

**EXPLORING ISSUES AND CHALLENGES TO REGISTER *HIBAH* LAND IN THE
CONTEXT OF MALAYSIA'S LAND REGISTRATION SYSTEM**

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ABSTRACT

Land is one type of property that is recognised both under the civil and syariah law. Ownership of land guarantees property rights of an individual under both legal systems. However, to own a piece of land, one must follow the procedures and legal requirements prescribed under the National Land Code 1965 (Act 828) (“NLC”) which brings to the issue of the right of a recipient of *hibah* to be legally able to be registered as the land owner since different rules and conditions apply under the syariah law. To date, Malaysia has yet to enact any specific law on *hibah* and therefore *hibah* has been referred to certain provisions from several state legislations. The legality of *hibah* is founded on the syariah law and statutorily, in various legislations. This research endeavors to explore issues and challenges pertaining to the registration of *hibah* land according to the current land registration system. This study employs doctrinal legal analysis by examining primary and secondary sources of both civil and syariah law. A comparative study from both legal systems will be undertaken to analyse legal requirements and procedures to transfer ownership of land as *hibah* in light of the provisions under the NLC. The finding demonstrates that land can be a subject matter of *hibah* and

therefore registerable in the current land registration system provided that the legal requirements are met. The conclusion of this analysis not only adds to the body of knowledge, it is also hoped that this study will be beneficial to various agencies such as the land office, religious departments, Syariah Court and other relevant stakeholders in managing property relating to land. More importantly, the findings may provide an insight that can assist the land office to draw up a guideline or manual as reference for the Registrar of Title in dealing with the application to register *hibah* land. Last but not least, the study also recommends for future research on consolidating a uniform legislation for *hibah* in Malaysia.

Keywords: *Hibah, Land, Law, Legal requirement*

MENEROKAI ISU DAN CABARAN UNTUK MENDAFTAR TANAH HIBAH DALAM KONTEXT SISTEM PENDAFTARAN TANAH MALAYSIA

ABSTRAK

Tanah adalah salah satu jenis harta yang diiktiraf di bawah undang-undang sivil dan syariah. Pemilikan tanah menjamin hak harta seseorang di bawah kedua-dua sistem undang-undang tersebut. Walau bagaimanapun, untuk memiliki sebidang tanah, seseorang perlu mengikuti prosedur dan keperluan undang-undang yang ditetapkan di bawah Kanun Tanah Negara 1965 (Akta 828) ("KTN") yang membawa kepada isu hak penerima hibah untuk didaftarkan secara sah sebagai pemilik tanah memandangkan peraturan dan syarat yang berbeza dikenakan di bawah undang-undang syariah. Sehingga kini, Malaysia masih belum menggubal sebarang undang-undang khusus mengenai hibah dan oleh itu hibah dirujuk kepada beberapa peruntukan daripada pelbagai undang-undang negeri. Kesahan hibah didasarkan kepada undang-undang syariah dan secara statutori, dalam pelbagai perundangan. Kajian ini berusaha untuk meneroka isu dan cabaran berkaitan pendaftaran tanah hibah menurut sistem pendaftaran tanah yang terpakai pada masa kini. Kajian ini menggunakan analisis undang-undang doktrinal dengan memeriksa sumber primer dan sekunder dari kedua-dua undang-undang sivil dan syariah. Kajian perbandingan daripada kedua-dua sistem undang-undang akan dijalankan untuk menganalisis keperluan dan prosedur undang-undang untuk memindahkan tanah sebagai hibah dengan mengambil kira peruntukan di bawah KTN. Penemuan menunjukkan bahawa tanah boleh menjadi objek hibah dan oleh itu boleh didaftarkan dalam sistem pendaftaran tanah dengan syarat keperluan undang-undang dipenuhi. Kesimpulan analisis ini bukan sahaja menambah kepada badan pengetahuan, tetapi diharapkan kajian ini juga akan memberi manfaat kepada pelbagai agensi seperti pejabat tanah, jabatan agama, Mahkamah Syariah dan pihak berkepentingan lain dalam menguruskan harta berkaitan tanah. Lebih penting lagi, penemuan ini mungkin memberikan pandangan yang boleh membantu pejabat tanah dalam menyediakan garis panduan atau manual sebagai rujukan untuk Pendaftar Hakmilik dalam menangani permohonan pendaftaran tanah hibah. Akhir sekali, kajian ini juga mencadangkan penyelidikan lanjut mengenai penyatuan undang-undang yang seragam untuk hibah di Malaysia.

Kata Kunci: *Hibah, Tanah, Undang-Undang, Keperluan undang-undang*

INTRODUCTION

Currently, the knowledge and awareness of *hibah* are rising. People are exposed to the concept and benefits of *hibah* and consequently driven them to give out *hibah* as part of their property management. Many types of property are given out as *hibah* and one of popular choices is house/land. However, the legality of *hibah* in Malaysia at present finds its roots in syariah law since there is yet to be a specific legislation on *hibah*.

In this regard, Islamic scholars unanimously agreed that *hibah* is permissible in Islam based on several authorities according to the primary and secondary sources of Islamic law. The relevant authorities governing *hibah* include Al-Quran, hadith and fatwa. Based on surah An-Nisa' 4:4, this verse renders an obligation to the husband to provide the wife with an obligatory bridal gift (*mahr*) upon marriage as Islam provides this right for women in marriage. However, this verse further indicates that the husband may accept and enjoy any part of the *mahr* in a situation where the wife chooses to give it away to the husband as a gift based on her free will. Another authority comes from surah Al- Baqarah 2:177, in which this verse indicates that the practice of giving charity or giving *hibah* is encouraged to be done in Islam, where Allah has classified persons who are entitled to be given the said charity. This act nurtures the spirit to love one another by taking care of their safety and welfare.

On the other hand, land is one of valuable properties a person can own. People usually invest in real property because it is a profitable sector. Other than an investment tool, land is generally kept within the family bloodline which will involve transfer from parents to their children without any valuable consideration. A study by Kamarudin and Muhammad (2017) showed that the factors of this type of transfer are attributed to 1) the roles of the parents; to show love, to help the children getting financing facility, and to avoid inheritance dispute, 2) position of the children; as a reward for taking care of the parent, low level of well-being/ wealth.

However, it must be noted that there are specific laws and legal procedures in Malaysia pertaining to the issue of granting and registering land as a subject matter of *hibah*. Land ownership, including transfer of land is governed by the NLC whereas *hibah* is based on syariah law. The NLC is a federal law, under the jurisdiction of the Parliament to control under article 76 (1) whereas *hibah* is part of the jurisdiction of syariah court which makes it under the jurisdiction of respective state in Malaysia pursuant to Item 1, List II, the Ninth Schedule of the Federal Constitution. There are specific elements as regard to the donor, donee and subject matter of *hibah* to make the gift valid whereas the NLC prescribes different conditions and legal procedures. This issue becomes more complex since there is no specific legislation that deals with *hibah* at the moment.

It is interesting to note that certain requirements have to be fulfilled in order to form a valid *hibah*. According to Al-Khatib al-Syarbini (1994) in Mughni al- Muhtāj Ila Makrifah Ma'ani Alfaz al-Manhaj, there are three main pillars in forming *hibah* contract. It consists of 'Aqid (it refers to the donor and the donee), *ṣighah* (it refers to 'aqad ijab wa qabūl), and mauhūb (it refers to the asset and property). Furthermore, Wahbah Al-Zuhayli (1997) in his book al-Fiqh al-Islami wa Adillatuh discussed about the pillars of *hibah* which include the donor, the donee, the asset and the contract ('aqad). In this regard, several researchers conducted a study on *hibah* and agreed on

the same views that there are four main pillars to validate the entire *hibah* contract (see for example Kambol, 2019; Azhar & Md. Nor, 2019; Zakaria et al., 2017; Ahmad et al., 2016; Azhar et al., 2014).

The objective of this study is to examine whether conditions to form a valid *hibah* comply with the provisions in the NLC and therefore the *hibah* land is registrable under the same Code. There are many factors to be looked into when it comes to the issue of registrability of *hibah* land since the NLC prescribes steps to be taken before any registrable dealings (including transfer of land) can be registered which include preparation of instrument of dealings and making sure that the documentations are in order and fit for registration. Therefore, this study aims at identifying issues and challenges that one might face when a *hibah* land is made and intended to be registered in the land office. Comprehension of the issues and challenges is significantly important because it will enable formulation of a standardized guideline for the Registrar of Title at the land offices as well as facilitate individuals to deal with *hibah* land when they have a better understanding of the subject matter.

LITERATURE REVIEW

The conflict between syariah and civil law jurisdiction regarding *hibah* of land has been a topic of discussion since the practice of giving out land as *hibah* is rising at present. Registrability of such land has been analysed in the context of *hibah* land due to several issues that arose. A study by Serji and Shapiee (2018) has examined the topic of *hibah* of land from parent to children to identify the issue of revocation of *hibah* and the legal conflict that arose in *hibah* of immovable property in Malaysia. The research concluded that *hibah* is part of dealings recognized by the NLC and therefore registrable on the condition that all the procedures of the NLC are fulfilled. The main issue invoked in this study relates to the right of the donor to revoke his *hibah*, in the circumstance where the donee has been registered as the new owner. Revocation of *hibah* is valid under the syariah law, but does it mean that the donee can be compelled to transfer back the property? The finding shows that the Civil Court had implicitly recognized the revocation of *hibah*. However, there is a legal conflict between Syariah Court jurisdiction and section 340 of the NLC since there are no statutory exceptions regarding *hibah* in the NLC. Therefore, the study calls for statutory provisions regarding revocation of *hibah* of immovable property under the NLC to be enacted.

It is worth noting that the above study focuses only on one specific issue; revocation. The *hibah* of land is more complex than that in this time since property management which is in compliance with the syariah is prevalent. To investigate this point, a study by Said et al (2023) on *hibah* regarding collateral property has been undertaken with the objectives of examining the views of the relevant fuqahas on the subject of collateral *hibah* and to analyze the tendency of judges in adopting the views of these fuqahas in their ruling on collateral *hibah*. The main question to be answered is whether a *hibah* land/property which has been put up as collateral for financial facilities by a banking institution is valid. The study concluded that there are views of the relevant sects that allow collateral *hibah* on the condition of obtaining consent from the collateral holder and this view has been adopted by the judges. Knowing the views of these fuqahas (that allow the concept of collateral *hibah*) and realising the inclination of the judge's decision on this issue, this finding supports the industry offering the product to be implemented according to the Islamic syariah perspective that agrees to the court's decision.

According to the latest *fatwa* from the state of Selangor, dated 12 January 2021, it provides the following;

9. Hibah on a charged property is valid if the property (mauhub) is under the protection scheme such as Mortgage Reduction Term Takaful (MRTT) and Mortgage Level Term Takaful (MLTT) or when there is a permission given by the owner of the said property.

The above fatwa indicates that *hibah* on a charged property is permissible if certain conditions are fulfilled. Another study carried out by Azhar et al. (2014) concluded that *hibah* on a charged property is valid to be made provided that there is a consent given by the real owner of the property. Moreover, Wan Kamal Mujani (2012) proposed in his research that the transfer of a charged property is possible through a written application of consent from the bank or lender (chargee), where the chargor has to state his intention to transfer the said property by way of *hibah* to the prospective donee and the chargee has the right to give approval with the condition that his right remains intact as it is in line with the requirement under the NLC. However, the absence of legislation on *hibah* has resulted in diverse court decisions and therefore an action to enact a specific law must be made.

Rashid (2013) has discussed the position of syariah law and the power of the syariah court in relation to the matters prescribed in the NLC. Section 421A of the NLC (read with section 417 of the NLC) has empowered Syariah court to give necessary order, directing the Registrar of Title or any Land Administrator to do all things necessary in relation to proceedings relating to land. In addition, the syariah court is also empowered to direct the Registrar of Title or the Land Administrator to register vesting orders by virtue of section 420 of the NLC. Syariah law is also applicable within the context of section 340 (4) (b) of the NLC in which the court in *Rosinah binti Abdul Majid dan Azmi bin Abdul Majid (as the legal representative of Pah binti Abdul) v Norsiah binti Yob dan Noraini binti Yob [1992] 2 MLJ 417* interpreted "...operation of law" to include syariah law.

It is undeniable that land is a valid subject matter of *hibah*. However, to make *hibah* land effective, such land must be registered according to the NLC, or else, it will not be effective or recognized under the land law of Malaysia. It is therefore pertinent to identify issues and challenges in registering *hibah* land so that such incumbrances can be dealt with by the relevant authorities and ultimately facilitates asset and property management of individuals in this country.

METHODOLOGY

This study endeavors to identify issues and challenges to register *hibah* land within the context of Malaysia's land registration system. In achieving the objective of this study, the content analysis will be carried out by examining the provisions in the NLC, particularly on the aspect of registration of land and matters connected therewith. In addition to that, an analysis of Islamic sources of law will also be discussed to comprehend the legality of *hibah* land as it requires an examination of legislation relating to *hibah* in Malaysia. This approach is significant to clarify the current and existing legal provisions in regard to *hibah* from the various legislations as a specific

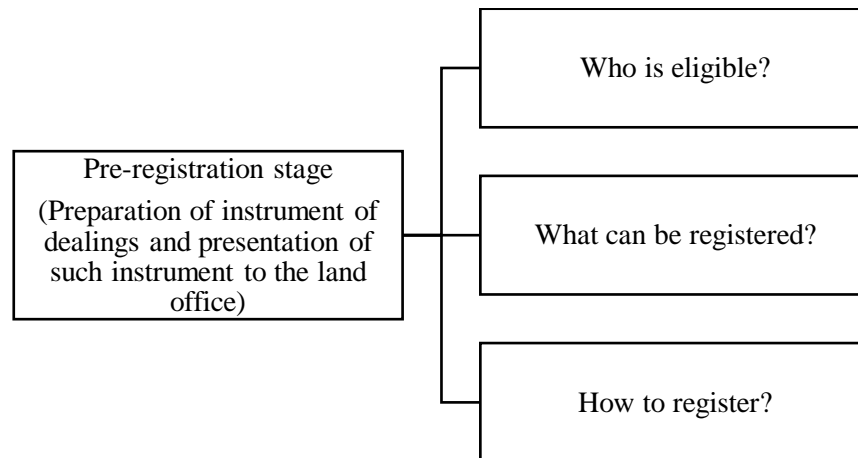
hibah law is yet to be enacted in Malaysia. Lastly, this study also adopted library based-research where the data were collected from primary and secondary sources. The primary data collection sources include Al-Quran, *hadith*, constitution, fatwa, law cases and statutory provisions. Meanwhile, secondary data collection sources include journal articles, newspapers, textbooks and seminar papers which were also referred to. Comparison between the requirements under the NLC and the validity of *hibah* under the syariah law will be discussed to point out any problem that may arise if there is any conflict between the two sets of law.

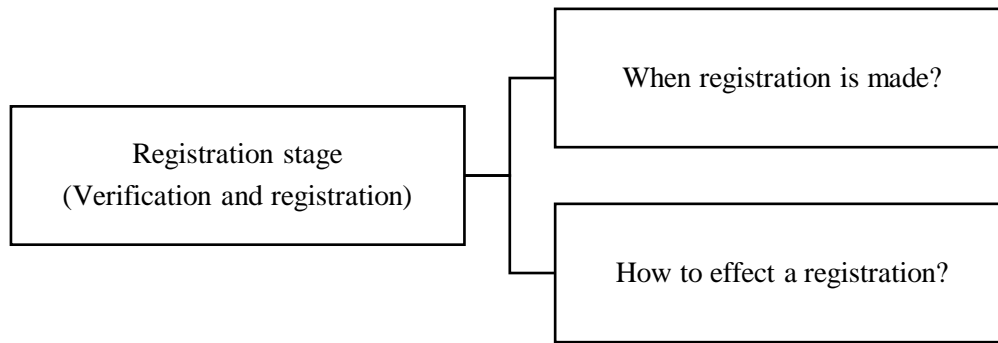
RESULTS & DISCUSSIONS

Based on an analysis made to the existing legislations relating to land and *hibah* law, this study found that matters pertaining to land and *hibah* have been allocated in the various statutes namely; NLC, Federal Constitution, Administration of Islamic Law Enactments etc. As for *hibah*, the main reference referred by Syariah Courts' judges in deciding *hibah* matters in Syariah Court is the Administration of Islamic Law Enactments from each state. As such, it is understood that the provisions in regard to *hibah* land from the abovementioned statutes are restrictive in scope as it does not cover matters pertaining to *hibah* land in detail. This is to show that there is a lacuna in the abovementioned laws where both the substantive and procedural part of executing *hibah* land in Malaysia is unclear and insufficient. In this regard, this study traced that land is only transferable as a subject matter of *hibah* if it fulfills all requirements under the NLC.

The discussion will focus on the pre-registration stage until the registration of the *hibah* land is made as described in Figure 1 below.

Figure 1: Registration process for transfer of land





Based on Figure 1, the process of registration starts with preparation of instrument of dealings. Here, it is important to identify parties (in case of *hibah* land, donor and donee), types of dealing (to identify necessary Form or instrument needed) and related matters before such instruments can be presented to the land office for registration as prescribed under section 292 of the NLC. Meanwhile, at the land office, upon receipt of the instrument of dealings, a verification process is undertaken. According to section 297 of the NLC, when the instrument of dealing is fit for registration, the Registrar of Title or the Land Administrator will register it in the manner prescribed by the NLC.

Indefeasibility of title is proven by registration of title as stated in section 340 (1) of the NLC. This is a trite law regarding land ownership in Malaysia which is modeled after the Torrens system. A transfer of title or ownership is completed once the name of the transferee is registered in the register document of title and an issue document of title (“IDT”) is given to the proprietor. Once that happens, the mirror and curtain principles are applied. Everything that is stated in the IDT is guaranteed by the mirror principle, including the name of the owner of the title and no one else can claim such land. In other words, the IDT is the reflection of ownership and such other things that relate to the title for instance, tenure, restriction in interest, and location. The curtain principle prevents any need to investigate the history of the title; the IDT is the evidence of itself. Hence, registration is everything.

Since registration is the cardinal principle in land law, any title of *hibah* land is only transferred after it is registered. Before registration can take place, the NLC sets up several requirements and procedures that will be examined below, together with issues and challenges that may arise out of such requirements and procedures.

a. Pre-registration stage

Who is eligible?

According to section 205 (2), read together with section 43 of the NLC, natural persons other than minors are eligible to receive land. Artificial persons such as corporations, governments, organizations and bodies empowered to hold land under any written law are also qualified to receive transfer of land. In this regard, a minor lacks legal capacity to enter into a contract and thus is not entitled to hold land in his own name as decided in the case *Tan Hee Juan v Teh Boon Keat*

[1934] MLJ 96. However, a trustee or guardian can be named to hold and manage the land on behalf of the minor. This position is similar to that syariah law on *hibah* (except for the discussion on legal age/ *aqil baligh* may differ from Islamic perspective and civil law). Therefore, *hibah* land can be made to any person who has attained the age of majority and there is no prohibition under the NLC and the syariah law as to the matter of religion or even relationship between the donor and donee.

What can be registered?

Only four dealings are recognized and capable of being registered under the NLC: transfer, lease, charge and easement. This is outlined in section 205 (1) of the NLC. According to Abd. Latip (2023), disposal of land by way of *hibah* can be categorized as a transfer of land, and therefore registrable under the NLC. In this regard, Form 14A has to be filled up and presented to the land office for registration (section 215 of the NLC).

It must be noted that any land to be transferred is subject to any prohibition or limitation imposed by the NLC or any other written law, restriction in interest and in relation to lease, charge or tenancy, the provisions thereof (refer to section 214 (2) of the NLC. In addition to that, section 215 (2) and (3) of the NLC will be applicable where the transferee (and in the case of *hibah*, the donee) will get the benefit of any registered interest as well as all matters that are stated in the register document of title, including any lease, charge, tenancy, conditions and restriction in interest. Therefore, it is important that the donee be aware of these particulars so that the transfer of *hibah* land can be completed with ease.

Apart from that, Form 14A requires the party to disclose consideration for the transfer (monetary, non-monetary or no consideration). *Hibah* normally does not involve any consideration. While it is allowed for a transfer to be made without consideration, it is normally a transfer between family members. Referring to section 26 (a) of the Contract Act 1950;

An agreement made without consideration is void, unless-- it is in writing and registered

*(a) it is expressed in writing and registered under the law (if any) for the time being in force for the registration of such documents, **and is made on account of natural love and affection between parties standing in a near relation to each other;***

Hibah can be made to whomever, including those who has no blood ties. As a gift, *hibah* is indeed given without any consideration. In this situation, it is a legal requirement for a contractual dealing under the Contract Act 1950 and also applicable under the NLC that consideration must be adequate, with an exception that the contract is made on the basis of natural love and affection between parties who have close relation to each other. Therefore, it might be an issue which may complicates the registration of *hibah* land since it may not be allowed to give *hibah* land for no consideration, unless an order of court validate such transfer.

How to register?

The parties (donor and donee) have to execute Form 14A by signing or affixing their thumbprints. The execution must be attested in accordance with section 211 of the NLC. Then, to register a transfer of *hibah* land, Form 14A (has to be accompanied by the prescribed registration fee) has to be presented to the land office, either by lodging it or by dispatching it. Form 14A also must be submitted with a single original duly stamped in accordance with the provisions of the Stamp Act 1949 (Act 378). If the land is subject to a lease, sublease or charge, there must be a certified true copy of the duplicate thereof.

Referring to Circular by the Office of the Director General of Lands and Mines Johor bill 12/2019 “The execution of *hibah* orders and the charging of registration fee for transfer of ownership based on *hibah* orders (*Perlaksanaan Perintah Hibah Dan Pengenaan Fee Pendaftaran Pindahmilik Berdasarkan Perintah Hibah*)” (“Circular 12/2019”), item 3.9 states that for an application to register a *hibah* land, payment for registration fees for transfers of ownership based on grant orders are calculated based on current land values as set out in the Johor Land Rules (Amendment) (No. 1) 2004 in the "Schedule 6 Table V of the Office Fees", as well as registration fee for *Hibah* Order is set at the rate RM60.00 must be made. It must be noted that this circular is enforced only in the state of Johor and therefore there is no specific guidelines for other states in relation to registration fee.

From the abovementioned discussion, at the pre-registration stage, in preparation of Form 14A together with relevant documentation, payment of stamp duty for *hibah* land, the application to register such dealing may be presented to the land office. However, it is more desirable if there is a clearer provision on the issue of consideration for *hibah* in the NLC.

b. Registration stage

When registration is made?

Once the instrument for transfer has been received by the Registrar, it will be recorded in the ‘Presentation Book’ pursuant to section 295 of the NLC. Then, the Registrar will determine whether the instrument is fit for registration or not in accordance with Chapter Three, Part Eighteen of the NLC. In this regard, the Registrar has the power to hold an enquiry; to produce any evidence, oral or documentary, as he may think necessary. If the Registrar determine that the instrument is fit for registration, then he shall register the instrument in the manner prescribed under section 304 of the NLC. Section 340 (1) of the NLC emphasizes that the registration made by the Registrar confers indefeasibility of title. From the abovementioned discussion, at the registration stage, *hibah* land is registrable.

However, there may be an issue of revocation of *hibah* as discussed in previous study by Serji and Shapiee (2018). Even though there has been a ruling by the court that *hibah* land may be cancelled, it is recommended 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 land.

How to effect a registration?

Registration is made in accordance with section 304 of the NLC by making a memorial on the register document of title, and on the instrument itself, completing it under his hand and seal. On this note, another important aspect that should be highlighted is the fact that the registration takes effect on the date and time endorsed by the memorial made by the Registrar. This is set out in section 304 (3) and (4) of the NLC. A donor of *hibah* may set a condition that the *hibah* becomes effective after his death. However, for *hibah* land, the title can only be passed to the donee after it has been registered in the donee's name. If Form 14A has been executed and the donor (or donee) dies before registration takes place, section 292 (4) of the NLC enables the instrument to be presented for registration as if the death does not occur. However, if the intention of the donor is passed the title only after his death, registration of *hibah* land can be made through transmission where Part Twenty-two of the NLC applies. This method is complicated since it will involve appointment of personal representative/s through the grant of probate or letters of administration and distribution order. In addition, disputes by beneficiaries are also possible that may affect the registration process.

This finding is in lined with circular 12/2019 where item 3.1 proposes for a transfer through Form 14A is made when the donor is still alive. Item 3.8 on the other hand provides for the event of death of the donor, a court order must be presented for registration of *hibah* land can be made by the Registrar of Title.

CONCLUSION & RECOMMENDATIONS

It is crucial to understand that this research considers land to be categorized as a valid subject matter of *hibah* based on the requirements and pillars of *hibah* as mentioned earlier. However, the previous studies have shown that the existing statutory provisions, civil and Islamic, adopted in Malaysia are insufficient in managing the issue of transferring land as *hibah* such as consideration, revocation, status of land itself (if there are any charges, restriction in interest or caveat). In response to this problem, it is worth noting here that the awareness in regards to the importance of estate planning is crucial for an efficient and educated property management.

The fact that a specific law on *hibah* pertaining to the transfer of land is silent in this country demonstrates that there is a crucial need for a significant and proactive move to facilitate registration of *hibah* land and a codified *hibah* law to be introduced in administering a transfer of land through *hibah*, in order to cater the needs of Malaysian Muslims in distributing their property since *hibah* is recognized as an instrument to facilitate estate planning processes. This initiative is necessary as a smooth administration of *hibah* land leads to better administration of property in the future. Apart from that, similar initiative is required to be done as the absence of a specific law governing the issue of *hibah* law affects the economic growth and will cause harm to the country and society.

In light of the abovementioned gaps, this study has identified several issues that may arise in relation to registration of *hibah* land. Recognizing these issues will help to avoid misunderstanding and unexpected disputes involving Muslims' properties to happen in the future. Hence, it is hoped that findings of this study will benefit the society and assist the land office to draw up a guideline

or manual as reference for the policymaker and the Registrar of Title in dealing with the application to register *hibah* land. With only the state of Johor has introduced a circular on registering *hibah* land, this effort should be expended to other states as well. This paper also recommends that further research to be done on consolidating a uniform legislation for *hibah* in Malaysia.

AUTHOR CONTRIBUTIONS

First Author: Conceptualization, Abstract, Methodology, Writing- Original Draft Preparation; Second Author: Introduction, Writing- Original Draft Preparation; Third Author: Conceptualization, Validation, Supervision, Reviewing and Editing; Fourth Author: Conceptualization, Validation, Supervision, Reviewing and Editing.

CONFLICTS OF INTEREST

The manuscript has not been published elsewhere and is not being considered by other journals. All authors have approved the review, agree with its submission and declare no conflict of interest on the manuscript.

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