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**BEQUEST TO HEIRS: A REVIEW FROM THE PERSPECTIVE OF
MALAYSIAN STATUTE**

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Abstract

Bequest to heirs have always been an issue of discussion among Islamic scholars. One reason for this is it involves a biased perspective if parents bequeath to heirs whom already inherit the assets as they will inherit from couple means. In this aspects, Muslim community were influence by conventional law rather than the Islamic law. Therefore, the paper aims to study on legal provisions regarding bequest to heirs, particularly with reference to the Muslim Wills Enactment of Malaysia. This study will examined whether the current provisions are aligned with the Shafi'i school of law or preferred to other school of thought. As well as the underlined provisions in term of soundness and robustness of the views. Hence, this paper will divide discussions into two. First, analysis of opinions from prominent scholars which based on accuracy of the arguments. Second, examine latest development in the Muslim Wills Enactment in Malaysia with regards to bequest to heirs. Data were attained through qualitative study and library research. Findings from this study shown that the statute have adopt a few preferred views that compliant to the maqasid of shariah without restricted to particular school of law, including on the bequest to heirs. One is permitted to bequest to his heirs provided of one-third of his asset.

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1. Introduction

Family members or relatives of a deceased can be categorized into two that is, legal heirs and non-legal heirs. A legal heir is who that has a right to inherit an asset after the passing of proprietor. In contrary to non-legal heir, he/she has not have a right to inherit either because of he/she was blocked by a closer heir or for being obstructed by the principle of law, whether wholly or partly. An automatic right to inherit is applied in the Islamic law under the law of inheritance (faraid). Under Islamic law, a property owner does not have to leave a will because the right of his/her heir is guaranteed by the shariah. However, a proprietor or property owner have option in distributing his asset through gift or bequeast/will. But in order to do so, he/she shall comply with certain regulations in the Islamic law such as the law of hibah, will and faraaid. This is because all of the above methods of transferring property have certain goals and wisdom. The attainment of that particular goal and wisdom is known as managed to achieve maqasid shariah. This achievement also indicates that the practice does comply with shariah standards and should be followed in the community.

2. Problem Statement

In normal practice today, some testators have misunderstanding the system of Islamic will and faraaid and applied them as they like without acknowledged the difference from the law perspective. They keen to bequest their assets to particular heirs as was practised in conventional law, without realizing that they are violating the shariah. Even though it is a good practice to leave family members in a good condition but the process should be aligned with the ruling. Under the bequeath principle, one should not bequest to his heirs as well as the portion of bequeath is in one-third only. The reason is the latter already inherit through inheritance which will arise conflicts among other heirs on inequity basis (Mohamed & Sulong, 2016).

By receiving double acquisition through inheritance and bequeath also mislead the intent of shariah in executing both system. The fact is, inheritance is to guarantee the rights of legal heirs and bequest is to guarantee others beneficiary rights'. It does not aim to provide additional source of acquisition to the same receiver from the same asset. The permissible of one-third allocation in bequest must not overlap with the recipient of two-third allocation of inheritance. The imbalance of the underlined system of shariah will rise conflict in the practice. Therefore, by bequeathing to heirs whom already inherit through faraaid law will caused conflict among family members and should be evaded (Sulong, 2005).

Fuqaha have contradicting views on whether bequest to heirs is encouraged by the Islamic law or otherwise. Most of them concluded that bequest to heirs is valid provided by consent from other heirs. Without other heirs' consent, a bequest is null and void. However in the Muslim Wills (Selangor) Enactment 1999 as well as in the statute in Negeri Sembilan 2004, Malacca 2005 and Kelantan 2009, a bequeast to heirs is permissible in one-third portion without requiring permission from other heirs and was considered as a voluntary will (Sulong, 2019). This view is not in line with most of the earliest prominent scholars as well as with hadith, "no bequest to heirs". However, in other state which does not have special provision like these, the view is in contrary that rely on the provision of *qawl al-muktamad* from majority of Muslim scholars (Asni & Sulong, 2016). While comparing both of the two group views, it shows a

conflicts and inconsistent application of ruling that will caused confusion and misconception among people in Malaysia.

3. Research Questions

Research questions are very important to ensure that a study is focused on the issues that has to be resolved. The process of research often commences with an endeavour to attain at a clear declaration of the research questions. The research questions should be answered at the end of the study, which indicates that the previous question was answered and the study was completed. Thus, a researcher should always review and polish the research question some times to ensure that the research is focus and responded to previous issues. Therefore, in this study, the reseacher have underlined four research questions:

1. What is the dalil of Quran and hadith pertaining to bequeast to heirs?
2. What is the recent provision on the issue in the current statute in Malaysia?
3. Why the current practice is going against the majority view of the past Islamic jurist?
4. How the current provision is seen to be in line with the maqasid shariah?

4. Purpose of the Study

The purpose of a study is actually an objective of a research. It is the ultimate essence for the success of an investigation. The realisation in achieving a meaningful study means succeeding the targets that have been outlined before a study begins. Therefore, purpose of the study is underlined as below in order to answer four of the above research questions, which are:

1. To examine the dalil of Quran and hadith pertaining to bequest to heirs.
2. To scrutinize the recent provision on the issue of bequest to heirs in the current statute in Malaysia.
3. To analyse reason behind current practice through perspective of maqasid shariah.

5. Research Methods

Research method is a set of systematic procedure that was used in this study. The investigators will explain by what method the research is directed and in what way the result is acquired (Ugwuowo, 2016). The method of study on this investigation is a qualitative study by gathering data from library and interview. The source of data involves verses from Quran and hadiths, jurist books, statutes, past cases, by-laws, fatwas (religious decisions) as well as court cases. The evidences were collected from traditional Islamic jurists as well as contemporary scholars which are found in the form of manuscripts or journals. All those views were then supported by recent statutes, cases as well as fresh resolution pertaining to bequest to heirs. In this case, interviews are conducted with figures who are experts in the field as well as those who are experienced in current legislation. The originality of the information, evidences as well as applications are very essential and therefore, only primary data will be given preference in this investigation. Secondary data only be entertained when it comes in parallel with the primary. Thus, findings will portray the real development of the law which then led to a recent practice nowadays.

Then, the study will analysed all those evident using content analysis method by means of inductive, deductive and comparative ways. Method of inductive is arranged by using a specific set of evidences or

notions to form a broad opinion. Meanwhile deductive is a method in realising an answer or a resolution by discerning prudently about the identified facts. While comparative method is observing and finding a resemblance or difference between two thing and extra, in order to find a degree of assessment between themes or elements that he investigates (Ugwuowo, 2016).

6. Findings

The study will discuss in two points pertaining the findings about bequest to heirs under the Islamic law, that are;

6.1. Permission of Bequeathing to Heirs with Consent

There are three opinions in the issue of bequest to heirs. First, majority of the Islamic jurist from four prominent schools have opined that bequest to heirs is valid but its implementation depends on consent from other heirs. Second, jurist of Shiah al-Zaydiyyah, al-Imamiyyah and al-Isma'iliyyah have viewed that bequest to heirs is valid without any consent of other heirs. Third, some of later jurist such as al-Muzani have stated that bequest to heirs is void and prohibited, even though with consent from other heirs (Busari, 2018; Sulong, 2005).

The authority dalil that prohibit bequest to legal heirs was based on narration by Abi Umamah that the Prophet (pbuh) have said which mean, "Allah has appointed for everyone who has a right what is due to him, and no bequest must be made to an heir" (Mubarakfuri, 1990). The verse is clearly prohibit from bequeathing to legal heirs, which consequently resulted to the void of such bequest, unless agreed by all of the involved heirs. This condition is carried out according to another narration that was reported by Ibn 'Abbas that the Prophet (pbuh) have said, "It is not permissible to bequeath to an heir unless the heir wills it (with the other heirs' consent)" (Daruqutni, 2004). In another version, the similar ruling was comprehended from the narration of 'Amru bin Shuaib and 'Amru bin Kharijah RA that the Prophet (pbuh) have said, "There shall be no bequest to an heir unless the (other) heirs wills it (gives consent)" (Daruqutni, 2004). Thus, it was crystallly clear that these narrations have strengthen the need of other heirs' consent and agreement in order to make bequest to particular heirs (Busari, 2018; Mohammad, 2015).

The point of getting the consent is to avoid conflict among heirs which may result to family disputes (Ghul, Yahya, & Abdullah, 2015). To add, the consequence is not just breaking up the family ties, but it is even detrimental to the time and frustrates their right to enjoy the property. Whereas the Quran wants Muslim to carry out a will before death for the benefit of heirs. As stated in Al-Baqarah (Q2:180), "Prescribed for you when death approaches [any] one of you if he leaves wealth [is that he should make] a bequest for the parents and near relatives according to what is acceptable - a duty upon the righteous" (Busari, 2018; Mohammad, 2015).

While examine to those authority, it is found that the majority opinion which is the first group is the profound view. This means that to implement bequest to heirs, whether it is one third of the asset or more, requires the consent. The arguments looked plausible after analysing hadiths which narrates similar meaning and found to be trusted (mutawatir) in the angle of practice. Even though there was no requirement of consent in the Quran (Q2:180), no contradictions between the verse and hadith. The verse generally

shows an encouragement to bequest to parents and close relatives during the early stage of Islam (Asni & Sulong, 2016). Then, the Quranic verse (Q2: 180) has been repealed by the faraid verses (Q4:11, 12, 176). The necessity of consent also supported by narrations of Abi Umamah and Ibn Abbas (Sulong, 2019). According to Mubarakfuri (1990), hadith by Abi Umamah have emphasized that consent by all the heirs is a prerequisite for bequesting to heirs (Busari, 2018; Mohammad, 2015).

In perspective of maqasid shariah and consequences (ma'alat al-af'al), the study found that the basis of the Prophet forbidden of bequest to heirs is on the reason of harm (mafsadah) which can lead to family conflicts. Such conflicts may lead to negative activities such as fights, disunity, hurts as well as murder. Hence, whatever that may lead to haram is, therefore, haram and forbidden. In this situation, one must favour goodness than harm or destruction. To get goodness, removing harm must come at the first place. In the method of fiqh, the principle says, "rejecting a harm is more important than taking goodness". As sum, the stand is in line with the Islamic principle in prioritizing benefit and wellness to mankind (Sulong, 2005; Sulong, 2019).

In a different perspective, the requirement of consent portray virtuous bond among heirs whereby everybody concern about the needs of others. Heirs who are really poor or weak can still being assisted between them as the prohibition is not absolute, but to evade from being abused by a testator (Mohamed & Sulong, 2016). The reason behind this is to ensure that the welfare of the other beneficiaries is guaranteed.

6.2. Insertion of the Condition in the State Muslim Will Enactment

In the development of Islamic law in Malaysia hitherto, only four states have promulgated special Enactment pertaining to Islamic wills that are, the Selangor Muslim Wills Enactments of 1999, the Negeri Sembilan Muslim Wills Enactments of 2004, the Melaka Muslim Wills Enactments of 2005, and the Kelantan Muslim Wills Enactments of 2009. Based on related cases, it was found that the decision of these four states is paralleled to what was opined by jurist of Shiah Zaydiyyah, Imamiyyah and Isma'iliyyah, that bequest to heirs is permitted in one-third allocation without requires consent of other heirs (Sulong, 2005). However, it actually has a slight difference between the provision of those states and the view of Shiite (Nor Muhamad, 2012). According to Abd Wahid (2017) and Opir (2017), the decision by fatwa committee of Selangor was not inspired by the Shiite doctrine as the Shiite practice is permitting bequest to heirs in unconditional way. Whereas in Selangor, the permission is restricted only to bequest of one third of the estate.

As underlined in the Enactment, no consent of other heirs is needed in bequest of one-third of the estate. The authorisation is only needed if the value is exceeding the limit as provided in the Section 26(2), of the Selangor Wills Enactment which states;

A bequest of more than one third of the estate to an heir should be enforced
until consent from all heirs is given after the passing of the testator.

According to the principles of opposing comprehension (mafhum mukhalafah), the provisions indicate that bequest of less than one third on an estate is valid and does not require consent the other heirs. It only becomes invalid when the rate of estates bequeathed is more than one third and consent is not given by other heirs. The similar provision was adopted and implemented in Negeri Sembilan, Malacca and Kelantan.

In recent development pertaining to the issue of bequest to legal heirs, the State Legislative Assembly of Selangor in 8th November 2016 had approved an amendment to the Section 26(2) of the Muslim Wills (Selangor) Enactment 2016, in which Subsection (2) had been amended and abolished in order to standardize with the decision from the Selangor State Fatwa Committee Meeting No. 4/2016 on 28th July 2016. The Fatwa Committee had decided that it is not permissible to bequeath to heirs (Asni & Sulong, 2017b).

While in the rest of states in Malaysia, the consent of other heirs is needed while bequeathing to legal heirs. The decision is using the general provision of wills, for instance in the Perak administration of Islamic law Enactment which emphasized to adopt *qawl mu'tamad* (Section 43) of the majority of Islamic jurist, with priority to the Shafi'ite teaching. The similar provision was found in Section 54(1) and (2), of the Selangor Enactment that provides:

- (1) Upon deciding any fatwa under section 48 or any opinion under section 53, the Fatwa Committee must, under normal circumstances, follow the *qawl mu'tamad* (accepted opinions) in Shafi'i Madhhab.
- (2) If the Fatwa Committee finds that by following the final *qawl mu'tamad*, might lead to a situation that is not in the best interest of the public, then the Fatwa Committee can follow the *qawl mutamad* of Hanafi, maliki, or Hanbali madhhab.

The stand is clearly noticeable in will cases in Malaysia since independence. For instance, in the case *Siti binti Yatim versus Mohamed Nor bin Bujal (1928)*, the bequest to legal heir was held to be invalid. Meanwhile in the case *Shaikh Abdul Latif versus Shaikh Elias Bux (1915)* and *Katchi Fatimah versus Mohamed Ibrahim (1962)*, it was held that the two-third of the estate is to be distributed according to faraid unless consented by the other legal heirs. The pre- and after independence cases witnessed that the Malay states is preferred to the majority view of the Islamic jurist that bequest to legal heirs need a consent of the other heirs, otherwise the bequest and the distribution of estates could not be carried out (Mahamood, 2012). Similarly in the case of *Amanullah bin Haji Hasan versus Hajah Jamilah binti Sheikh Madar (1975)*, the court had decided that a bequest of more than one third of the estates to a son of the deceased was not valid (Mohamed & Sulong, 2016).

In contrast, the different move has been taken by Wilayah Persekutuan in the Muslim Will Legislation Bill 2001, that bequest to heirs is not allowed unless consent is given by other heirs (Nor Muhamad, 2012). Provisions from Section 29 (1) and (2) states:

- (1) A bequest that is made to the testator's heir should not exceed one third of the estate unless with consent from other rightful heirs after the passing of the testator.
- (2) A bequest made to the testator's heir is valid when all right heirs give their consent after the passing of the testator.

These provisions indicate encouragement to do a bequest to legal heirs with condition of getting a consent. The consent must be attained after the demise of the testator. The openness attitude in promulgating recent law in the country without restricting to particular school of law is a good sign in attaining the maqasid shariah. As the fiqh works on identifying the best decisions for humans based on Quran and hadith, hence the reference should not restricted to the limited resources (Sulong, 2011; Nor Muhamad, 2012). In

order to achieve goodness and in line with the intention of shariah, the recent ruling should be open and receptive to be reviewed and amended (Asni & Sulong, 2017a).

7. Conclusion

The law of will or bequest in Malaysia have developed in different phase, varied from one state to another. This is due to the jurisdiction of religion administration of Islam in Malaysia that was under the authority of each states. Some of states, which are Selangor, Negeri Sembilan, Malacca and Kelantan have undergone an advance in term of special law for wills. As a result, provision of wills and its procedures have been elaborated in comprehensive manner. Hence, in order to ensure that the implementation of bequest continues effectively and consistent among every state, it is crucial that all states have to make a further step by legislating the same ruling. Therefore, the existing enactments in the rest of states need to go on reviewing and improvement. In spite of this, it cannot be denied that an issues regarding bequest to heirs should make some improvements, to certify that the bequest to legal heirs must be within consent as decided in the latest Selangor fatwa 2016. Muslim Wills Enactments in Negeri Sembilan 2004, Malacca 2009, and Kelantan are expected to follow the path by making amendments and improvements in their existing enactments. Further review and development of the enactment reflects the authority's awareness, concern and sensitivity to the Muslim affairs.

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