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UNEQUAL INTERVIVOS WITHIN THE ISLAMIC CONTEXT

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Abstract

Intergenerational transfer is commonly discussed from economic, psychological and sociological perspectives. This type of transfer includes two main aspects which are transfers by bequest and inter vivos. The main issue that is debated within economic contexts is the wealth transfer motives from parents to children, which are altruism and exchange motives. Altruism motive indicates that parents are individuals who have wealth that need to be transferred to their children. Parents with good economic resources feel easier to transfer their wealth to children. While, exchange motive which is children can inspire their parents to transfer the wealth by offering them services and care. However, Islam underlines that inter vivos to the children must be equal to avoid disputes among other children. Hence, this study aims to identify whether inter vivos motives are in line to the Islamic requirement or otherwise. It is a qualitative research which employs document analysis method to compare the Western and Islamic theories regarding to the transfers. This study indicates that although most of the Muslim jurists (*Hanafi, Hanbali, Maliki and Syafie*) permit but reprehend *hibah* for some children. However, *hibah* is permissible in order to assist their children as supported by *Ibn Qudamah* and *Ibn Taymiyah*.

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Keywords: Hibah, inter vivos, intergenerational transfers, altruism, exchange.



1. Introduction

Intergenerational transfers from parents to children are essential economic phenomenon by determining the persistence of inequality among children and the capability of individuals and families to smooth consumption (McGarry, 2016). Transfers from parents to children could be in financial assistance, time and health care (Alessie, Angelini, & Pasini, 2014; Fu, 2018; Ho, 2015). Intergenerational financial transfers embody supporting resources to rise household wealth. Through intergenerational transfers, parents will support their children such as to get onto the real estate properties by helping to make down payment (Lee, Myers, Painter, Thunell, & Zissimopoulos, 2018; Mathä, Porpiglia, & Ziegelmeyer, 2015; Wu & Li, 2014) or to induce higher human capital development (Benton & Keister, 2017; Haider & McGarry, 2018; Ihuri, Kamada, & Sato, 2016; Zhu, Whalley, & Zhao, 2014).

Parents will transfer their wealth by bequest and inter vivos (Hochguertel & Ohlsson, 2009; Liu, Lu, & Feng, 2017; Nordblom & Ohlsson, 2011; Son & Son, 2018). Bequest is a transfer of wealth to another person after the death of owner (Markowski-Lindsay, Catanzaro, Milman, & Kittredge, 2016). However, main interest in this study is inter vivos instead of bequest due to some constraints of bequest in Shariah (Islamic law) which only permit 1/3 from total wealth and can be transfers for non-legal heirs (Kamarudin & Abdullah, 2016; Md Azmi & Mohammad, 2015).

Previous study indicated that parental income has a significant effect towards giving (Alessie et al., 2014; Alma'amun, Kamarudin, & Asutay, 2016; Brandt & Deindl, 2013; DeBoer & Hoang, 2017; Keister, Benton, & Moody, 2019). It is a major economic resources as parents have less wealth constraints and the ability to provide support to their children. For instance, parents who have large amount pensions, own the house and higher savings will offer assistance to their children (Jiang, Li, & Feldman, 2015; Olivera, 2017).

Parents also care to look at their children's economic resources. Transfers from parents aim to support the children (Wu & Li, 2014). Children with higher education are less expected to get transfers from parents (Albertini & Radl, 2012; Kalmijn, 2013). Parents are more possible to transfer their wealth to poor economic conditions and low income children (Jiang et al., 2015; Keister et al., 2019; McGarry, 2016; Olivera, 2017; Taniguchi & Kaufman, 2017; Witvorapong, 2015). As a result, parents support will increase the economic level, quality of life and wealth distribution among children (Fan, 2016; Mathä et al., 2015). The children employment status should also be taken into account as employment status is related to the economic resources. Children who are still jobless or studying are more probable to get transfers (Alma'amun et al., 2016; Jiang et al., 2015). Sudden transfers from parents will also help the children who lose their income or are laid off from their jobs (McGarry, 2016). The purpose of transfer is to assist the children to seek a new job. For children who are still studying with no fixed income, support from their parents will ease their financial burden.

Parents also more likely to support their unmarried children, living alone or divorced (Andaluz, Marcén, & Molina, 2016; Jiang et al., 2015; McGarry, 2016). Nevertheless, if a child has a large family with many grandchildren, parents tend to provide financial assistance and care (Fu, 2019; Ho, 2015; Olivera, 2017; Witvorapong, 2015). Support from parents will assist in terms of household expenditure and stabilizing their family (Mohamad, Alavi, Mohamad, & Aun, 2016). Parents transfer their wealth to children who do not have their own house which will help them to purchase a house (Jiang et al., 2015;

Mathä et al., 2015). Parental economic strength and children economic weakness indicate the existence of altruism motive.

Previous study also indicated services from children as the main indicator for parents to transfer their wealth. Parents 'pay' to their children as the services rendered (Fu, 2019; Jiménez-Martín & Prieto, 2015; Nivakoski, 2018; Park, 2014). There is also the possibility that parents transfer their wealth to encourage their children to take care of them in the future. Therefore, child who provide service and care to their parents is more likely to obtain transfers compared to their siblings (Kamarudin & Nor Muhamad, 2018). Services by these children are usually upon the old age of parents in the form of formal or informal care, instrumental and financial support (Polenick et al., 2016; Taniguchi & Kaufman, 2017; Yukutake, Iwata, & Idee, 2015). Responding to these services is in line with the exchange motive.

2. Problem Statement

Both motives will lead to unequal transfers which only some children will receive the wealth and the others are excluded. In Islam, inter vivos is similar to *hibah* within the concept of transferring wealth during lifetime. However, *hibah* puts some constraint as the gift must be in line with the Shariah concepts which emphasize justice elements and avoid disputes among children (Abdul Rashid & Ahmad, 2013; Ibrahim, 2017; Othman, Mohamed Said, Muda, & Nor Muhamad, 2017). It is based on the *Hadith* of Prophet Muhammad (p.b.u.h) who ordered that *hibah* to children must be given equally and not be given to certain or preferred children only.

3. Research Questions

1. What are Major Muslim School opinions on unequal inter vivos?
2. What are Traditional Muslim Jurists' opinions on unequal inter vivos?
3. What are Contemporary Muslim Jurists' opinion on unequal inter vivos?

4. Purpose of the Study

This study aims to examine the views of Muslim scholars regarding to whether unequal inter vivos is in line with Islam or vice versa. Muslim scholars in this study are classified into three categories which are Major Muslim School, Traditional Muslim Jurists and Contemporary Muslim Jurists.

5. Research Methods

This study applies qualitative approach by using literature and court case analysis. In order to evaluate Muslim scholars' views on transfer motives, this study focuses on current research which analyze Muslim scholars' opinion toward unequal transfers or preferential inter vivos. The literature review analysis is conducted to find information from various research articles (Bernardo, Simon, Tarí, & Molina-Azorín, 2015) and the first step in the theory development process (Yawar & Seuring, 2017). To gain the relevant articles, this study focuses on literature from online database through Google Scholar and university library system (Ogoursova, Souza Silva, Archambault, & Lamontagne, 2017). This study indicates two articles which are written by Awang and Abd Rahman, (2014), Ibrahim, (2017) and one book by Nor Muhamad, (2011). For court case analysis, this study finds one court case that argue unequal

inter vivos which is Muhammad bin Awang and Ors v Awang bin Deraman and Ors [2001]2 JH 165. Court case analysis is applied to demonstrate the practice of unequal inter vivos particularly in Shariah Court.

6. Findings

Generally, Islamic inter vivos or *hibah* aims to transfer the wealth for affectionate purposes among Muslims and assist those who are in need (Md Razak et al., 2015). *Hukm* for *hibah* is recommended (*mandub*) (Awang & Abd Rahman, 2014; Ibrahim, 2017). However, *hibah* from parents to children need to be scrutinized as parents must transfer their wealth without contradicting *Syarak* and justice. Awang & Abd Rahman, (2014), Ibrahim, (2017) and Nor Muhamad, (2011) outline traditional Muslim scholars' opinions towards unequal *hibah* or preferential *hibah* as in Table 01, Table02, Table03, Table04, Table 05, Table 06 and Table 07.

Table 01. Major Muslims School Opinions on Unequal *Hibah*

Major Muslim School	Hanafi	Maliki	Hanbali	Syafie
Ibrahim, (2017)	Unequal <i>hibah</i> – Reprehensible, legally permissible and valid	Unequal <i>hibah</i> - Permissible when parents transfer a little amount of property to some children..	Unequal <i>hibah</i> - Permissible when parents transfer a little amount of property to some children. Unequal <i>hibah</i> is prohibited if leads to injustice.	Unequal <i>hibah</i> – Reprehensible, legally permissible and valid
Awang & Abd Rahman, (2014)	Unequal <i>hibah</i> - Permissible if the donor is healthy.	Unequal <i>hibah</i> – Prohibited if the donor gives all the wealth.	Unequal <i>hibah</i> - Prohibited. Unequal <i>hibah</i> - Permissible when the children have a particular needs	Unequal <i>hibah</i> - Valid transaction of the parents favor a specific child over the others
Nor Muhamad, (2011)	Equal <i>hibah</i> - <i>Mandub</i> (Commendable). Unequal <i>hibah</i> – Reprehensible, legally permissible and valid	Equal <i>hibah</i> - <i>Mandub</i> (Commendable). Unequal <i>hibah</i> - Valid but reprehensible	Unequal <i>hibah</i> - Permissible when the children have a particular needs	Equal <i>hibah</i> - <i>Mandub</i> (Commendable). Unequal <i>hibah</i> – Reprehensible, legally permissible and valid

Table 02. Traditional Muslim Jurists' Opinion on Unequal *Hibah* (Hanafi Jurists)

Traditional Muslim Jurists (Hanafi Jurists)	Al-Kasani	Abu Yusuf	Muhammad Al-Shaybani	Ibn Nujaym	Al-Haskafi
Ibrahim, (2017)	When a father transfers their wealth, nobody can stop it.	Children who are excluded could be either learned and uneducated,	Children who are excluded could be either learned and uneducated, well-	Sinful to give unequal <i>hibah</i> although it is legally	Sinful to give unequal <i>hibah</i> although it is

		well-behaved or misbehaved This type of hibah is unjust	behaved or misbehaved This type of hibah is unjust	permissible and valid.	legally permissible and valid.
Awang & Abd Rahman, (2014)					
Nor Muhamad, (2011)		Unequal <i>hibah</i> - Permissible if the objective of that <i>hibah</i> will not harm their children			

Table 03. Traditional Muslim Jurists' Opinion on Unequal *Hibah* (Maliki Jurists)

Traditional Muslim Jurists (Maliki Jurists)	<i>Al-Qarafi</i>	<i>Qadi Abd Al-Wahab</i>	<i>Ibnu Rushd</i>	<i>Ibn Juzayr</i>
Ibrahim, (2017)	Unequal <i>hibah</i> - Parents give all or most of his wealth is permissible but reprehensible.	Unequal <i>hibah</i> - Parents give all or most of his wealth is permissible but reprehensible.	Unequal <i>hibah</i> - Parents give all or most of his wealth is invalid	Unequal <i>hibah</i> - Parents give all or most of his wealth is invalid
Awang & Abd Rahman, (2014)				
Nor Muhamad, (2011)				

Table 04. Traditional Muslim Jurists' Opinion on Unequal *Hibah* (Hanbali Jurists)

Traditional Muslim Jurists (Hanbali Jurists)	<i>Ibn Al-Najjar</i>	<i>Ibn Qudamah</i>	<i>Ibn Taymiyyah</i>	<i>Hisham Qablan</i>
Ibrahim, (2017)	Unequal <i>hibah</i> - Permissible when other children give the permission.	Unequal <i>hibah</i> - Permissible if children are in need: 1. Chronic illness 2. Large family to support 3. Pursuing studies 4. Excluded children are misbehaved	Unequal <i>hibah</i> - Permissible if the children are pious but poor and in greater need of material support.	
Awang & Abd Rahman, (2014)		Unequal <i>hibah</i> - Permissible if children are in need: 1. Large family to support 2. Pursuing studies 3. Younger <i>Hibah</i> to some children is permissible if the children have a large family, younger and still studying.		Unequal <i>hibah</i> - Permissible if children are in need such as chronic illness
Nor Muhamad, (2011)				

Table 05. Traditional Muslim Jurists' Opinion on Unequal *Hibah* (Syafie Jurists)

Traditional Muslim Jurists (Syafie Jurists)	<i>Al-Shirbini</i>	<i>Ibnu Hibban</i>	<i>Ibn Hajar Al-Asqalani</i>
Ibrahim, (2017)	For disobedient or misbehaved children, the exclusion is not reprehensible.	Unequal <i>hibah</i> - Lead to injustice is prohibited	Unequal <i>hibah</i> - Lead to injustice is prohibited
Awang & Abd Rahman, (2014)			
Nor Muhamad, (2011)			

Table 06. Contemporary Muslim Jurists' Opinion on Unequal *Hibah* (1)

Contemporary Muslim Jurists (1)	<i>Al-Sayid Sabiq</i>	<i>Abd Al-Karim Zaydan</i>	<i>Al-Saad</i>	<i>Inas Abbas</i>
Ibrahim, (2017)	Unequal <i>hibah</i> - Permissible when other children give the permission.	Unequal <i>hibah</i> - Permissible when other children give the permission. Unequal <i>hibah</i> - Permissible if children are in need: 1. Chronic illness 2. Large family to support 3. Pursuing studies 4. Excluded children are misbehaved. Agree with <i>Ibn Qudamah</i>	Unequal <i>hibah</i> - Permissible when other children give the permission. Unequal <i>hibah</i> - Permissible if children are in need: 1. Chronic illness 2. Large family to support 3. Pursuing studies 4. Excluded children are misbehaved. Agree with <i>Ibn Qudamah</i>	Unequal <i>hibah</i> - Permissible when other children give the permission
Awang & Abd Rahman, (2014)		Unequal <i>hibah</i> - Prohibited		
Nor Muhamad, (2011)	Unequal <i>hibah</i> - Prohibited	Unequal <i>hibah</i> - Prohibited		

Table 07. Contemporary Muslim Jurists' Opinion on Unequal *Hibah* (2)

Contemporary Muslim Jurists(2)	<i>Salih Al-Fawzan</i>	<i>Abd Allah Ibn Abd Al-Rahman</i>	<i>Ali Bassam</i>	<i>Wahbah Zuhayli</i>	<i>Al-Hafnawi</i>	<i>Faizan Mustafa</i>
Ibrahim, (2017)						
Awang & Abd Rahman, (2014)	Unequal <i>hibah</i> - Prohibited	Unequal <i>hibah</i> - Prohibited	Unequal <i>hibah</i> - Prohibited	Unequal <i>hibah</i> - Prohibited		
Nor Muhamad, (2011)					Unequal <i>hibah</i> - Prohibited	Unequal <i>hibah</i> - Prohibited

This study indicates that *Hanafi* school opined that unequal *hibah* is valid but reprehensible. Giving *hibah* equally among children is commendable (*mandub*) not compulsory (*wajib*). Hanafi jurists, *Ibn Nujaym* and *Al-Haskafi* stated that this type of *hibah* is sinful even though it is valid. *Abu Yusuf* and

Al-Shaybani viewed that unequal *hibah* will lead to injustice. For addition, *Abu Yusuf* asserted that the objective of unequal *hibah* is permissible if the aim of this *hibah* will not harm their children.

Maliki school approved unequal *hibah* when the parents only transfer a little amount of their property which would not cause dispute among siblings. They also viewed that equal *hibah* is commendable. *Al-Qarafi* and *Qadi Abd Al-Wahab* opined that if parents give all or most of their wealth, it is permissible but reprehensible but *Ibnu Rushd* and *Ibn Juzayr* contended that this *hibah* is invalid.

Hanbali school also agree with *Maliki* school that unequal *hibah* is permissible only for a little amount of property. However, it is permissible only when the children have a particular need, for instance disabled children, children with large family, poor children and children who are still studying. This opinions also supported by *Ibn Qudamah*, *Ibn Taymiyah* and *Hisham Qablan* (*Maliki* jurists). *Ibn Al-Najjar* (*Maliki* jurists) viewed that unequal *hibah* is permissible when the other children approve it.

Meanwhile, *Syafie* school asserted that unequal *hibah* is valid but reprehensible similar to *Hanafi* school's opinion. *Ibnu Hibban* and *Ibn Hajar Al-Asqalani* detailed that unequal *hibah* which lead to injustice is totally prohibited. However, *Al-Shirbini* opined that the exclusion of children who are disobedient or misbehaved are not reprehensible.

Nonetheless, according to contemporary jurists, *Al-Sayid Sabiq*, *Salih Al-Fawzan*, *Abd Allah Ibn Abd Al-Rahman*, *Ali Bassam*, *Wahbah Zuhayli* and *Abd Al-Karim Zaydan*, unequal *hibah* is prohibited. While later jurists, *Abd Al-Karim Zaydan* and *Al-Saad* argued that unequal *hibah* is permissible if the children are in need as suggested by *Ibn Qudamah* such as the children have chronic illness, large family to support and pursuing studies, while misbehaved are excluded. *Al-Sayid Sabiq* and *Inas Abbas* asserted that unequal *hibah* is permissible when other children give the permission.

The different opinions among Muslim Scholars are based *hadith* narrated by *Nu'man bin Bashir* which means:

“I heard Nu‘mān ibn Bashīr on the pulpit saying: My father [Bashīr] gave me a gift . . . The Messenger asked: Have you given [the like of it] to every one of your sons? He [Bashīr] replied in the negative. The Prophet said: ‘Be afraid of Allah and be just to your children’. My father then returned and took back his gift.”

In Malaysia, court cases regarding to unequal *hibah* is valid and legal (Nor Muhamad, 2011). In case Muhammad bin Awang and Ors v Awang bin Deraman and Ors, *Al-Marhum* (late) Awang bin Deraman (first defendant) had handed over two lot of lands to his two daughters (second and third defendants). However, the plaintiff argued that the *hibah* is unfair because the plaintiff is the eldest children. Plaintiff argument was based on *Surah Al-Maidah*, verse 8 and *hadith* narrated by *Nu'man bin Bashir*. The court decided that equal *hibah* is commendable and not compulsory. Therefore, *hibah* revocation (main dispute in this case) was not accepted (Nor Muhamad, 2011). The decision made by the court was contradictory with *Hanafi*, *Maliki* and *Syafie* school opinions.

Altruisme motives which indicate parents transfers wealth to their children based on children's economic condition is in line with *Hanbali* jurists' opinion (*Ibn Qudamah* and *Ibn Taymiyah*). The children who are in need such as having a large family to support, suffering health problem and pursuing studies must be assisted by the parents to keep them survived. Meanwhile, exchange motives which indicate parents transfer their wealth as payment for the services and care that are provided by their children is not supported by any jurists. This study opined that exchange motives is allowed as an

encouragement for children to take care their parents in the future. This will also control their children's in order to avoid negative attitudes and behaviors.

7. Conclusion

Parents play a vital role in ensuring children's economic conditions improved. This support shows altruistic attitude among parents. By the same token, parents can transfer wealth to their children who have supported and cared about their well-being and health or encourage them take care of parents in the future. However, Islam emphasizes fairness in *hibah* giving. This study indicates that although most of the Muslim jurists reject *hibah* for some children, *hibah* is permissible in order to assist their children as supported by *Ibn Qudamah* and *Ibn Taymiyah*.

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