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**LEGAL REVIEW ON HIBAH (INTER VIVOS GIFT) IN
MALAYSIA: PROBLEMS AND SOLUTIONS**

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Abstract

Frozen or unclaimed estate is disconcerted issue until today. Based on 2016's statistic, there are a total of RM60 billion worth of unclaimed estates in Malaysia. Despite of suggestion by previous researchers to use *Hibah* (*inter vivos gift*) as a solution to resolve the pertaining issue, the number of unclaimed estate still increase every year. Thus, the purposes of this study are to bring to the light problems posed in implementing *Hibah* and proposed solutions in order to resolve or at least decrease the number of unclaimed estate in Malaysia. In this paper, Islamic ruling and Malaysian legal provisions on *Hibah* were highlighted and critically discussed. The discussion identifies that, since the number of Muslims using *Hibah* as a method to distribute assets is still low in Malaysia, it is strongly argued and suggested that, there is a need for a clear law on *Hibah* be enacted in Malaysia to settle this matter. Besides, cooperative action to disseminate knowledge and create awareness inclusive of government and private agencies involved should also be implemented immediately.

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Keywords: Islamic law inheritance, Hibah, Inter Vivos Gift, administration of estate, estate planning.



1. Introduction

According to the Islamic law of inheritance, methods to distribute Muslim's property can be categorized into three parts i.e. Wasiyyah: will, Faraidh: inheritance of property which is based on determined portion as stipulated in Al-Quran i.e. Surah An-Nisa':11 and Hibah: property given during the lifetime of the donor to the donee. For the purpose of discussion, this paper attempted to emphasizes on Hibah.

2. Problem Statement

Hibah or legally known as "inter vivos gift" has been highlighted and suggested by researchers to be one of the best solution for estate planning due to the increasing number of unclaimed estate in Malaysia. According to Muda (2008), Hibah is important tool and should be implemented in order to avoid disputation over inheritance that can lead to the issue of frozen estates. Based on 2016's statistic, there are a total of RM60 billion worth of unclaimed estates in Malaysia (Shafie, Wan Yusoff & AlEdrus, 2016). In 2009, the value of the frozen estates was RM42bil and out of this figure, RM1.8bil was still stuck in Unclaimed Monies Registry Board. Statistics show that in 2011, an estimated of RM42bil of the frozen estates supposed to be distributed to 500,000 beneficiaries have not reached them (Murali, 2013).

The suggestion to use Hibah as a tool of estate planning in order to resolve or reduce the unclaimed estates issue seems not avail since the number of frozen estate keep increasing, and based on the number of Hibah distribution among Malaysian Muslims is still low. According to a study conducted by Salleh, Abu Hasan, & Sabtu (2007) in Lembah Klang, Malaysia, from 300 respondents, only 31.7% receive Hibah and majority of respondents (68%) never used Hibah to distribute their estate.

3. Research Question

- i. What are the problems in implementing Hibah as a tool of estate planning?
- ii. Is there any solution in implementing Hibah as a tool of estate planning?

4. Purpose of the Study

This paper attempted to identify the problems and provides suggestions in implementing Hibah as a tool of estate planning in order to resolve or reduce the unclaimed estates issue in Malaysia.

5. Research Methodology

The methodology of this research is by way of literature review. Much has been written on the topic of Hibah as one of the solutions to frozen estate. However, despite of the suggestion, the issue of frozen estate still unsettle. Therefore, this paper will review literature on Hibah and identify the problems. This research will analyze the relevant provisions of law related to the Hibah in Malaysia. This study used primary data such as statutes, decided cases and articles.

6. Islamic Ruling of *Hibah*

6.1. Legality of *Hibah* in Islamic law.

Hibah comes from an Arabic term “*wahaba*” which means giving without consideration. *Hibah* or *inter vivos gift* transfer took place between the living of the donor and donee (Zuhaili, 1999). The practice of *Hibah* is encourage in Islam. Quranic verses permit and recommend gift giving. Based on [Al-Nisa’: 4], Allah says:

“*But if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer.*”

Another verse urge Muslim to give charitable gift, Allah says in the Quran [Al-Baqarah: 177]:

“*Spends of the wealth that he cherishes, to his kinfolk, orphans, the needy, the wayfarer...*”

Hibah giving has been practiced since the days of Prophet Muhammad and he himself gave and received *Hibah*. This is based on hadith by Imam Bukhari based on Hadith narrated by Aisyah “The Prophet used to accept gifts and reward from the donor” (Zuhaili, 1999).

6.2. Essential Elements of *Hibah* in Islamic law.

In order to implement *Hibah*, there are certain conditions that need to be followed. Firstly, the existence of Donor or *Hibah* Provider (*Al-Wahib*). *Hibah* provider must have full ownership (*milk tam*), full authority over his/her property Therefore, there is no limitation in the context of rate and *Hibah* can be given to anybody that the donor pleases with one condition that, his intention of giving is not violate Islamic law. Second, is the existence of *Hibah* recipient (*al-Mawhub lahu*). It can be anyone as long as he capable to own property. If *Hibah* provider is not (*mukallaf*) not reached puberty or disabled, *Hibah* can be given to his guardian or trustee on his behalf. *Hibah* recipient must receive the property and has authority over the property. This means that he is capable of controlling the property received. Third condition is goods (*al-Mawhub*), the property must be lawful and property is belong to *Hibah* provider and the ownership of property can be transferable. Fourth, is *Sighah* (*ijab and qabul*). It is the pronouncement or an act of giving and receiving by *Hibah* provider and *Hibah* recipient (Muda, 2008).

7. Legality of *Hibah* in Malaysia

Legality of *Hibah* in Malaysia can be found under the Federal Constitution which provides:

“Item 1 under List II of the 9th Schedule: Except regarding the Federal Territory of Kuala Lumpur, Labuan and Putrajaya, the Islamic law and the self and family laws of the Muslims, including Islamic law with regards to inheriting intestate or non-intestate properties, engagement, marriage, divorce, dowry, maintenance, adoption, status of children, child custody, **gift**, division of property and non-charitable trusts..”

It is clear that *Hibah* is fall under state matters and thus within Syariah Court’s jurisdiction. In addition, the Administration of Islamic Law (Federal Territories) Act 1993, states:

“Section 46 (2) (b) (v) and (vi): Syariah High Court shall, in its civil jurisdiction, listen to and determine all actions and proceedings in which all parties are Muslims and are related to a will or **gift (alang)** during *marad-al-maut* of a Muslim deceased person; a **gift** during the lifetime, or settlements made without adequate compensation with money or money’s worth, by a Muslim;”

Based on the provisions, it is found and argued that:

- The word *Hibah* is unknown. The word “gift” or “alang” is the word uses which refers to *Hibah*. Malacca, Selangor, Johor, Perak, Penang, Terengganu, Kedah, Sarawak and Sabah also use the same word. The word “grant” uses by Pahang and Perlis. While “alang hayat” uses by Kelantan. Only Negeri Sembilan uses the word “*Hibah*” (Muda, 2008).
- The provisions on *Hibah* are too brief. People might question on what is the definition of *Hibah*, essential elements of *Hibah*, guideline and procedure to do *Hibah*.
- *Hibah* can be done not only during the lifetime of donors, but during donors’ *marad al-mawt* too. Eventhough Islamic law permits *Hibah* during *marad al-mawt*, however it subjects to a number of rulings which should be followed in order for the *Hibah* to be valid. The rulings are not mention in the provisions, thus people might execute invalid *Hibah* unconsciously.

8. Findings : Problems in implementing *Hibah* in Malaysia

8.1. No specific laws enacted for *Hibah*.

It is clear that there is no specific law enacted for *Hibah*. In other words, there is no specific guideline for public, legal practitioner and agencies involved to refer. People might interested to use *Hibah* to distribute property, but they do not know where to refer. When people only rely on the brief provisions, it may lead to dispute in the future.

Any disputes on *Hibah* will be referred to Syariah Court. The Syariah Court refers to Muslim scholars’ views and opinions in deciding a case, however it may create difficulties among the judges to decide since there is no specific law to refer (Mohd Yusof & Ahmad, 2013).

8.2. Lack of knowledge about *Hibah* as a tool of estate planning.

Hibah had not been used widely as a tool of estate planning by Malaysian Muslim due to lack of knowledge. Only two methods commonly known by public, i.e. through operation of law namely Faraidh or by making a will (Mokhtar, 2007). Salleh et al. (2007) reviewed that Muslim community has lack of knowledge on the existence of other methods that can be used to for estate distribution except Faraidh.

8.3. Lack of awareness about *Hibah* as a tool of estate planning.

According to ZAR Perunding Pusaka Sdn. Bhd., Malaysian Muslims still lack of awareness regarding the proper practice of Islamic estate planning (Hassan & Yusop, 2006). Poor estate planning awareness among Malaysian Muslims also includes their lack of awareness regarding *Hibah* as a method for managing their assets (Md Razak et al., 2015).

Some people might claim that they were aware about *Hibah* but they might understand differently (not as a tool as estate planning). The word *Hibah* can easily misunderstood with “gift” and “*sadaqah*”. It

is important to note that, *Hibah*, “gift” and “*sadaqah*” are dissimilar eventhough their meanings are quite similar. The main difference is in terms of the objective of giving. Gift is when a person give something to others because of affection and appreciation, while *sadaqah* is when he give something to get reward from Allah (Zuhaili, 1999). Where someone gives his property to others without the expectation of any consideration, it is called *Hibah*. Thus, “every gift and *sadaqah* are *Hibah* but not all *Hibah* are gifts and *sadaqah*” (Muda, 2008).

Besides, the community might confuse between will and *Hibah*. There is a big difference between will and *Hibah*. *Hibah* is basically any item that one willingly donated while they were alive and mentally competent. However, will is the distribution of one’s wealth to others in terms of debt, beneficiaries or property upon one’s death (Ghul, Yahya & Abdullah, 2014).

Awareness among public on the importance of estate planning is low in Malaysia (Noordin, Haron, & Abdullah, 2016). According to Rashid and Ahmad (2013) Malaysian Muslims are still be less concerned in planning their wealth during their lifetime. Poor awareness on the importance of estate planning shows that the community is still not aware on the importance of *Hibah*

9. Recommendations and solutions

Since the provisions on *Hibah* are too brief, it is suggested that:

- There is a need for specific law for *Hibah* to be enacted (Enactment since *Hibah* falls under state matters), or;
- Make a standardization among states regarding rules of *Hibah* and placed under one Act for *Hibah*, or compile in one Act with other methods of Islamic inheritance (e.g Islamic Inheritance Act), or;
- If no specific law enacted for *Hibah*, at least there is a need for the respective states to:
 - a. Replace the word “gift”, “grant”, “alang” and “alang hayat” in the provisions mentioned in the previous part before to the word “*Hibah*”. There should be standardization in terms of word uses in order to avoid confusion among public, and;
 - b. Produced one module on *Hibah* as a guideline for all parties involved.

In terms of knowledge and awareness, it is suggested that;

- Islamic Religious department in every state may conduct workshop/courses on *Hibah* and other methods of Islamic inheritance in mosque or surau, and/or;
- Islamic Religious department in every state may include *Hibah* and other methods of Islamic inheritance in their script for Friday sermons, and/or;
- Law on Islamic inheritance should be included in high school subject (Pendidikan Islam or Pendidikan Syariah Islamiah). Students should learn about methods of distribution of Muslims asset especially Faraidh, then accompanied with other methods of distribution including *Hibah*. The importance of learn Faraidh was mentioned in the hadith: “Learn Faraidh and teach them to people for it half of know knowledge and it will be forgotten and the first to be taken up from my community.” (Zuleika & Putu, 2014) and/or;

- Government (JAKIM) and private agencies like As-Salihin Trustee Bhd. should cooperatively promote and create awareness on Hibah among public through media. According Kushwaha (2015), media plays a significant role in forming the positive attitudes of the public.

10. Conclusions

The increasing number of unclaimed inheritance properties in Malaysia is a serious issue. It is strongly agreed that *Hibah* is one of solution that might help to resolve or at least decrease the number of the frozen assets. In order for *Hibah* to be successfully implemented, problems in executing *Hibah* should be addressed immediately. Based on the discussion, it is clear that law on *Hibah* needs improvement. Clear law is needed for *Hibah* to avoid confusion among parties involved and to be implemented successfully. Besides, knowledge about *Hibah* should be disseminated and awareness need to be created among public. Urgent action should be done cooperatively among government and private agencies in order to ensure *Hibah* as a tool of estate planning to settle frozen estate not remain only as a suggestion.

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