

## Hibah as Alternative to Resolve Inheritance Issue among New Muslim Converts (Muallaf) in Malaysia: An Analysis

Hibah Sebagai Alternatif di dalam Menyelesaikan Isu Pewarisan Harta Pusaka Yang Melibatkan Muallaf di Malaysia: Satu Analisis

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### ABSTRACT

*In Malaysia, Muslim converts (Muallaf) face certain difficulties including restrictions in inheritance. In this regard, Islam provides that the property of Muslims shall be inherited by Muslim heirs only. In other words, the general principle provides that non-Muslim heirs have no right in inheritance to property that belonging to Muslims. By taking into consideration the status and rights of family members of Muallaf in Malaysia, hibah is categorized as an alternative method of distribution, in addition to wasiat and other methods. In recent years, there has been an increasing interest in studying and promoting hibah (inter vivos gift) as one of the alternatives in distributing someone's wealth, in addition to other methods. This paper applies a doctrinal legal research methodology where data collection involves primary and secondary sources which include Al-Quran, hadith, journal articles, constitution, statutes and case law. This study seeks to identify the extent hibah applies as an alternative to resolve the inheritance issue among the Muallaf and to provide some recommendations in proposing hibah law to be enacted in resolving this issue in Malaysia. To date, none of the authors has studied in detail drafting of hibah law to be enacted for resolving the inheritance issue concerning Muallaf in this country. This study discovers that a specific law on hibah could clarify its position and application in Malaysia where it can further be used as an alternative to resolve inheritance conflict affecting the heirs, especially non-Muslim, of Muallaf. Furthermore, it may also benefit various agencies such as religious departments, Shariah Court and other relevant agencies to preserve the rights of Muallaf in regard to their inheritance issues.*

*Keywords: Alternative; hibah; inheritance; Muallaf; religion*

### ABSTRAK

*Golongan Muallaf di Malaysia berhadapan dengan pelbagai masalah termasuklah permasalahan mengenai sekatan di dalam pewarisan. Sistem pewarisan Islam telah menetapkan bahawa harta seseorang Muslim hanya akan diwarisi oleh waris yang beragama Islam sahaja. Dalam erti kata lain, waris yang tidak beragama Islam tidak mempunyai hak di dalam pewarisan tersebut. Justeru, hibah diklasifikasikan sebagai satu alternatif pembahagian harta selain daripada wasiat dan instrumen-instrumen pembahagian harta yang lain bagi memelihara status dan hak-hak ahli keluarga golongan Muallaf di Malaysia. Malah, dalam tahun kebelakangan ini kajian dan promosi mengenai instrumen hibah dilihat semakin mendapat sambutan memandangkan hibah adalah merupakan satu alternatif di dalam pembahagian harta orang Islam di Malaysia. Kajian ini menggunakan kaedah penyelidikan undang-undang doktrin, yang melibatkan data-data yang diperolehi daripada sumber primer dan sekunder seperti Al-Quran, hadith, artikel jurnal, Perlembagaan Persekutuan, statut-statut dan kes undang-undang. Kajian ini bertujuan untuk mengklasifikasikan penggunaan instrumen hibah sebagai alternatif di dalam menyelesaikan permasalahan pewarisan di dalam kalangan Muallaf serta mencadangkan beberapa langkah penyelesaian di dalam cadangan mewujudkan undang-undang hibah di Malaysia. Walaubagaimanapun, kajian secara terperinci mengenai cadangan penggubalan undang-undang hibah di dalam mengangani isu berkaitan pewarisan harta Muallaf ini belum pernah dilakukan. Justeru, kajian ini berpendapat bahawa perundangan yang khusus mengenai instrumen hibah mampu memberi penjelasan mengenai kedudukan dan aplikasi hibah di Malaysia sebagai alternatif pengurusan harta orang Islam. Selain itu, undang-undang hibah ini akan memberi manfaat kepada banyak agensi seperti Pejabat Agama, Mahkamah Syariah dan agensi-agensi yang lain di dalam usaha mereka untuk memelihara hak-hak golongan Muallaf berkaitan isu pewarisan mereka.*

*Kata kunci: Alternatif; agama; hibah; Muallaf; pewarisan*

## INTRODUCTION

It is important to emphasize that a proper property planning is encouraged to be executed as long as it does not violate any Islamic principles. In view of this, Muhammad Mui'zz et al. (2020) urged that the stigma and beliefs of the community that Islamic inheritance is the distribution system which exists after death should be changed. Understandably, Islam encourages the practice of a systematic property planning to safeguard the rights of the heirs over the deceased's property. Recently, *hibah* has been suggested as one of the important methods in property distribution as *hibah* has been used widely by many insurance agencies and banking institutions. The importance of *hibah* as an instrument in a proper Islamic estate planning in Malaysia cannot be denied (see for example Noor Lizza & Wan Amirul Adli 2021; Rosmiza et al. 2020; Noor Lizza & Adnan 2020; Mohd. Khairy et al. 2018; Khairiah et al. 2016; Yusnita & Asmida 2013; Rusnadewi et al. 2013). Rositah (2019) further concluded in her study that *hibah* is considered as one of the most competitive method in property planning as it helps to resolve many inheritance issues, inter alia the issue of inheritance involving *Muallafs*. This situation has inspired the authors to study *hibah* instrument as an alternative in resolving Islamic estate problems in Malaysia. It is interesting to note that the flexibility in *hibah* principle has acknowledged Islam as a religion which promotes respect and love among each other. Undoubtedly, the difference in religion between the deceased and the heirs is an obstacle in inheritance. Thus, in such cases, *hibah* stands as a solution because *hibah* could be made to anyone regardless of the donee's religion. As such, Nurul 'Izzah & Noor Lizza (2017) suggested *hibah* as a solution in resolving inheritance problem of *Muallafs* in Malaysia as the authors were in the opinion that *hibah* stands as an alternative measure in property planning to enable the *Muallafs* to distribute the property to the ex-wives and the children according to the *Muallaf's* wish. Thus, *hibah* promotes justice and mutual love between the donor and the donee of the property. Likewise, Ahmad Termizi (2017) agreed that property planning made during one's lifetime is encouraged as long as it is done fairly. In fact, Ahmad Termizi (2017) viewed that a reasonable *hibah* could be made without denying the supremacy of *faraidh* principles. However, the excessive *hibah* made by the donor to the non-legal heirs of the donors are not reasonable because the idea of distributing the

donor's property is to assist the family members and to upheld justice in Islam. Thus, property planning does not mean that the *faraidh* principles should be ignored. In fact, *faraidh* should be made as a main reference in property planning.

As of now, *hibah* has been referred to certain provisions from the various statutes since a specific law on *hibah* is yet to be enacted. The provisions of the law are from the Malaysian Federal Constitution, the Administration of Islamic Law Enactments and Federal Territories Act, Syariah Courts Enactment, Islamic Financial Services Act 2013, National Land Code 1965 and Contracts Act 1950 as these are the existing legal provisions governing *hibah* matters at present. Though *hibah* has been used by many agencies and individuals, the laws governing *hibah* remain unsolved. The absence of *hibah* law affects the jurisdiction of the court in deciding cases when there are issues on *hibah* being under dispute in court. It is anticipated that the absence of a specific law governing *hibah* has caused a lot of problems, inter alia; jurisdictional problems in managing the Muslims property (Wan Amirul Adli & Noor Lizza 2020; Rozmiza et al. 2020; Nasrul Hisyam et al. 2019; Rabi'ah 2017). Further, by taking into consideration several laws on other instruments such as *wasiyyah* (will) and *waqf* (endowment) which have been successfully enacted, this is the right time for *hibah* laws to be introduced in Malaysia. Thus, this paper aims to propose a specific law on *hibah* to be formulated by the legislators and to consider drafting a bill of *hibah* to be discussed immediately as it may resolve the jurisdictional problems and issues of Islamic estate in Malaysia, including inheritance issues involving *Muallafs*.

## POSITION OF HIBAH IN ISLAM

Central Bank of Malaysia (Bank Negara Malaysia) issued a policy document on 3<sup>rd</sup> of August 2016 that referred *hibah* as a transfer of ownership of an asset made by the donor to the donee without any form of consideration in its Paragraph 8.1. Similarly, Muhammad Fathullah & Jasni (2016) viewed *hibah* as an act of giving a gift voluntarily by the donor and it is executed during the lifetime of the donor without asking for any form of compensation from the donee ('*aqd tabarru*'). Other than that, Nazrul Hazizi et al. (2016) mentioned that traditionally, *hibah* means giving away one's property to create mutual love and affection among Muslims and also to help those who are in need.

According to Mohamad Zamro (2008), the practice of *hibah* is favourable (*sunat*) under Islamic law. It is encouraged to make *hibah* to the immediate family members such as one's spouse, parents, grandparents, children, grandchildren, brothers and sisters. The authorities for the permissibility of contracting *hibah* can be found from the primary and secondary sources of Islamic law including sources from Al-Quran, *hadith*, *ijma'* and many more. Muhammad Husni & Mohd Zaidi (2015) stated that though *hibah* is encouraged to be done in Islam, the donor of *hibah* must do it without any prejudice to the other legal heirs from getting their rights in *faraidh*. Many researchers found that *hibah* stands as an alternative method in Islamic estate planning (see for example, Mohamad Zamro 2008; Ahmad Hidayat 2008; Mohd Khairy & Suhaili 2013; and Yusnita & Asmida 2013). In addition, Rusnadewi et al. (2013) also viewed that the implementation of *hibah* may ensure the distribution of the deceased's property to be done fairly, and in a way may help to reduce the number of unsolved cases which cannot be solved through the process of *faraidh*. Nurul Syahirah et al. (2017) further viewed that *hibah* does not require a tedious process where it is effective immediately as it is executed during the lifetime of the donor.

To simply put, this process is done without any element of force and without asking for anything in return. It is interesting to note that in order to form a valid *hibah*, there are four main pillars that must be fulfilled as mentioned by several researchers in their studies (see for example Mohamad Zamro 2008; Yusnita & Asmida 2013; Alias et al. 2014; Syahirah et al. 2017). The pillars to form a valid *hibah* consists of the donor of *hibah* (*al-wahib*), the donee of *hibah* (*al-mauhub lahu*), the subject matter for *hibah* (*al-mauhub*) and the contract of *hibah* (*aqad ijab wa qabul*).

#### DEFINITION AND LAWS GOVERNING MUALLAFS IN MALAYSIA

The term "*Muallaf*" is stated in Al-Quran in the chapter of At-Taubah, verse 60; "*muallafati qulubuhum*" as it is referring to those whose hearts will be brought together for Islam. According to this verse, *Muallaf* is considered as one of the eight *asnaf*, who is entitled to receive *zakat*. This is a proof that Islam is concerned with the welfare of *Muallafs*. Based on the definition given from the Kamus Dewan Edisi Keempat (2010), *Muallaf* is

defined as the new converts or those who are newly converted to Islam. Meanwhile, the term *Muallaf* has been defined in the State Enactment as it falls under the state jurisdiction. For example, Section 2 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 has defined "*Muallaf*" as a person who is newly converted to the religion of Islam under Section 107. Section 107 provides the requirements that should be complied with for a valid conversion of a person to the religion of Islam. Therefore, it is understood that the term *Muallaf* is more accurate to be used in the context of people who just embrace Islam. Most importantly, the term *Muallaf* cannot be used forever by the new converts. According to Mohammad Ridzuan et al. (2021), issues related to the status and term limits of converts are rarely discussed by the community. In this regard, Selangor Fatwa Council has gazetted that the maximum period of five years to be given for the new converts to be called as *Muallafs*.

With regard to the law governing *Muallaf*, this article has revealed that the conversion procedure in Malaysia is governed by the Administration of Islamic Enactment from each state as Islamic matters fall within the jurisdiction of a state. For instance, the Administration of the Religion of Islam (State of Selangor) Enactment 2003 has mentioned about the matters relating to the conversion of a person to the religion of Islam in its Part IX, which consists of section 107 to section 117. Siti Adibah & Siti Zubaidah (2018) viewed that the existing provisions concerning *Muallafs* in Malaysia are not sufficient and further suggested for an order or a guideline in assisting the relevant Islamic institution which involve in managing matters as regards *Muallafs*.

#### THE CHALLENGES FACED BY MUALLAFS WITH REGARDS TO INHERITANCE

It is interesting to highlight that the issue of inheritance involving *Muallaf* has become a debatable discussion in recent years due to the fact that those who have converted to Islam have been deprived the right to inherit from one another (see for example Nurul 'Izzah & Noor Lizza 2017; Alias & Muhammad Hafiz 2015; Jasni 2014). In this regard, Usama bin Zaid reported Allah's Messenger (may peace be upon him) as saying: A Muslim is not entitled to inherit from a non-Muslim, and a non-Muslim is not entitled to inherit from a Muslim (translation of Sahih Muslim, Book 11, Number 3928). In dealing with the issue of inheritance, Jasni



(2014) viewed that generally the issue of inheritance involving *Muallaf* is governed based on the *Syariah* principles as the Administration of Islamic Law Enactment is silent on the division of inheritance property for *Muallaf*. Due to this constraint, the property of *Muallaf* will only be inherited by their Muslim legal heirs as discussed earlier. In the event when the *Muallaf* leaves no heirs, then the whole property will be distributed to the *baitulmal* to be managed. This is supported by a study conducted by Nurul 'Izzah & Noor Lizza (2017) where the authors further added that the difference of faith (*aqidah*) has deprived the right to inherit from one another.

Another important issue to be addressed is the status of the divorced couple concerning *Muallaf* and the non-Muslim spouse. According to Jasni (2014), based on a reference made to *Syariah* principles, a marriage is dissolved once either the husband or the wife has converted to Islam. However, it is crucial to highlight that the declaration for the divorce in *Syariah* Court does not bind the non-Muslim spouse because the jurisdiction of *Syariah* Court is applicable to Muslims only. It is worth noting here that conversion of a spouse to the religion of Islam does not automatically dissolve a civil marriage. Before an amendment was made to the Law Reform (Marriage and Divorce) Act 1976, there were decided cases which awarded the *Muallaf*'s property to the non-Muslim spouse. This scenario can be further illustrated in the case of *Eeswari Visuvalingam v Kerajaan Malaysia* [1990] 1 MLJ 86, where the court held that the wife, who is a Hindu, is entitled to claim for the husband's (new convert) pension since the marriage was declared valid as there was no petition made for the dissolution of marriage between them. However, an amendment made to the Law Reform (Marriage and Divorce) Act 1976 has managed to resolve many issues, among others; issue relating to the dissolution of marriage and inheritance. In this regard, Najibah (2018) concluded that the recent amendment of the Law Reform (Marriage and Divorce) Act 1976 or Act 164 relating to the status of marriage between *Muallaf* and his non-Muslim spouse help to solve conflicts of jurisdiction, i.e. whether a divorce petition should be filed under *Syariah* or Civil Court. Rina Fakhizan et al. (2020) further viewed that the amendment made to Act 164 provides rights to both parties to apply for a dissolution of marriage and issues relating to the division of matrimonial property. Hence, this amendment is seen as an attempt to ensure the smooth process in managing

the jurisdictional issues pertaining to the status of the spouse after conversion to Islam.

#### HIBAH AS A SOLUTION IN PROPERTY PLANNING INVOLVING *MUALLAF*

Currently, research pertaining to the Islamic estate management in respect to inheritance issue, particularly on *Muallaf* cases is still limited. Realizing the fact that *hibah* is considered as one of the relevant alternatives to distribute *Muallaf*'s wealth to their non-Muslim heirs, it is important to educate the public about the importance of understanding *hibah*. Undoubtedly, *hibah* offers many advantages to the public as it stands as an alternative in distributing Muslims' property that may help to reduce the increasing number of frozen assets in Malaysia. According to Nurul Syahirah et al. (2017), *hibah* stands as an alternative in property planning as it nurtures the spirit of love between one another. Nurul 'Izzah & Noor Lizza (2017) found that a proper property planning by way of *hibah* is necessary to be done to resolve the issue of inheritance concerning *Muallaf* in Malaysia. Apart from that, Alias & Muhammad Hafiz (2015) viewed that *hibah* would come into discussion when the deceased has different religion with the heirs as *hibah* would be able to solve certain circumstances in a situation where the heirs have no rights in *faraidh* and there is no *wasiat* made on him. Therefore, it is understood that *hibah* stands as an exception to the general rule of inheritance where it allows the non-Muslim heirs to inherit from the *Muallafs*' estates as *hibah* could be made to anyone regardless of their religion.

Simply put, it is obvious that the right for inheritance in Islam is meant for Muslim legal heirs only. However, Islam allows *hibah*, *wasiyyah* and *waqf* to be given to the non-Muslims as these methods are seen as the best mechanism to protect the welfare of the donor's family members although they differ in religion. Thus, a proper property planning is encouraged to be done by the donors in order to secure the rights of their family members who are not converted to Islam. This is supported by Jasni (2014)'s view that a proper property planning is permissible to be done to ensure the welfare of the donor's family members. In addition to that, Nurul 'Izzah & Noor Lizza (2017) suggested in his study that *hibah* stands as a solution to distribute the *Muallaf*'s property as the number of the *Muallafs* are increasing recently. This issue is important to be

resolved as the difference in religion is considered as an obstacle in inheritance. The decision in *Majlis Agama Islam Wilayah Persekutuan v. Lim Ee Seng & Anor [2000] 2 MLJ 572* reaffirmed that the difference in religion has caused the heirs to lose the rights to inherit from one another. Thus, in order to solve this conflict, *hibah* is seen as the best solution to enable *Muallaf* to grant the property to the non-Muslim family members as Islam is concerned about the welfare of parents and family members of the *Muallafs*.

## RESEARCH METHODOLOGY

The present study is categorised as a qualitative type of research work. It applies a doctrinal approach that seeks to identify and analyse the challenges faced by the *Muallafs* in regard to inheritance issues in Malaysia. In accomplishing this research objective, the data collection was conducted involving primary and secondary sources. In this paper, the primary data collection sources include Al-Quran, *hadith*, constitution, case law, treaties, and statutory provisions. It is important to highlight that the Federal Constitution and the Administration of the Religion of Islam (State of Selangor) Enactment 2003 are the main statutes that become primary sources in this research. Meanwhile, secondary data collection sources include journal articles, seminar papers and dictionaries which were also referred to in order to keep up with the latest information relevant to this topic. It is hoped that this paper would become a contribution to the body of knowledge and contribute towards more in-depth research in the area of Islamic estate management in the future.

## RESULTS AND DISCUSSION

It can be concluded that *hibah* is known as a method to distribute the deceased's property apart from *wasiyyah* and *waqf*. Moreover, Jasni (2014) affirmed that Islam does not prevent a Muslim to facilitate the non-Muslim heirs by using alternative methods of inheritance due to the fact that the relationship between families and siblings must continue and cannot be denied even though after the person has changed his religion to Islam. With this regard, Jasni (2014) suggested *hibah* as an alternative to enable the non-Muslim heirs to be entitled to inherit from the *Muallafs* other than through *wasiyyah* and *waqf*.

It is important to highlight that as of now, Malaysian law is silent on the matters pertaining to inheritance involving *Muallaf*. Jasni (2014) mentioned that generally a reference is made to the classical Islamic law about the issue of the distribution of inheritance involving Muslim and non-Muslim heirs in Malaysia. In recent years, there has been an increasing interest in studying and promoting *hibah* as one of the alternatives in resolving Islamic estate issues (see for example Yusnita & Asmida 2013; Rusnadewi et al. 2013; Mohd Khairy & Suhaili 2013; Alias et al. 2014; Nurul Syahirah et al. 2017; Akmal Hidayah & Tajul Aris 2017). The authors traced that there were disputes regarding *hibah* which have been tried before the Civil Court as there were confusions in interpreting the court's jurisdiction. Therefore, there is an urgent need for a specific law on *hibah* to be implemented immediately as to avoid any conflicts regarding the jurisdiction of the court. These reforms are needed not only to provide the appropriate guidelines in judiciary system, but this is also important to ensure that justice prevails for all family members and affected parties who are entitled to get the benefits from the donor's property. Moreover, a proper law on *hibah* may help to enhance the public confidence over the application of Islamic legal system in Malaysia.

Based on an analysis made to the existing legislations relating to conversion to Islam and *hibah* in Malaysia, this study found that matters pertaining to *Muallafs* and *hibah* have been allocated in the state provisions although there are some differences found on certain matters. However, it is important to highlight that those provisions are insufficient to resolve the issue of inheritance through *hibah* instrument, involving *Muallafs* in Malaysia. In this regard, this study traced that the existing legal provisions concerning *Muallaf* in the State Enactment are silent on the issue of inheritance. The provisions provide matters relating to requirements for conversion, inter alia; duties and obligations, registration, offence of giving false information, capacity to convert to the religion of Islam. There is no provision available with regard to inheritance issues involving *Muallafs*. Similarly, *hibah* is basically mentioned in general under the various provisions from each State Enactment. It is important to highlight that those enactments have verified *hibah* to be placed under the purview of Syariah High Court. However, these provisions

do not explain further about the principles and procedures of *hibah* in Syariah Court. Moreover, these provisions are almost similar between one state to another. Due to this constraint, this study recommends for a specific statute as regards to *hibah* to be enacted in Malaysia, as the existence of an independent law concerning *hibah* could resolve cases pertaining to Islamic estate problem in Malaysia, including the issues of *Muallafs*.

## CONCLUSION AND RECOMMENDATIONS

In Malaysia, Islamic law of property is based on a mixture of the customary practice and *Syariah* principles. Islamic law provides that inheritance system or *faraidh* plays an important role in managing and distributing the donor's property upon death. *Faraidh* describes how the property will be distributed accordingly based on a specific portion as mentioned in Al-Quran. Therefore, the adherence to the *faraidh* principle is a must as *faraidh* is the basis of property distribution in Islam. However, there is some flexibility in the distribution of Muslim's assets as *hibah* is recognised as an instrument to accommodate the estate planning process. Inarguably, *hibah* could stand as an alternative method in distributing the *Muallaf's* property to the non-Muslim legal heirs as well. Therefore, it can be concluded that the awareness among public about the application of *hibah* as an alternative method in property distribution should be enhanced. This issue has to be addressed seriously to ensure that the effective application of *hibah* could be done successfully in the future by having a proper laws governing *hibah*. In fact, a proper inheritance management involving *Muallafs* plays a significant role in ensuring the harmonious family relationship between *Muallafs* and their family members. Therefore, it is hoped that the findings from this research will provide an appropriate solution for issues relating to inheritance for *Muallafs*.

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