THE APPLICATION OF *HIBAH* TO IMMOVABLE PROPERTY IN WEST MALAYSIA

BY

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A thesis submitted in fulfilment of the requirement for the degree of Master of Comparative Law

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ABSTRACT

The research is undertaken based on the premise that the lack of understanding of the *Sharīʿah* and the law on *hibah*, the transfer of property and trust has led to both *Sharīʿah* and legal non-compliance of *hibah* of immovable properties with regard to its related documentation and practices in West Malaysia. The methodology of this research involved two methods, namely library research and interviews. As for the library research, the researcher has attempted to examine and analyse the primary and secondary literature containing the scattered materials in respect of the Islamic law of *hibah* in *al-Qurān*, *al-Sunnah* and the works of Muslim jurists, classical and contemporary alike, articles, statutes and case law. The researcher has also conducted interviews with Amanah Raya Berhad, the Small Estate Distribution Section, the Syariah High Court, and the Civil High Court and analysed any available legal documentation such as deeds of *hibah* and deeds of trust. The research findings are as follows: First, the basic and simple form of *hibah* is not sufficient to achieve the objective of postponing the donee from fully exercising his right of ownership on the object of *hibah* by circumventing the requirement of the National Land Code 1965. The donee may give effect to the operation of Islamic law *via* sections 417 and 421A of the National Land Code 1965; Second, the trust arrangement without *hibah* could be used to pass the property from the donor (the settlor) to the donee (the beneficiary) through the trustee under the general principles of Islamic law. The conventional trust may be harmonised with Islamic law as long as the non-Islamic elements in it are removed; Third, future jurisdictional conflict might arise in the case of the *hibah*-trust hybrid. In order to avoid any conflict, there must be a specific legislation which governs the contract of *hibah* and guarantees its legal effect before any Malaysian court.

ملخّص البحث

أجري هذا البحث على أساس أن عدم الفهم الصحيح لموقف كل من الشريعة والقانون إزاء الهبة قد نتجت عنه مخالفات شرعية وقانونية بخصوص هبة الأصول الثابتة فيما يتعلق بالتوثيق والممارسة. وتقوم منهيجة هذا البحث في أحد جوانبها على بحث مكتبي، بينما يقوم الجانب الأخر على إجراء بعض المقابلات. وقد حاول الباحث فحص وتحليل الدراسات السابقة الأولية والثانوية المتعلقة بأحكام الهبة في القرأن والسنة وآراء الفقهاء متقديمهم ومعاصريهم على حد سواء، إضافة إلى المواد القانونية والتشريعات والسوابق القضائية ذات الصلة. وقد أجرى الباحث مقابلات مع كل من Amanah Raya Berhad، و قسم توزيع التركة الصغرى، و المحكمة العالية الشرعية، و المحكمة العالية المدنية. وقام بتحليل الوثائق القانونية الموجودة مثل اتفاقية إنشاء الهبة واتفاقية الاستئمان. وقد توصل البحث إلى مجموعة من النتائج كالتالي: أولا: أن الصيغة الأساسية والبسيطة للهبة ليست كافية لتحقيق أهداف تأخير ممارسة الموهوب له حق الملكية على الأصل الموهوب بالتحايل على متطلبات القانون الوطني للعقار 1965 م. يجوز للموهوب تنفيذ الشريعة الإسلامية بموجب الفرعين 417 و 421A من القانون المذكور أعلاه . ثانيا: أن إدارة الائتمان دون الهبة قد تستخدم لتمرير العقارات من الواهب إلى الموهوب له من خلال الوصي بمقتضى القواعد العامة للشريعة الإسلامية. ويمكن التوفيق بين الائتمان التقليدي والشريعة الإسلامية إذا ما تم إبعاد العناصر المخالفة للشريعة. ثالثا: أن أي تعارض في المستقبل للصلاحيات القانونية بين الهبة والائتمان قد ينشأ على الخلط بين الهبة والائتمان. ولتفادي مثل هذا التعارض لا بد من سن قانون خاص يحكم عقد الهبة ويضمن أثرها القانوني أمام أي محكمة ماليزية.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Law.

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Wan Noraini Wan Mohd Salim
Supervisor

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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

Mohd Syukri Azaari

Signature …… Date ……..

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Affirmed by Mohd Syukri Bin Azaari.

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Signature Date

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LIST OF ABBREVIATIONS

app.	appendix	n.p.	no place: no publisher
art./arts.	article/articles	no./no.s	number/numbers
b.	born	n. s.	new series
bk./bks.	book/books	o. s.	old series
C. P. C.	Criminal Procedure Code	P. B. U. H.	Peace Be Upon Him
c.	copyright	P. L. D.	All Pakistan Legal Decisions
ca.	(circa): about, approximately	P. P. C.	Pakistan Penal Code
cf.	compare	p./pars.	paragraph/paragraphs
ch.	chapter (in legal firms)	passim	here and there
chap./chaps.	chapter/chapters	pt./pts.	part/parts
col./cols.	column/columns	q. v. *(quode vide)*: which see	
comp./comps.	compiler/compilers; compiled by	Q. Sh	Qanun - E Shahadat
dept./depts.	department/departments	S. L. J.	The Sudan, Law, Journal
d	died	S. W. T.	Subhanahu Wa Ta'ala (Praise be to Allah and the Most High)
div./divs.	division/divisions		
e. g	*(exempligratia)*; for example	sc.	scene
ed./eds.	edition/editions; editor, edited by	sec./secs.	section/sections
et al.	*(et alia)*: and others	sic.	so, thus
et seq	*(et sequers)*: and the following	s. l.	*(sinoloco)*: no place of publication
etc	*(et cetera)*: and so forth pages that follow		s. n. *(sine nomine)*: no publisher
fig./figs.	figure/figures	s. v.	*(sub-verbo, sub-voce)* under the word of heading
ibid.	*(ibidem)*: in the same place	trans.	translator/translated by
id	*(idem)*: the same below	v./vv.	verse/verses
L. E.	Law of Evidence	viz.	*(videlicet)*: namely
l. v.	*(locus variis)*: various places (of publication)	vol./vols.	volume/volumes
ms./mss.	manuscript/manuscripts		
n. d.	no date		

TRANSLITERATION TABLE

ا a	ز z	ق q
ب b	س s	ك k
ت t	ش sh	ل l
ث th	ص ṣ	م m
ج j	ض ḍ	ن n
ح ḥ	ط ṭ	ه h
خ kh	ظ ẓ	و w
د d	ع ʿ	ء ʾ
ذ dh	غ gh	ي y
ر r	ف f	

short vowels	long vowels
ـَ a	ـَا ā
ـِ i	ـِي ī
ـُ u	ـُو ū

diphthongs	doubled
ـَو aw	ـُوْ uww
ـَي ay	ـِيْ iyy

CHAPTER ONE

INTRODUCTION

1.1 THE GENERAL *SHARĪʿAH* FRAMEWORK FOR SUCCESSION

The Islamic law of succession is distinctively characterised by its emphasis on the compulsory rules of succession of general application.[1] The paramount purpose of the Islamic law of succession is to provide for surviving dependants and relatives, for the family group bound to the deceased by the mutual ties and responsibilities which stem from the blood relationship.[2] The legal prescription of the material provision for these surviving dependants and relatives is made in the utmost rigid and uncompromising terms. Relatives are arranged into a strict and comprehensive order of priorities and the quantum of their entitlement is thoroughly defined. The term 'legal heir' under the Islamic law of succession only applies to those relatives to whom the property is transmitted after the demise of its owner by operation of law. Coulson remarked that the rights of the legal heirs are the keynote of the whole system of succession and are fundamentally indefeasible.[3]

Despite this, the *Sharīʿah* does recognise the power of the deceased to dispose of his property by will but it is restricted to one-third of his net assets. However, this restriction to dispose in excess of this one-third limit may be lifted if the legal heirs voluntarily waive their rights. Thus, the transmission of property by way of bequest, or in accordance with the wishes of the deceased is of secondary importance, and priority is given to the system of succession formed by the compulsory rules of inheritance created for the material welfare of the family group. This being the

[1] Coulson, N.J., *Succession in the Muslim Family*, The University Press, 1971, at 1.
[2] Coulson, n. 1 at 1.
[3] Coulson, n. 1, at 1.

general framework of the Islamic law of succession justifies the description of the rules of inheritance as the ideal way for the deceased to fulfil his duty to his surviving family in the Islamic legal philosophy.[4]

Notwithstanding the comprehensiveness and strictness of the rules of inheritance in dealing with the question of who will be the legal heir and how much he or she will inherit from the deceased, there is a growing need within the Malaysian Muslim community to determine the manner in which their properties will be distributed after their demise. The manner in which their properties will be transmitted after their death may not necessarily be in tandem with what is envisaged by the rules of inheritance.

The motives for opting out of these rules may vary from the need to ensure the present and future welfare of the children and descendants to the strategic planning to protect and grow the wealth long after their death. The trend to search for ways in which Muslims may devise the devolution of their property after their death may give rise to the development of Islamic estate planning. Whatever the underlying reasons or motives for opting out is outside the scope of this research.

As to the methods or manner in which Muslims may plan for their estate, they include *waṣiyyah* (bequest), *waqf* (*endowment*), *ṣadaqah* (donation), *nadhr* and *hibah* (gift *inter vivos*). The researcher, however, will confine the scope of his study to the method of planning by way of *hibah*. It should be stressed from the outset that the research will not concern itself with the issue of planning but merely the legal and *Sharīʿah* issues surrounding the theoretical and practical aspects of *hibah* as will be discussed later in this chapter.

[4] Coulson, n. 1, at 1-2.

Hibah offers a certain degree of flexibility to the donor in terms of to whom and how much he will give as compared to the rules of inheritance and bequest. For instance, the donor may transfer the whole of his property to one of his children or anyone as he thinks fit. This right may not be realised where the rules of inheritance apply and with significant limitations on the freedom of the owner of the property in the case of bequest. Despite its flexibility, *hibah* could be problematic to estate planning since *hibah* must take immediate effect during the lifetime of the donor and not otherwise. This is the vital difference between *hibah* and *waṣiyyah* which only takes effect after the death of the testator.

In the context of estate planning involving parents and children, the children will acquire the property from their donor parents while their parent is still living. This may make the parents vulnerable to certain risks like giving the children a free rein to dispose of the property, charge it to the bank to start a business or raise capital, while the property is the only place where the parents have to live and spend their remaining days. There could also be a problem in the case where the parents are expecting that by transferring the house to their married children, they will take the better care of their parents during their old age, but, eventually, due to serious disagreements with their sons or daughters-in-law, these aging parents might be forced out of their safety nest.

Thus, the researcher seeks to analyse and identify the principles of the Islamic law of *hibah*, which might be lawfully utilised to bring about the desired effect of somehow postponing the change of ownership until the death of the donor. In conducting the analysis on the *hibah* principles, the researcher will also look at its inter-relations with other legal principles and statutory provisions in Malaysia. The outcome of this research will help Muslims to manage better their immovable property

and contribute to the further development of the estate planning industry in West Malaysia.

1.2 SUMMARY OF THE PROPOSED RESEARCH

The researcher will seek to comprehend the theoretical aspects of the Islamic law of *hibah* as expounded in the classical textbooks of the Islamic law of Shāfiʻī jurisprudence and contemporary Muslim scholars with particular reference to *hibah* of immovable properties.

From this theoretical understanding of the principles of *hibah*, as expounded by the classical Shāfiʻī jurists, the researcher will proceed to look at the legal framework and application of *hibah* of immovable property in its simple form within the Malaysian context. In this regard, the Federal Constitution and other relevant statutory laws such as the Administration of Islamic Law (Federal Territories) Act 1993, the National Land Code 1965, the Trustee Act 1949, the Small Estates (Distribution) Act 1955 and case law will be examined.

The application of *hibah* of immovable property in its simplest or most basic form may range from formal transfer *via* memorandum of transfer to a mere verbal declaration and acceptance of *hibah*. The researcher will look into the technical details of how *hibah* of immovable property *via* the provision under the National Land Code 1965 takes effect and other collateral issues such as *hibah* made without effecting a memorandum of transfer and transfer of immovable property in consideration of love and affection. *Hibah* by mere verbal declaration and acceptance without the title being registered formally makes it necessary to see how it is enforced

under the Malaysian land and succession law. This issue will also be discussed at length.[5]

Due to the purported immediacy of the legal effect of *hibah* simpliciter to pass the ownership from the donor to the donee, a legal device has been introduced recently in the form of the *hibah*-trust. The main objective of this new arrangement, arguably, is to confer the donor flexibility to determine who will get what through *hibah* and to let this determination take effect after the death of the donor through trust. The *Sharīʿah* and legal-compliance issues concerning the incorporation or combination of Islamic law of *hibah* and the English law of trust will become the main subject-matter of this research. To further study these issues, the research will examine recently-created products such as '*amanah hibah*', and '*hibah harta*'. The possibility of the modifification of trust to make it compatible or in harmony with Islamic law will be probed as well. Thus, the researcher will discuss briefly the concept of conventional trust and its application in West Malaysia.

1.3 STATEMENT OF THE PROBLEM

The research is undertaken based on the premise that the lack of understanding of the *Sharīʿah* and the law on *hibah*, transfer of property and trust has led to both *Sharīʿah* and legal non-compliance of *hibah* of immovable properties with regard to its related documentation and practices in West Malaysia.

1.4 HYPOTHESIS

The research proposes the following hypotheses: First, the basic and simple form of *hibah* is sufficient to achieve the desired objective of postponing the donee from fully

[5] Please refer to pages 84-91.

exercising his right of ownership on the object of *hibah*; second, certain aspects of the *hibah*-trust concept such as *hibah harta* and *amanah hibah* contravene or do not fully comply with the *Sharīʿah* requirements, thus rendering the whole transaction void and invalid; and, third, there is a real possibility of future jurisdictional conflict between the Syariah and Civil Courts as to the adjudication of *hibah*-trust disputes.

1.5 LITERATURE REVIEW

The authority for *hibah* in Islamic law may be derived from *al-Qurān*, *al-Sunnah* and the consensus of Muslim jurists or *al-ʹIjmāʿ*.[6] In the Malaysian legal context, the provision relating to *hibah* may be found in the Federal Constitution and the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505). The Federal Constitution provides that matters pertaining to Islamic law relating to, among other things, gifts is within the jurisdiction of the State's legislature.[7] The Administration of Islamic Law (Federal Territories) Act 1993 (Act 505), further provides that gifts *inter vivos* or settlements made without adequate consideration in money or money's worth,[8] by a Muslim are within the civil jurisdiction of a Syariah High or Subordinate Court depending on the circumstances of the case.[9]

The eminent classical Muslim jurists such as al-Sharbīnī, Ibn Qudāmah and others have extensively discussed the various aspects of *hibah* such as its essential requirements, *hibah* of *al-mushāʿ*, *ʿumrā* and *ruqbā*, and *hibah* from parents to children. Some of these jurists like Ibn Qudāmah, al-Nawawī, al-Sharkhasī, and Ibn Ḥazm wrote volumes of comparative legal compendiums as expounded by the major

[6] Al-Sharbīnī, Shams al-Din, Muhammad ibn al-Khatīb, *Mughnī al-muhtāj ilā ma'rifah maʿānī alfāẓ al-minhāj*, 1st edn., Dar al-Ma'rifah, 1997, vol. 2, at 511.
[7] Federal Constitution, Article 74(2), Ninth Schedule, List II, Item 1.
[8] Administration of Islamic Law (Federal Territories) Act 1993 (Act 505), s. 46(2)(b)(vi).
[9] Administration of Islamic Law (Federal Territories) Act 1993 (Act 505), ss. 46(2)(b) and 47(2)(b).

schools of Islamic law. These works may serve as great references to study the modern practices of *hibah* particularly in Malaysia. The modern Muslim scholars of the likes of Syed Ameer Ali, Faiz Badruddin Tyabji, and Wahbah al-Zuhaylī, also made very important contributions especially in making systematic expositions of the *hibah* theory and principles as laid down in the classical works.

As far as Malaysian scholars are concerned, no books, articles or research on *hibah*, to the best knowledge of the researcher, have ever been written to date, except for a few brief explanations on *hibah* like in the recent work by Ismail Mohd. @ Abu Hassan.[10] This may be due to the relatively unimportant status of *hibah* at this point of time. However, this position might change in the very near future, if the validity of the recently launched *hibah*-related products likes *Hibah Harta* and *Amanah Hibah* are to be challenged in the Syariah court.

After reviewing all the above sources, it is submitted that there is a lack of discourse in the literature on *hibah* particularly with reference to the recent application of *hibah*. There is no discussion on current issues such as banking, *takaful* and estate planning which involve certain elements of *hibah*. Therefore, this research attempts to examine and study one of the recent applications of *hibah* namely, *hibah* of immovable property in the context of estate planning in the light of the principles expounded by the Muslim jurists and the law of Malaysia.

1.6 SCOPE AND LIMITATIONS OF THE STUDY

The position on the Islamic law of *hibah* in this research will be confined to the Shāfiʿī school of Islamic law. Reference will not be made to the other three schools namely; Mālikī, Ḥanafī and Ḥanbalī except where the researcher thinks it is

[10] Sadali Hassan, et. al., *Estate planning for Muslims*, 1st edn., HTHT Advisory Services Pte. Ltd., 2004.

instructive to do so. The research will mainly refer to Malaysian cases. Pakistani and Indian case law will not be referred to except when it is necessary in order to explain and illustrate any points of law discussed.

The research will only examine the concept of *hibah* as far as its application as an instrument of estate planning involving family members is concerned. The subject matter of *hibah* which is the focus of this research is immovable property. No other applications of *hibah* such as in banking, *takaful*, Islamic capital market or matrimony will be touched upon.

1.7 METHODOLOGY

The methodology of this research involved two research methods, namely library research and interview. As for the library research, the researcher has attempted to examine and analyse the primary and secondary literature containing the scattered materials in respect of the Islamic law of *hibah* in *al-Qurān*, *al-Sunnah* and the works of Muslim jurists, classical and contemporary alike, articles, statutes and case law.

The researcher has conducted interviews with the officers from Amanah Raya Berhad, the Small Estate Distribution Section, the Syariah High Court, and the Civil High Court. The researcher also studied and analysed any available legal documentation such as deeds of *hibah* and deeds of trust.

CHAPTER TWO

THE CONCEPT OF *HIBAH* IN ISLAMIC LAW: AN ANALYSIS

In this chapter, the researcher intends to outline briefly the commonly agreed principles of the Islamic law of *hibah* amongst the Shāfiʿī jurists. Details about the disagreements within the Shāfiʿī or between other schools of law will not be discussed, except where the circumstance requires such elaboration. This chapter will discuss the definition of *hibah* and its differences from other forms of disposition. The discussion throughout this chapter will inevitably be descriptive since it is primarily the exposition of the Islamic law of *hibah* as embodied in the Shāfiʿī literature. The essential ingredients of *hibah* and other conditions which affect the validity of *hibah* will be thoroughly examined. Among the issues that will be discussed here are the contingent and conditional *hibah* such as *ʿūmrā* and *ruqbā*, the actual and constructive possession and the requirement of consent. Finally, the legal effect of a valid *hibah*, and the circumstances which warrant the subsequent revocation of validly constituted *hibah* will be elaborated. The reference, where appropriate, will be made to the case law to illustrate the application of the principles of *hibah* as expounded by the classical Shāfiʿī jurists in the present Malaysian context.

2.1 THE DEFINITION, NATURE AND CHARACTERISTICS OF *HIBAH*

Hibah from the linguistic point of view is derived from the phrase '*hubub al-rīḥ*' (blow of wind) i.e. its passage since the subject of *hibah* is passed from one person to another. It is also said that *hibah* comes from the root of '*habb min naumihi*' (to wake from one's sleep) since the donor is awakened to do charitable deeds about which