

THE DEMISE OF HIBAH (ISLAMIC GIFTS INTER VIVOS) UNDER MALAYSIAN LAND LAW

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This article explores the apparent demise of the legal concept of hibah (Islamic law of gift inter vivos) from Malaysian land law pursuant to the recent judgment delivered by the Court of Appeal and implicitly affirmed by the Federal Court by its refusal of the notice of motion for leave to appeal.

A. INTRODUCTION

In *TM Feroze Khan & Ors v Meera Hussain TM Mohamed Mydin*², (“the *TM Feroze Khan Case*”) the Court of Appeal held that, amongst others, the Islamic law of gift was inapplicable in Malaysian land law. This decision was then implicitly approved by the Federal Court when it refused the appellant’s notice of motion for leave to appeal.

The facts were not complex. In essence, the father owned a piece of land but elected to transfer and register the land to himself as trustee for the benefit of his son i.e. the respondent. Simultaneous with this transfer, the father executed a trust deed declaring that the property was held in trust for the said son. The said transfer and the said trust deed were never revoked at any point during the lifetime of the father. Upon the demise of the father, the respondent duly applied and obtained an ex-parte vesting order from the High Court vesting the property in his own name.

The appellants, being the deceased’s children from his other marriage, took exception to the fact that the property was registered in the respondent’s name. *Inter alia*, the appellants argued that the purported gift was void under Islamic law and ought to belong to the deceased’s estate.

With those facts before it, the Court of Appeal resolved to dismiss the appellant’s appeal *inter alia* on two grounds:

“... the applicability of Islamic law is subject to the civil law which are applicable to all irrespective of whether the parties are Muslims and non-Muslims. And here there are no preserving rules of Islamic law in the applicable **land law** and the law of **trust** that govern this case.”³

AND

“... the transfer is duly registered in favour of the deceased as the trustee for the respondent. Therefore under s. 340(1) of the NLC the deceased trustee would have indefeasible title and such indefeasibility could only be defeated by any of the specified grounds under s. 340(2) thereof ... However .. the appellants have not brought themselves within s. 340(2) of the NLC, and therefore, the appellants are not entitled to the declaration that the trust deed and the transfer were null and void.”⁴

***The Non-Preservation of
Islamic Law Reasoning***

***The Doctrine of Indefeasibility
Reasoning***

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² [2006] 3 CLJ 616

³ *Ibid* at page 625 at paragraph 19.

⁴ *Ibid* at page 627 at paragraph 26.

For the purposes of brevity, this article will only deal with the first ground but it may be of interest to consider that a similar case has arose in Singapore and it was dealt with purely on the second ground.⁵

As such, dealing only with the first ground, it seems to have sounded the death knell for the Islamic concept of *hibah* (gift) in Malaysian land law.

However, with the greatest of respect, the reasoning utilized in the *TM Feroze Khan Case* is at odds with salient Articles of the Federal Constitution. This is considered accordingly.

B. LAND LAW AND TRUST LAW: FEDERAL MATTER

Land Law

Prior to 1966 (pre-National Land Code), there were *two different systems relating to land* in Peninsular Malaysia.⁶ Penang and Malacca utilised a system modelled on the English laws of property and conveyancing where privately executed deeds were the basis of title to the land. Conversely, the other nine States utilised the Torrens system of land title registration.⁷

Historical matters aside, it must also be borne in mind that the right to promulgate legislation relating to *land* resides with the State.⁸

However, *land* is one of the few subject matters within the Federal Constitution where the Federal Government can exercise 'overriding' legislative competence over the State if the following pre-conditions exist i.e.:

“... for the purpose only of ensuring uniformity of law and policy,

make laws with respect to

land tenure, the relations of landlord and tenant, registration of titles and deeds relating to land, transfer of land, mortgages, leases and charges in respect of land, easements and other rights and interests in land, compulsory acquisition of land, rating and valuation of land, and local government; ...”⁹

**1ST PRE-CONDITION :
UNIFORMITY¹⁰**

**2ND PRE-CONDITION :
SUBJECT MATTER¹¹**

Taken at face value, it seems that the preconditions were met and the National Land Code, 1965 was duly enacted.¹²

⁵ <http://lwb.lawnet.com.sg/legal/lgl/rss/supremecourt/51239.html>

⁶ This is not to say that *adat* law, Islamic law and English law does not affect land laws in Malaysia. See <http://tinyurl.com/ybtsor> at page 1.

⁷ <http://www.serd.ait.ac.th/ump/op8.pdf> at page 9.

⁸ See Article 74(2) of the Federal Constitution read together with the Ninth Schedule Second List.

⁹ See Article 76(4) of the Federal Constitution.

¹⁰ See *East Union (Malaya) Sdn. Bhd. v Government of the State of Johore & Government of Malaysia* [1981] 1 MLJ 151 at 154.

¹¹ *Ibid.*

¹² See Article 76(4) of the Federal Constitution, paragraph 4 and 5 to the Preamble in the National Land Code, 1965 and *Lim Chee Cheng & Ors v Pentadbir Tanah Daerah Seberang Prai Tengah, Bukit Mertajam* [1999] 4 MLJ 213 (CA) at 215.

Law of Trusts

Fortunately, legislative competency to enact legislation pertaining to **trust laws** are less convoluted. Clearly, the power for this particular subject matter resides with the Federal Government.¹³

C. ISLAMIC LAW OF GIFTS: STATE MATTER

Conversely, as far as *hibah* (gift) is concerned, the right to promulgate legislation resides with the State.¹⁴ In point of fact, practically ***all States in Malaysia have exercised that right and enacted legislations granting the respective Syariah High Courts the express jurisdiction to determine claims which involve hibah (gift).***¹⁵

D. JURISDICTIONAL AND LEGAL TENSION : CIVIL OR ISLAMIC

So, as in the *TM Feroze Khan Case*, if:

- a. a Muslim father resolves to gift a piece of land during his lifetime to his Muslim child in accordance with Islamic laws of *hibah* (gift); and
 - b. a dispute arises relating to whether the pre-conditions of Islamic laws of *hibah* (gift) were met;
- a 'tension' actually arises as to the appropriate forum and the appropriate law. However, by omission or design, this aspect was neither raised nor considered by the parties to the *TM Feroze Khan Case*.

Even so, it is submitted that the 'tension' (if any) must be resolved in favour of the Syariah Courts and Islamic law. This is so as:

- a. as alluded to above, *hibah* (gift) is a matter solely within the State Government's competence;¹⁶
- b. while **land laws** can be within the 'overriding' competency of the Federal Government, it is submitted that this does not extend beyond the specific subject matters listed in Article 76(4).¹⁷ In fact, ***hibah* (gift) is NOT a subject matter specifically listed in Article 76(4).**¹⁸ As such, the fact that *hibah* (gift) is not saved specifically by section 4 of the National Land Code,

¹³ See Article 74(1) read together with the Ninth Schedule List 1 Item 4(e)(i).

¹⁴ See Article 74(2) read together with the Ninth Schedule List 2 Item 1.

¹⁵ See s. 59(3)(b)(vi) Administration of Islam Enactment (Johore) 1978 [*"pemberian-pemberian semasa hidup"*], s. 9(2)(b)(vi) Syariah Court (Kedah) Enactment, 1993 [*"alang semasa hidup"*], s. 9(vi) of the Administration of Islam Enactment (Kelantan) 1982 [*"alang hayat (hibah) atau membatakannya"*], s. 49(3)(b)(vi) Administration of Islam (Malacca) Enactment 2002 [*"alang semasa hidup"*], s. 41(2)(b)(vi) Administration of Huqum Syarak (Negeri Sembilan) Enactment, 1991 [*"pemberian semasa hidup"*], s. 43(4)(b)(vii) Administration of the Religion of Islam and Pahang Malay Adat (Pahang) 1982 [*"pemberian-pemberian yang berkuatkuasa semasa hidup"*], s. 48(2)(b)(vi) Administration of Islamic Affairs Pulau Pinang, 1993 [*"alang semasa hidup"*], s. 44(2)(b)(vi) of the Administration of Islam (Perak) 1992 [*"hibah"*], s. 10(2)(b)(vi) of the Syariah Courts (Sabah) Enactment, 1992 [*"pemberian intervivos (hibah)"*], s. 10(2)(b)(vi) of the Syariah Courts (Sarawak) Ordinance, 1991 [*"pemberian semasa hidup (hibah)"*], s. 42(2)(b) Administration of Islamic Laws (Selangor) Enactment, 1989 [*"pemberian semasa hidup"*], s. 11(3)(b)(vi) Syariah Courts (Terengganu) Enactment, 2001 [*"alang semasa hidup"*] and s. 46(2)(b)(vi) Administration of Islamic Laws (Federal Territory), 1993 [*"alang semasa hidup"*]. Cf. Perlis but the implied jurisdiction arguments may be applicable to it – see s. 8(2)(ix) of the Administration of Syariah Courts (Perlis) Enactment, 1991 [*"perkara-perkara yang mana bidang kuasanya telah ditetapkan oleh mana-mana undang-undang bertulis"*] read together with the Ninth Schedule List 2 Item 1.

¹⁶ See Article 74(2) of the Federal Constitution read together with the Ninth Schedule List 2 Item 1.

¹⁷ See paragraph (B) above and in particular the Second Pre-Condition : Subject Matter.

¹⁸ See Article 76(4) of the Federal Constitution.

1965 is irrelevant as the Federal Government was never seized of any ‘overriding’ legislative competency to do so in the first place;¹⁹ and

- c. the Federal Government also lacks the competence to enact legislation on **equity and trusts** affecting *hibah* (gift) as its competency to do so in the Ninth Schedule is simultaneously removed by the subsequent sub-paragraph when the subject matter pertains to “**Islamic personal law** relating to ... **gifts** ...”;²⁰ Still, it must be fairly pointed out that “personal law” can be a troubling phrase as no proper definition is to be found in the Constitution. However, it may indicate that the scope of Islamic law of *hibah* (gifts) is only confined to non-commercial matters.

E. CONCLUSION

In the premise, it is submitted most respectfully that the observations contained in the *TM Feroze Khan Case* may not necessarily be good law.

By extension and paraphrasing Mark Twain’s oft quoted saying, the demise of Islamic law of *hibah* (gifts) in Malaysian land law may have been greatly exaggerated.

¹⁹ Cf. s. 4(2)(e) of the National Land Code, 1965 which saves the applicability of any laws for the time being in force for *wakaf* or *bait-ul-mal* and *TM Feroze Khan & Ors v Meera Hussain TM Mohamed Mydin* [2006] 3 CLJ616 at 625 paragraph 19.

²⁰ See Article 74(1) of the Federal Constitution read together with the Ninth Schedule List I Item 4(e)(i) and particularly (ii).