that could be utilized to avoid the application of the Islamic law of succession to some or all of the property for Islamic estate planning in Malaysia which permits a person to transfer ownership of his property from his individual name into a person that he or she wishes (Wan Kamal Mujani et.al. 2011). It is because the concept of estate management in Islam is not just to collect, manage, develop and protect the property, but also to ensure that the property should be passed to the beneficiaries without causing inconvenience and hardship to them (Mohd Zamro Muda et.al. 2006). Looking at this point of view, the authors believe that the implementation of *hibah* in Malaysia is really a need.

#### INTRODUCTION OF LEGAL FRAMEWORK OF GIFT *INTER VIVOS* (*HIBAH*)

In order *hibah* to become a potential alternative method of estate planning management, there must be specific law which governs the substantive and procedural aspect of law. This is because it is widely recognized that in reality there must be certain law in order to legalize the rule. It is undoubted that the property will still remain the donor's property however passionately she or he may have wished to give it away (Othman Yaacob, 2006) if it does not comply with the principle of law. Thus, there must be specific a law to regulate and control the implementation. In Western countries, the formalities of the law of donative transfers including gift *inter vivos* have a respectable historical pedigree. The requirement that a gift be delivered was discussed by Coke as early as 1675 (Jane B. Baron. 1989). Thus, the authors opine that there is an urgent need to introduce a complete legal framework of *hibah* for the implementation of this mechanism. Without the proposed framework, the implementation of *hibah* could not bring to fruition. This complete and comprehensive legal framework must also be outlined to overcome some statutory, non statutory as well as the practical impediments for the implementation of *hibah*.

#### CONCLUSION

With respect to gift *inter vivos* (*hibah*), where the primary legal goal is to effectuate donative intent, formalities are said to be required to put that intent beyond question. Even though *hibah* is treated as one-sided transfer that merely redistribute existing wealth, there still warrant of legal enforcement as matter of formality which make administration of it simple. The formalities

provide substantive and procedural law that alerts the donor to the import of the act she or he is undertaking, besides provide reliable evidence of the intent to give. It also serves to protect donors and donees against fraud, undue influence or the like. Finally, the law channels donors into using easily recognized devices for gratuitous transfers, thus easing administrative burdens and ensuring that intended transfers will be given legal effect.

In short, the application of gift *inter vivos* (*hibah*) in Malaysia must be strengthened by the introduction of the law. The potential legal frameworks must come in the mode of substantive law and procedural law which potentially be applied by the the legislative body in order to enact law relating to *hibah*. This legal framework ensures the protection to the donors from impulsiveness, misinterpretation and pressure.

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