

INCoH 2017
The Second International Conference on Humanities

**JOINT TENANCY IN THE ISLAMIC LAW AND ITS
APPLICATION IN MALAYSIA**

J. Sulong (a)*, M. M. Taha (b), A. Mohamad (c)
*Corresponding author

(a) Universiti Sains Malaysia, Pulau Pinang, Malaysia, jasni@usm.my

(b) Universiti Teknologi Mara, Permatang Pauh, Pulau Pinang, Malaysia, mohdmarbawi620@ppinang.uitm.edu.my

(c) Universiti Teknologi Mara, Jengka, Pahang, Malaysia, asjad@pahang.uitm.edu.my

Abstract

Joint Tenancy is referring a method of possession that is all co-owners take an equivalent rights towards the asset, and after the demise one of them, the survivor will own the property solely. It is an adaption from common law perspective that has been applied in the Penang land law. However, the method of succession has brought discussion especially among Muslim in Penang and generally in Malaysia. It was not just against the law of Islamic inheritance but also similar to a concept of conditional gift (*hibah ruqba*) that was rejected among majority of Muslim scholars. Traditional Islamic jurist have opined that a conditional gift is unacceptable for reason of outlawing heirs from inheritance. Nevertheless in the written law in Malaysia, joint tenancy contract was acknowledged by the National Land Code (Penang and Malacca Titles) Act 1963 (A518), as well as the rule of survivorship. At a meantime, the fatwa of Wilayah Persekutuan Shariah Committee and the Shariah Consultative Board of the SC (securities commission) Malaysia in recent have decided to accept the *hibah ruqba*. Therefore the study is at aim to investigate the conflict of laws as well as it current position in the application of joint tenancy and *hibah ruqba*. In the methodology, evidences will be collected from scholars, statutory provisions as well as recent cases. The findings will be used as a new guideline in the position of joint tenancy and *hibah ruqba* among Muslims in Malaysia.

© 2019 Published by Future Academy www.FutureAcademy.org.UK

Keywords: Joint tenancy, gift, hibah, conditional, fatwa, land.



1. Introduction

This article is purported to discuss on joint tenancy and its application towards Muslim in Malaysia. As for Muslim, their personal law is applied on some of their deeds in matters relating to religious teachings. Thus, this study will discuss on position of joint tenancy in the country, particularly from the perspective of common law as well as Islamic law.

1.1. Principle of Joint Tenancy

Joint Tenancy is a term that refer to a kind of possession in the common law in which the entire sharers of the asset own an equivalent rights, no one will be considered own a major portion and the others is less. A consent from all co-owners is needed in any transactions towards the property. Thus, it is not a separable ownership but carries joint possession around co-owners, who to act on mutual decision (Rahman, 2012). Therefore, if any of joint tenants died, the left portion of the deceased will obligatorily be conceded to the residual sharers (Rasban, 2010). Based on the principle, joint tenancy is not a normal ownership and hence cannot be divided through inheritance process (Noordin et. al., 2016).

1.2. Joint Tenancy under Islamic Law

Generally in Islam, a person's ownership over sharing or partnership is based on particular portion. The type of joint ownership is known as *sharikah* or *shirkah*, where more than one person shares ownership upon a property as co-owner. The formation of *sharikah* varies from one case to another as either through agreement or during acquisition of a property. After a death of co-sharer, his share will be inherited by his heirs.

However based on joint tenancy principle in the common law, it seems that the concept is equal to *hibah ruqba* and not *sharikah*. Even though ownership is established through partnership at the beginning of the deal, decision to determine the last ownership is followed on a gift method. The last survivor will received the asset as an absolute owner that the deceased award him/her the portion left. In this case, it is fitting with *hibah ruqba* that giving a total rights to survivors if he survives the giver. The survivor will took a full possession on the asset as what has agreed in a deal between him and the giver (Tyabji, 1968). Heir's of the deceased do not have any rights for inheritance.

When discussing on conditional gift, Islamic jurist have different views on its legality. They have discussed about conditional gift under the topic of *umra* and *ruqba*. The word *'umra* refers as a gift to a donee in throughout life and the property is reverted to the giver after the donee's died. This kind of gift is also known as loaning/borrowing for a life time (*ariyah*). Meanwhile *ruqba* is a gift from a donor to a donee or donees with condition that the last owner of the property is belong to the last survivor. In another word, *ruqba* means each of the co-joint anticipates and waits for the death of another co-joint so that the donated item would come back to him (Ali & Adnan, 2016).

2. Problem Statement

Islamic jurist have different views on the legality of conditional gift, which derives from conflicting sources on hadith regarding *umra* and *ruqba*. There are hadiths which authorized them, as well as hadiths which went in contrary. In this case we can separate them to three views, which is:

2.1. The gift (*hibah*) as well as the condition is valid

Abu Yusof and other jurist from Hanbali have opined that, such arrangement of *hibah* is valid. The alike opinion was preferred by Ibn Taymiyyah (Rahman, 2012). Their view was referred to narrations by Ahmad, Tirmidhi and Nasa'i that the *umra* as well as *ruqba* is permitted (*al-umra ja'izah li-ahliha wa al-ruqba ja'izah li-ahliha*). The hadith has been valued as *sahih* by Albani (1979). The permission to execute conditional gift is in line with the verse that allow Muslim to set their own conditions (المسلمون عند شروطهم) in their contracts (Bukhary, 1986).

2.2. Only *hibah* is authorized but the condition is null and void

Abu Hanifah, Muhammad, Shafi'i (new opinion), Nawawi (1914) and some of Hanbali as well as Ibn Hazm on the view that the gift and ownership is lawful, however the condition is illegal. The condition either in term of *umra* or *ruqba* were among customs that were practiced since before Islam which contained uncertainty (*gharar*) connotation. Therefore, it was against the meaning of voluntary gift and hence the condition was considered unlawful. As a result, the condition is not authorized and the property will be inherited by the donees' heirs after his demise.

2.3. Both *hibah* and the condition is unauthorized

Under this view, only a small number of jurist such as Maliki and old opinion of Syafi'i have opined that *hibah* as well as the condition is void. The reason was based on principle that any condition in the gift will hold down its meaning whereby any gift should be given without stipulation (Ibn Qudamah, 1985). Meanwhile a gift which hold ownership until the last survivor (*hibah ruqba*) involves an element of *gharar* (uncertainty) and preventing inheritance to heirs violates the principle of Islamic law of inheritance.

To summarize these ranges of opinions, we can conclude that even though there is a conditional gift, majority of scholars have opined that the gift is still valid, authorized and enforceable. Only the condition is void as it is contradict to the concept of voluntary, generous and certainty. Conversely, there is an exemption in the form of gift from parent to children, where the shariah has underlined that it is revocable. Similarly if it is done by mutual agreement between parties, revocable was also allowed (Nor Muhamad, 2011).

3. Research Questions

There are three research questions in the study:

- What is the position of joint-tenancy in the current law of Malaysia?
- What is the stand of Islamic law in the application of conditional gift?

- How the acceptance of current law towards Muslim's practise of joint-tenancy?

The answers to this research question will be able to solve the above research problem

4. Purpose of the Study

Aim of the study is underlined as below:

- to investigate the position of joint-tenancy in the current law of Malaysia
- to examine the stand of Islamic law in the application of conditional gift
- to analyse the acceptance of current law towards Muslim's practise of joint-tenancy.

5. Research Methods

Method of the research is a qualitative study. The data has been collected from books, statutes, by-laws, fatwas (religious decisions) as well as court cases. Data from books were collected from traditional Islam scholars as well as contemporary in order to get a majority stand on the issue. Meanwhile statutes, by-laws, fatwas and court cases that were referred involved either common law or Islamic law pertaining to gift, particularly that related to transferring of property.

All of the data will be analysed through content analysis in order to examine a precise stand on the transaction, as well as to examine the right perspective in allowing or disallowing the dealings. The analysis is done by separating views among scholars in a replicable forms as well as by making valid inferences by interpreting textual material from them. As a result, the study can quantify and analyze the meanings and relationships of such concepts, legal provisions and fatwas to current application. This will produce a fair, accurate and comprehensive conclusion on the issue being discussed.

6. Findings

Based on the above discussions by using the specific approach as well as methodology, below are my findings throughout the study;

6.1. Shariah Court and Fatwa Acknowledged the Conditional Gift

In Malaysia, issues pertaining to the validity of *hibah* or gift is being discussed under Islamic law matters that fall under jurisdiction of the Shariah court. The authority has been underlined by Federal Constitution in the State dominion where any Islamic law matters, such as in matters of inheritance, either testate or intestate, gifts, awards or trusts are under state authority. The provision has been extended in the State Enactment of Islamic Affairs, such as in the Section 61(3)(b)(vi) of Penang Enactment 2004 (No. 2), that provided the Shariah High Court have jurisdiction in Islamic matters to hear and to verify all proceeding which involve Muslims, including *hibah* (Muda, 2008). The enactment provision also empowers the mufti to decide on the matters referred to him by the Shariah Courts.

Therefore, in recent practice, the Shariah Court have acknowledged and allowed conditional gifts, especially when a condition is inserted after the contract (*ijab* and *qabul*). Based on *Rafizah verses Kamar & others* (2011), the Shariah Judge referred his judgement to the fatwa made by the Shariah Advisory Committee (SAC) of Security Commission on the gift of *ruqba*. The Shariah Committee at the 44th

meeting (15 January 2003) had decided that the *ruqba* gift was compliant to shariah. The resolution was achieved on its beneficial point (*maslahah*) in recent need as well as to match the aim of shariah (*maqasid*) in facilitating Muslim's matters. Therefore, the application of the *ruqba* in joint unit trust fund accounts among Muslim account holders was authorized and certified (Securities Commission, 2007; Rahman, 2012; Azalan & Mohamed Said, 2016).

Similarly, in the case of *Mohd Akbar versus Fara Soraya & Kharafil Rusyaidi* (2014), the Shariah Judge also decided that the gift is lawful based on the same fatwa made in the 34th Meeting of SAC of Bank Negara Malaysia about *hibah ruqba*. In the practice, a declaration of *hibah* have to be include in the procedure of gift to legalize the transaction that a condition was inserted after a contract. The principle was underlined in the decision (fatwa) on *hibah ruqba* by the office of Mufti Wilayah Persekutuan on the 5th October 2000 that *hibah ruqba* is permitted if the condition of *hibah* is inserted after *ijab* and *qabul* (Yaacob, 2006; Ali & Adnan, 2016; Asni & Sulong, 2016). In the practice, there should involve two contract that is first, a contract of gift and second, a contract that having conditions such as an appointment of trustee. Those combination of contracts making the conditional *hibah* become valid and enforceable as the inclusion of *ta'liq* after the marriage contract (Yaacob, 2006; Buang, 2012; Azalan & Mohamed Said, 2016).

Five years later, Islamic Religious Council of Singapore (2008) have also issued fatwa pertaining to joint tenants (*hibah ruqba*), in two directions (MUIS, 2011):

- i. The co-owner only received half of the share, or only inward his actual share in the property, after the demised of other co-sharer, if there was no earlier agreement have been made among them. The left assets will be inherited by heirs' of the deceased.
- ii. But, if there was an agreement between the co-sharers, either under a mode of *ruqba* (conditional gift) or in a form of *nazhar* (vow) which clearly indicates that the assets is to be given totally to the existing co-sharer, after the demised of one of them, subsequently the survivor will own the property.

Thus, an acknowledgement of conditional gift (*hibah ruqba*) is pending on earlier arrangement between parties that indicate to own the property to the last survivor (Noordin et al., 2016; Rasban, 2010; Ramlan, 2015).

6.2. Common Law Authorized Conditional Gift and Joint Tenancy

Under ecclesiastical jurisdiction during the colonial era, the application of Islamic law was recognized among Muslims in Malaya. The position was obvious from the case of *Ramah versus Laton* (1927), that Muslim regulation is not an unfamiliar law but a home rule and decree of the land. In *Re Ismail bin Rentah deceased* (1940), the Islamic law was recognized as part of common law in the state as long as its involved the Malays. Thus for Muslim, the law that in charge their personal matters always refer to Islamic law, including *hibah*. Therefore in the *Zaleha versus Salmah* (2001), it was held that *hibah* is not consider contractual in nature as a gift inter-vivos dissimilar in common law. Thus for Muslim, Section 215 to 217 of the National Land Code (Act 56) have guaranteed transferring one property by gift (*hibah*), including in the form of undivided share. In a meantime, Part 21 of the National Land Code also guaranteed the transfer of co-proprietorship and trust, including transferring by mode of

hibah. Section 343 (1)(a) have recognized the joining ownership even though in the form of undivided share, as the provision have underlined that in the incident of co-ownership where any property is vested in two or more individuals as co-owners, their allocations therein shall be supposed to be equivalent except dissimilar amounts are underlined in the registration records (Mustar & Nor Muhamad, 2013).

Under the same Act (A56), the law had acknowledged joint tenancy in the Section 343 to 345. Section 344 (1) had underlined that where any property or division or interest in such a property was relocated in favour of a trustee by a trust deed or a court order, the transfer must be recorded in the title deed on such agreement. While Section 344 (2) had provided the jurisdiction of the Registrar in making modifications or additions to the existing title deed. Section 345 (1) then specified more that, any share or interest that was registered in the names of two or more individuals as ‘trustees’, the asset should be hold by them in a joint manner; and consequently, on the death of any one of them, share or interest shall transferred absolutely to the survivor. (Mustar & Nor Muhamad, 2013).

In Penang and Malacca also, joint tenancy contract was also acknowledged by the law of 1963 (A518), that the whole estate will be owned by a left co-sharer who survived. The law had acknowledged the intent under the joint tenancy contract, which giving the left undivided portion to the co-sharers (A518, 1963). The rights of survivorship were recognized by the statute as underlined in Section 47(1)(c) that the right of survivorship was embedded together among two or more individuals of the shared occupants who their names were registered in the provisional record (Ali & Adnan, 2016).

Notwithstanding the above provisions, especially on the joint tenancy, an application of the joint tenancy was not strictly apply for Muslim, but subject to the acceptance of the Islamic law. Zakaria Sam J in the *Salmah Omar & Ors. v. Ahmad Rosli Aziz & Anor* (2012), said that the principle of right of survivorship is not compliant with the shariah as it have a kind of uncertainty elements in the ownership rights. Therefore the ruling cannot be imposed on the Muslim populations in the Straits Settlement as it contravened to their religion. The element of ownership in limited time brings uncertainty of rights to the ownership as well as will caused irrational and harm. However in the case *Peter Chong & Chuah Chooi Gaik v. Khatijah Bte Md Ibrahim & Anor* (2017), the opposite verdict was given that the joint-tenancy is permissible for Muslim if the donor had explained his intention to make a conditional gift for the benefit of his children and stated the intention on the right deed, as well as the gift is in line with current ruling at that time (1963 Act). It seems that the ruling had recognized any solemnization of agreement among parties as it was done under their good faith and in line with the current law (Mustar & Nor Muhamad, 2013).

7. Conclusion

Islamic *fiqh* is something that is dynamic and changeable according to human well-being. The views that achieved by majority in the past do not necessarily remain by majority in the present time. Thus in the case of conditional gift, recent scholars have opted the past minority views that a conditional gift is valid in certain circumstances. The basic principle is remain that a gift is still valid and authorized after solemnization (*qabd*) and execution of a gift contract. In addition, a condition in a gift is valid if the condition has been inserted in the second contract through mutual agreement. Moreover, the constraint of not permitting conditional gift was exempted in the case of children as the gift for them is revocable.

Thus, to achieve public benefit (*maslahat*) as well as to safeguard the interests of parent and children, a conditional gift (*hibah ruqba*) to the latter should also be permitted. On this basis, recent fatwa of the Department of Mufti of Wilayah Persekutuan, as well as by the Shariah committee of some institutions such as Securities Commission, Bank Negara and State Shariah Judiciary Department that had approved the use of conditional gift. The recognition is paralleled with the underlining stipulation of joint tenancy in the law pertaining to land of 1963 (Act 518) and 1965 (Act 56). Thus, it is obvious and a good remark that the recent developments of ruling have portray the dynamics of shariah law that run parallel with current needs.

Acknowledgments

This study is part of my research that was sponsored by Malaysian Higher Education Ministry, through FRGS Scheme, Phase 1/2017.

References

- Albani, M. N. D. (1979). *Irwa' al-Ghalil fi Takhrij Ahadith Manar al-Sabil*, [Irwa' al-Ghaleel in the graduation of the hadith of Manar al-Sabil]. Beirut: al-Maktab al-Islami.
- Ali, M. N., & Adnan, A. (2016). Hibah Amanah Hartanah. International Conference on Aqidah, Dakwah and Syariah 2016 (IRSYAD 2016), 1159-23159.
- Asni, M. F. A. H., & Sulong, J. (2016). Fatwa concerning Qabd in Hibah and the insertion of Qabd element in States Fatwa in Malaysia. *Journal of Islamic Studies and Culture*, 4(1), 143–154
- Azalan, N. S., & Mohamed Said, N. L. (2016). Keputusan Hakim Syarie dalam Kes-kes Pengesahan Hibah Ruqba, [The decision of the Syarie Judge in Ruqba Hibah Confirmation Cases]. *Journal of Contemporary Islamic Law*. 1(2), 91-101.
- Buang, A. H. (2012). Pembentukan dan Pentadbiran Harta Amanah Menurut Perspektif Undang-Undang Islam dalam Siti Mashitoh Mahamood, Harta Amanah Orang Islam di Malaysia, [Establishment and Administration of Trust by Islamic Law Perspective in Siti Mashitoh Mahamood, Islamic Property Trust in Malaysia]. Kuala Lumpur: Penerbit Universiti Malaya.
- Bukhary, M. I. (1986). *Fath al-Bari Syarh Sahih al-Bukhary*. Cairo: Dar al-Rayyan li-Turath.
- Ibn Qudamah, A. M. A. (1985). *Al-Mughni*. Beirut: Dar al-Kitab al-Arabi.
- Muda, M. Z. (2008). Instruments of Hibah and Gifts: Analysis of the Regulations and Applications in Malaysia. Jakim: Hibah and Faraid National Convention.
- MUIS, (2011). Guidelines for Muslims on Purchasing and Owning an HDB Property under Joint Tenancy. Singapore: Islamic Religious Council of Singapore, 1-9.
- Mustar, S., & Nor Muhamad, N. H. (2013). Kedudukan Joint-Tenancy dan Kepentingannya dalam Pemilikan Rumah Menurut Perspektif Undang-Undang Islam dan Sivil di Singapura, [Joint-Tenancy Position and Its Importance of Home Ownership According to the Islamic and Civil Law Perspective in Singapore] *Jurnal Teknologi*. 65 (1), 29–37.
- National Land Code (Penang and Malacca Titles) (1963). The Commissioner of Law revision, Malaysia. Section 1-124. Retrieved from [http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20518%20-%20National%20Land%20Code%20\(Penang%20And%20Malacca%20Titles\)%20Act%201963.pdf](http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20518%20-%20National%20Land%20Code%20(Penang%20And%20Malacca%20Titles)%20Act%201963.pdf), on 20 May 2017.
- Nawawi, M. A. Z. (1914). *Minhaj et Talibin*. Thacker: Spink & Co.
- Noordin, N. H., Ismail, M. I., Abd Rahman, M. A. H., Haron, S. N., & Abdullah, A. (2016). Re-evaluating the practice of hibah trust in Malaysia. *Humanomics*. 32(4), 418-436.
- Nor Muhamad, N. H. (2011). Hibah dalam Undang-undang Islam. Skudai: Penerbit UTM.

- Rahman, M. H. (2012). A Juristic Analysis on Hibah al-Umra and al-Ruqba and Their Applications to The Joint Tenancy and Disbursement of Takaful Benefit. Seminar of Contemporary Fiqh: Issues And Challenges. International Islamic University Malaysia.
- Ramlan, M. N. (2015). Application of The Muslim Law and The Survivorship of Joint Tenancies in Singapore, *Singapore Law Review*, 7, 1-5.
- Rasban, S. (2010). Hibah Al-Ruqba & Joint Tenancy in Shariah Law. Singapore: HTHT Advisory Services Pte Ltd.
- Securities Commission. (2007). Resolutions of the Securities Commission Shariah Advisory Council. 2nd Edition. Kuala Lumpur: Suruhanjaya Sekuriti Malaysia.
- Tyabji, F. B. (1968). The Personal Laws of Muslims in India and Pakistan. Pakistan: N M Tripathi Private Ltd.
- Yaacob, O. (2006). Pembentukan Trust Hibah sebagai Alternatif Perancangan Harta [Establishing a Grants Trust as an Alternative to Property Planning]. [The. Mashitah Mahamood (ed.), Harta Amanah Orang Islam di Malaysia, Kuala Lumpur: Penerbit Universiti Malaya.