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The Concept of Law of Gift Inter Vivos Under Islamic Law and the Contracts Act, 1950

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Abstract: Hibah or gift inter vivos is a way of distribution of the estates of a Muslim during his lifetime and have been implemented since, the existence of Islam. Notwithstanding its popularity, this long established instrument which is practised in Malaysia will not be able to provide a satisfactory and viable alternative to overcome problems if it receives a double standard treatment as compared to the civil system. The significant difference between the two is that Islamic law of hibah is a unique contract but is obviously denied the status of a contract under the civil law, particularly the Malaysian law of contracts. Following the above facts, the study seeks to compare the differences between the two concepts of gift, one which is under the Malaysian Contracts Act, 1950 and the other is hibah under Islamic law. In addition, this study will also seek to examine the problems that could arise if hibah is not recognized as a valid contract under the law of contracts.

Key words: Gift inter vivos, contracts act, hibah Islamic law of succession, standard treatment, Malaysia

INTRODUCTION

Estate management of a deceased property is a critical matter but the failure of heirs to settle the matter and the weaknesses of the administrative system have caused injustice (Poterba, 2001). As a general rule, estate distribution can be made during the lifetime or after death (Page, 2003, 2004). During lifetime, estate can be distributed through will (wasiat), endownment (wakaf) and gift (hibah) while after death, the only method of estate distribution is through sucession (faraid). For testamentary disposition using wills (wasiat) within the limit of one-third, a testator is allowed to devolve his property among his heirs as well as to strangers to the extent of one-third (1/3) of his estate. But there is no limitation if the distribution of property is made during the deceased lifetime through gift inter vivos (hibah) (Ibrahim, 1989).

Definition of gift inter vivos (hibah): Hibah is the immediate and unqualified transfer of the property during the donor's lifetime without any return. Article 833 of Mejelle, hibah gives the ownership of property to another without a reward. As a contract which transfers property voluntarily without any return, hibah is different from a general contract of sale.

In hibah, the donor makes proposal (offer) to transfer the property to the beneficiary and in return, the beneficiary accepts the proposal. There is no consideration. In the case of Ibrahim bin Haji Abu Bakar lwn Mohd Sah bin Mohd Ali and Ors, the Syariah High Court clarified the meaning of hibah by referring to the book of Minhaj al-Talibin by Imam al-Nawawi, Vol. 3 at page 254 which means a transfer of something to others without any payments through a proposal (an offer) and acceptance. For instance, when a father says to his son, I give this (something) to my son and thus the son owns that by possession. The other definition of hibah can also be seen in the case of Awang bin A. Rahman v. Shamsuddin bin Awang and Ors Vol. 8, Bil. 1, Januari 2000 where hibah is defined as a transfer of a thing which is subject to the sale contract or subject to the debt to

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another person/persons without any consideration. In short as said by Syed Sheh Barakbah J in Itam and Anor v. Zain (1961) MLJ 54, the word hibah in Malay simply means a gift without consideration.

Elements of hibah: There are 3 elements of hibah which is conjunctive in nature thus, the hibah is not complete if any of the conditions is not complete. First, a declaration/manifestation of the wish to give up the property on the part of the donor. Declaration/ manifestation does not simply mean an announcement of the gift but it also entails that the donor should have a real intention of making gift. Second, the express or implied acceptance of the gift by the beneficiary, expressly or impliedly, i.e., by conduct.

But no acceptance is required when a father or guardian makes a gift to his son or ward. Third, actual possession of the subject matter of the gift by the beneficiary either actually or constructively Tengku Jaafar lwn State of Pahang (1987) 2 MLJ 74, Mustak Ahmed Dato' Hj Abdul Rahim Gulam Rasool Shaikh v. Abdul Wahid Dato' Hj Abdul Rahim Gulam Rasool Shaik and Ors (2004) CLJ 132-146. Mohammad Abdul Ghani v. Fakhr Jahan Begam (1922) 49 IA 195, 209 and Amjad Khan v. Ashraf Khan (1929) 56 IA 213, 219 which dealt with the validity of gift under Muslim law. When the donor makes a declaration of a gift and the beneficiary accepts then the possession of the gift should also be given to the beneficiary. The delivery of possession may be actual or constructive, it does not mean that the donor must have physical possession of the property but suffice if he is given legal possession Kairum Bi v. Mariam Bi, AIR 1960 Mad 447. In certain circumstances, delivery of possession is not necessary at all:

- Donor and beneficiary reside in the same house; in such a case, the donor can complete the gift without the physical transfer of possession
- Husband to wife where a married couple lives in a house which belongs to the husband, the husband may make a gift of the house to the wife without physical delivery of possession
- Father to child or mother to son or guardian to ward; no transfer of possession is necessary where a father or mother makes a gift of immovable property to their minor child. The same is the rule between guardian and ward. But if a gift is made to a minor by a person other than the father or guardian delivery of possession to the father or guardian is necessary
- Gift to beneficiary in possession where the subject matter of the gift is already in the possession of the beneficiary, the gift is complete by declaration and acceptance without formal delivery of possession

Revocation of hibah: All voluntarily transactions are revocable as a voluntary act, gifts may also be revoked. There is however, a difference in the case of complete and incomplete gifts, i.e., gifts are complete after delivery of possession but considered as incomplete prior to delivery of possession.

Before delivery: A gift may be revoked by the donor at any time before delivery of possession. The reason is that the gift is no gift before delivery of possession and hence, the rules relating to gifts do not apply over it.

After delivery: When a gift is made and the subject matter of the gift is duly transferred to the possession of the beneficiary, its revocation is only possible by the intervention of the court of law or by the consent of the beneficiary a mere declaration on the part of the donor is not enough. When consideration has been given for a thing sent as a gift, the receipt of it by the donor is an impediment to revocation. Therefore, when a thing has been given to the donor as a consideration for his gift either by the beneficiary or some other person if the donor has received it he cannot revoke gift. In Eshah Abdul Rahman v Azuhar Ismail (2004) CLJ (Sya) 421, the Plaintiff had his piece of land transferred to the defendant his adopted son. After filled up Form 14A of the National Land Code effecting the transfer, the Plaintiff changed his mind demanding that the land be returned. By then, the defendant had developed the land and had constructed several buildings thereon.

The issue was whether the transfer here in constituted a hibah and if so whether the Plaintiff could demand from the defendant for its return. It was held that the transfer here represented a duly constituted hibah given that the plaintiff and the defendant had complied with all the conditions of hibah. As regards to the issue of revocation of the said hibah, the court opined that when a value which is inseparable from the subject matter of hibah was added there to as for instance when a building was constructed by the beneficiary on the hibah land, the donor could no longer retract the gift and demand for its return. The rules on the revocation of hibah are stated in the Mejelle:

- If the beneficiary has put the thing given out of his ownership by sale or by gift and delivery, the right to revoke the gift does not continue
- If the thing given has been destroyed in the hands of the beneficiary there is no place for revocation
- The death of the donor or beneficiary is an impediment to revocation. Therefore on the death of the beneficiary, the donor cannot revoke the gift and on the death of the donor his heir cannot demand the return of the thing given

Hibah on the death-bed (Marz-ul-Maut): Gifts made on the death-bed are subjected to certain constraints (Bin Lembut, 2003). It is stated in the Majelle that:

> Marz-ul-maut (mortal sickness) is the kind of sickness such that in the condition of the sick person there has generally been fear of death for him and the sick person being unable to attend to his business if he is a man, his business outside the house if she is a woman, her business inside the house has died before a year passed on account of his condition whether the person has been confined to his death-bed or not. And if when the illness of a sick person is prolonged 1 year passes while he is always in one state, unless the illness of the sick person gets worse and his state is changed he is like a man who is well and his transactions are like transactions of a man who is well. But if his illness gets worse and his state changes and he dies before a year passes his state until he dies, calculating from the time of change is mortal sickness

In this respect, the Minhaj-et-Talibin (Translated by EC Howard, Lahore by the great Imam Nawawi) refers to the doctrine of Marz-ul-Maut as:

> A person who becomes so ill as to be in danger of death may no longer dispose of his property for nothing to a greater amount than one-third but should he against all hope recover these dispositions cannot be invalidated. A sick person not in any danger may freely dispose of his property and even if he unexpectedly dies during this sickness, his dispositions have all the same their full legal effect. This is not the case where the death is caused by the malady in question even though, the latter may not be regarded as of a dangerous nature for then it is manifested to be really dangerous. In case of uncertainty as to character of the malady it should be ascertained by two doctors, free men irreproachable in character

Thus, a gift made by a person suffering from Marz-ul-Maut takes effect in respect of one-third of his estate when made in favour of heirs but it is altogether inoperative unless it is assented to by other heirs Ameer Ali, Mohammedan Law, Vol. 1, Calcutta, 1912. The case of Mustak Ahmed Dato Hj Abdul Rahim Gulam Rasool Shaikh v. Abdul Wahid Dato Hj Abdul Rahim Gulam Rasool Shaik and Ors (2004) CLJ 132-146. In Mustak Ahmed Dato Hj Abdul Rahim Gulam Rasool Shaikh v. Abdul Wahid Dato Hj Abdul Rahim Gulam Rasool Shaik and Ors (2004) CLJ 132-146., the respondents had filed an action in the High Court, Kota Bharu, seeking an order to invalidate the transfer of shares in the Kelantan Match Factory Ltd. by the late Dato Haji Abdul Rahim bin Gulam Rasool Shaikh to the four appellants.

The respondents argued that the deceased was fully aware that his health was deteriorating and he was suffering from one or more incurable disease including cancer, fully aware that death would ensue as a result (Buang, 1993). The respondents alleged that the transfers were null and void according to the doctrine of Marz-ul-Maut (death-sickness). The court held that the gift by transfer of shares of the Match Factory to the four appellants was not subjected to the doctrine of Marz-ul-Mau. The learned judge opined that the deceased despite knowing about his illness did not believe that his death was imminent and the said hibah was therefore valid under the Syariah law (Bustami *et al*., 2005).

Hibah in Malaysia: Hibah has long been practised in Malaysia, formerly recorded in the 1950's (in the case of Kiah lwn Som, 1953 19 MLJ 82). It was practised by Muslim Malays particularly those with blood relations as in the case of father and son as can be seen in Tengku Jaafar lwn State of Pahang (1987, 2 MLJ 74) and Muhammad Awang and Ors v. Awang Deraman 7 Ors (2004 CLJ (Sya), p. 139) between husband and wife in Roberts lwn Ummi Kalthom; (1966, 1 MLJ 163). Wan Mahmud bin Wan Abdul Rahman and 3 Ors v. Aminah binti Hj. Taib 72 Ors (JH Dis 2004, XVIII/II Bhg II, p. 331) and Harun bin Muda and Ors v Mandak binti Mamat and Ors (JH Jun 1999, Jld XII, Bhg 1, p. 63) and also between a grandmother or grandfather and their granddaughter and grandson (in the case of Kiah lwn Som (1953) 19 MLJ 82; and Ibrahim bin Haji Abu Bakar v. Mohd She bin Mohd Ali and Abdul Razak bin Mohamad, JH Dis 2003, Jld XVI, Bhg II, p.189).

However, the concept of hibah is not only limited to those who have a blood relationship but covers very wide interpretation to include also those who have no blood ties. In the case of Eshah Abdul Rahman v. Azuhar Ismail (2004, CLJ (Sya) 421); Salmiah binti Che Hat v. Zakaria bin Hashim (JH 2001, Jld 14, Bhg 1 and 2, p. 79) Poolimahee Rajeswary @ Fatimah Binti Baba v. Meah Binti Hussein, (JH Feb 2005, XIX/I, Bhg 1, p. 164); Nang Lijah Bte Megat Stan (8 Kanun (3), Sep. 1996, p. 169). Hibah is seen to be practised as a mechanism to give away the property to their adopted son or daughter who are obviously not entitled to receive any property by way of distribution through faraid. It is never disputed that the applicable law for hibah in Malaysia is an Islamic law (It can be seen through the decided cases such as Tengku Haji Jaafar Ibni Almarhum Tengku Muda Ali and Anor v.

Government of Pahang (1987) CLJ 380 Latifah Bt Mat Zin lwn Rosmawati Binti Sharibun dan Roslinawati Binti Sharibun (2007) 5 MLJ 101). It is noted that hibah is among the matters of the state list included in item 1 of the 9th schedule to the Federal Constitution. So far, it should be obvious that the matters of hibah are matters within the judicial jurisdiction of Syariah Courts. However, it appears that the issue of conflict of jurisdictions was viewed in several cases of hibah such as, in the case of Jumaaton and Anor v Raja Hizaruddin (1998, 6 MLJ 556) and Latifah Bt Mat Zin v. Rosmawati Binti Sharibun and Roslinawati Binti Sharibun (2007, 5 MLJ 101).

In Jumaaton and Anor v. Raja Hizaruddin, the Syariah Court of appeal held that Syariah Court had no jurisdiction in hibah case which coupled with the issue of a probate and administration matter. That is because probate and administration are matters in the Federal list and no exception was made in respect of Muslims (Ibrahim, 1989). Therefore, the law applicable is the Probate and Administration Act, 1959 which is within the jurisdiction of the Civil High Court.

Once again, the issue of conflict of jurisdiction of the Civil and the Syariah Courts has come to the forefront in the case of Latifah Bt Mat Zin v. Rosmawati Binti Sharibun and Roslinawati Binti Sharibun. It seems that the problem has arisen and has become more serious over the last two decades, despite the amendment made in Article 121(1A) of the Federal Constitution which excludes the jurisdiction of Civil Court in Syariah matters. Courts, the Civil Courts as well as the Syariah Courts, now have had to grapple with this problem. In this case, the learned judge viewed that:

> where a question arises as to whether a specific property forms part of the assets of an estate of a deceased person who is a Muslim in a petition for a letter of administration in the Civil High Court, the answer to which depends on whether there was a gift inter vivos or not that question shall be determined in accordance with the Islamic Law of gift inter vivos or hibah. The determination of that issue and the beneficiary or beneficiaries entitled to it and in what proportion if relevant is within the jurisdiction of the Syariah Court and the Civil Court shall give effect to it in the grant of a letter of administration and subsequently in distributing the estate

Thus in this case, the court ruled that the solution available to the parties in dispute is to undergo double proceedings which involves these two courts even though, it would cause some delay and more expenses (Rashid, 1996).

Gift under Contract Act, 1950: The concept of transfer of property without any consideration is also recognized under the Malaysian Contract Act, 1950. One of the exceptions to the general rule that an agreement without consideration is void is provided in sub-section (a) to Section 26 which states that: An agreement made without consideration is void, unless; 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. The validity of this agreement is dependent upon the following conditions:

- It is express in writing which may be in any reasonable form
- It must be registered where a law exists requiring such registration
- It is made on account of natural love and affection between parties standing in near relation to each other

As regards to the second requirement since, there is no law requiring registration of agreements made on account of natural love and affection this element will not be discussed. The most important elements for the discussion are the first and third elements. Looking at the first condition, the law requires that in order to become a valid agreement under this sub-section, the agreement must be recorded in writing. Thus, the agreement which is made orally will not fall under the ambit of this sub-section. As regards to the third requirement this element creates some uncertainty as to the fact that the word near relation is not defined in the Act, Illustration (b) of S. 26 (a) only provides for the relationship of father and son in the following words: A for natural love and affection, promises to give his son, B $1,000. A puts his promise to B into writing and registers it under a law for the time being in force for the registration of such documents. This is a contract.

While members of the immediate family will ordinarily constitute near relation there will be exceptions and any extension outside that group presents some real difficulties. Personal law with respect to family matters are still applicable to various ethnic groups and consequently what constitutes near relation can vary with each group, depending on its customs and social organization (Palmer, 1951). In Re Tan Soh Sim (1951, MLJ 21), an attempt was made to define near relation. The court of appeal considered the validity of an agreement between members of a Chinese family governed by their personal

law. The principal issues were whether an agreement was made on account of natural love and affection and three sisters and seven halfsisters and brothers stood in near relationship to their adopted nephews and nieces. The court in its judgment said that relationship and near must be applied and interpreted in each case according to the mores of the group to which parties belong and with regard to the circumstances of the family concerned. While the court conceded that Chinese adopted children are related to their adoptive parents and brothers, it held that they were not nearly related to the family of their adoptive mother.

Thus, the uncles and aunties of the adoptive mother in this instance did not stand in near relation to their nephews and nieces. Thus, the learned judge expressed the principle as:

> The words relationship and near must be applied and interpreted in each case according to the mores of the group to which the parties belong and with regard to the circumstances of the family concerned

Section 26 (a) was again judicially considered in Queck Poh Guan (as administrator of the estate of Sit Kim Boo, deceased) v. Quick Awang (1998, 3 MLJ 388). In that case, the Plaintiff is the administrator of the estate of one Sit kit Boo (the deceased) while the defendant was the son of the deceased and one of the beneficiaries of the estate. The deceased was the owner of 1/3 portion of a piece of land. A few days before the deceased's death, the latter had executed a transfer of the land to the defendant who had assumed greater responsibility towards the care and well being of his deceased mother as compared to the plaintiff and the other children. Idris, J (as he then was) dismissed the plaintiff's application for declaration that the instrument of transfer was void for non-compliance with Section 26 (a) and held that the transfer of the land was a gift from the deceased mother to the defendant on account of natural love and affection based on the relationship of mother and son and is thus valid.

The issue of whether the elements of natural love and affection existed as a matter of fact between the Plaintiff and the defendant was again raised in the case of Chock Yook Kwai @ Chock Yook Sze v. Chock Yook Choong and Ors (2001, MLJU 644). In this case, it involved a transfer of property made by uncle to nephews. The Plaintiff avers that the transfer of the Plaintiff's respective shares in the said property are void for want of consideration as the uncle-nephew relationship does not constitute a valid consideration on account of love and affection. The judge said:

> The expression natural love and affection has not been defined in Section 26 (a) supra and so, the ordinary popular dictionary meaning applies. In ordinary parlance, natural in the context of natural love and affection in my view means inborn, spontaneous happening in the usual course related by actual birth (not adoption). The word love is denoted by fondness an affection of the mind caused by that which delights, strong liking. The word affection denotes an act of influencing, emotion disposition love or attachment

In giving his judgment, the learned judge continued on saying that:

> On the facts before me and the law, I am unable to conclude that the plaintiff was transferring the said property as gifts to the 2 and 3rd defendants as the element of natural love and affection has never been established by the defendants generally or the 2 and 3rd defendants specifically. As adumbrated above, the attachment or feeling between the plaintiff and his nephews viz. the 2 and 3rd defendants. I therefore, hold that Section 26 (a) of the Contracts Act, 1950 does not apply to the facts of this case nor to persons standing in the position of uncle and nephews

Thus, in interpreting the words parties standing in a near relation as though they mean near relatives some of the judges are of the opinion that the meaning of the words should not be narrowed down where there are many instances in which persons who are not relatives or relations within the meaning of the law, nevertheless stand in a near relation to one another. But some other judges took a different approach and opted to apply a very narrow interpretation.

Differences between the concept of hibah under the Islamic law and an agreement on account of natural love and affection under the Contracts Act, 1950: There are certain differences between the concept of hibah under the Islamic law and an agreement on account of natural love and affection under the Contracts Act, 1950. Sub-section (a) to Section 26 of the Contract Act, only recognized the agreement without consideration when it is made in writing whereas the principle law in hibah does not put the condition that the gift must be made in written form. Thus, hibah can be made in any form so long that the three conditions as set out in the law are fulfilled (the elements in the case of Tengku Jaafar lwn state of Pahang (1987) 2 MLJ 74, Mustak Ahmed Dato Hj Abdul Rahim Gulam Rasool Shaikh v. Abdul Wahid Dato Hj Abdul

Rahim Gulam Rasool Shaik and Ors (2004, CLJ 132-146). The other restriction put in the sub-section (a) of the Section 26 is that the agreement must be made between parties standing in near relation to each other. This requirement creates some difficulties as regards to the interpretation of the meaning near relation as can be seen in some decided cases thus, resulting in uncertainty as to the scope of the section. While in hibah, it does not in any manner restrict the application of this rule so as to widen the scope of hibah to enable the donor to dispose his property to whom so ever he likes.

Is hibah a contract? Natural love and affection are not recognized as valid consideration under English law but Malaysian Contracts Act, 1950 (which is the replica of an Indian Contracts Act) provides that the agreement based on natural love and affection is a valid contract. However, in hibah where the element of consideration is absent similar to the agreement in Section 26 (a), the court refused to accept it as a contract. In Zaleha Bte Ariffin (As Legal Representative of Ibrahim Bin Arifin, Deceased (Administrator of the Estate of Jah Bte Hamzah, Deceased) v. Salmah Bte Md Zain (2001, 6 MLJ 234), the issue whether or not there was undue influence exerted by the defendant on the deceased was irrelevant. The learned judge viewed that as the transfer of the lots to the defendant was by way of hibah, the transfer was a gift inter vivos and was not contractual in nature. Section 16 of the Contracts Act, 1950 applies only to contractual relations and therefore did not apply to such a gift. As the lots were registered in the defendant's name, the principle of indefeasibility of title as provided under Section 340 (1) of the National Land Code, 1965 protected her proprietory right over the lots. By reason of Section 340 (2) of the NLC in law, it made no difference even if there was undue influence (Kamariah, 2004).

The implication of the judgement in the previous case resulted in difficulty, particularly when the donor of the hibah wishes to exercise their right to terminate the gift based on the lack of consent as stated in Section 14 of the Contracts Act. Thus, hibah cannot be terminated on the ground of fraud misrepresentation, undue influence, coercion and mistake. As compared to the agreement on account of natural love and affection under Section 26 (a) of the Contracts Act, 1950 in Hooi Cheng Kwong and Anor v. Paul Hooi (1981, 2 MLJ 306), this action was to set aside gifts on the ground that they were obtained by undue influence. The Plaintiff claimed a declaration that she was induced to make over certain shares to the defendant by his undue influence that the transfer of the said shares was null and void and that she was entitled to a retransfer and delivery of the said shares. In Chock Yook Kwai @ Chock Yook Sze v. Chock Yook Choong and Ors (2001, MLJU 644) amongst the issues decided by Shah Alam High Court was to invalidate the agreement made based on natural love and affection on the ground of fraud. Even though in both cases the Plaintiffs' claims were dismissed because the alleged undue influence and fraud were without any evidence in support yet, the courts recognized the agreement as a contract and allows the ground of undue influence and fraud under the Contracts Act to be applied.

The refusal of the court to recognize hibah as a contract also will lead to some injustice to the donor (as in the case of Zaleha) who wishes to set aside the transfer of a land on the ground of undue influence under Section 340 (2) of the National Land Code, 1965 (NLC) because this section does not provide an undue influence as an exception to the principle of indefeasibility of title. Section, 340 of the National Land Code provides registration to confer indefeasibility of title or interest, except in certain circumstances:

- The title or interest of any person or body for the time being registered as proprietor of any land or in whose name any lease, charge or easement is for the time being registered shall subject to the following provisions of this section be indefeasible
- The title or interest of any such person or body shall not be indefeasible: In any case of fraud or misrepresentation to which a person or body or any agent of person or body was a party or privy

Therefore in order to avoid such injustice because of different treatments given by law as regards to hibah and an agreement on account of natural love and affection, the decision made in Zaleha's case should be over-ruled. This is because the law of gift or hibah should be regarded as a part of the law of contracts following elements as prescribed for hibah by Muslim law which are offer (ijab) acceptance (qabul) and possession (qabd). Furthermore, the Muslim jurists have themselves acknowledged in their definitions, hibah as a part of the law of contracts. In the Mejelle, hibah is discussed in Chapter 1 of the said book and it defines hibah as the contract of gift. Ahmad Hidayat Buang defines hibah as a gratuitous contract without a consideration.

Thus, it is necessary for the court to define hibah as a valid and enforceable contract. There is no reason why hibah should not be regarded as a valid contract since, an agreement on natural love and affection under Section 26 (a) can be regarded as so even though, this agreement also lacks the consideration element.

Furthermore, Stamp Duty Act, 1949 treats hibah as a gift inter vivos similar as to an agreement on account of natural love and affection through the terms voluntary inter vivos and gives the same treatment in the course of the duty charged.

CONCLUSION

Hibah should be treated equally as an agreement based on natural love and affection under the Law of Contract, since both of them constitute a legal contract of gift, respectively one for the Muslims and the latter for non-Muslims. By recognizing hibah as a valid contract, the donor may enjoy the same protection in the Law of Contracts and Land law in Malaysia.

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