

Takharuj as an Effective Solution to the Inheritance Problems of Muslims

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Abstract: This study discusses takharuj in the Islamic inheritance law in Malaysia. The lack of awareness and comprehensive understanding of the said law could open the door to more serious problems concerning inheritance distribution in the event of a death. The law must also be wisely and pragmatically implemented, so that, the spirit behind its canonisation can be attained. Hence, this study was carried out with the objective of analysing the concept of takharuj and its justification as one of the effective solution mechanisms concerning the problems of Islamic inheritance distribution cases among Muslims in Malaysia. This qualitative study is based on primary and secondary sources, employing the methods of document analysis and interviews. This study found that takharuj is made permissible by the Shari'ah and found to be an effective mechanism in solving problematic inheritance cases. Takharuj is capable of handling legal constraints which forbid certain parties from getting their share of inheritance and restrict uneconomical estate distribution via. Fara'id and thus takharuj can avoid delay in matters of prolonged inheritance distribution due to heir's attitude. Therefore, takharuj in fact provides a relief to the heirs to distribute the inheritance in the best manner in accordance with the Shari'ah and the law.

Key words: Takharuj Islamic, inheritance law, inheritance, society, Malaysia, distribution

INTRODUCTION

The essence of Shari'ah as stipulated by Allah is to fulfil matters of general interests, worldly and in the hereafter. This is because Allah as the creator who creates, shapes and fortifies Shari'ah principles is all-knowing of the needs and desires of man's nature as compared to any philosophers, thinkers or social researchers who are involved in formulating social policies (Hashimi and Ali, 2007). Also, the application of Islamic inheritance law by Muslims in solving the distribution of inheritance is a qat'i (definite) matter. Nevertheless, from the perspective of its implementation, it must be wisely and pragmatically carried out, so that, the spirit or ruh behind its canonisation by Allah can be enjoyed to the fullest, especially in fostering the silaturrahim bond among the beneficiaries (Hifazatullah *et al.*, 2011).

The ever-increasing Muslim population in Malaysia can lead to more serious problems in dealing with

inheritance in the event of death, should there be no complete awareness and understanding on the Islamic inheritance law. This situation has been testified by none other than a Minister in the Prime Minister's Department, Datuk Seri Mohd. Nazri Aziz who stated that in 2007, a value of deferred inheritance properties of about RM38 billion in was from among the Malay estates (Anonymous, 2007). Then in 2009, this value almost reached RM42 billions (Anonymous, 2009). Up to date, there are about 500,000 heirs of frozen assets among the Muslim community in Malaysia who have yet to claim or solve their inheritance cases (Bakar, 2010). In light of this, this study was carried out with the objective of analysing the concept of takharuj and its justification as an effective solution mechanism to the Muslim problems of inheritance distribution cases in Malaysia.

In this regard, the best approach which needs to be applied before an official legal application is that the heirs must first discharge their obligations required by Shari'ah procedure (Ahmad *et al.*, 2015). These obligations include

funeral expenses, discharge of the deceased's debts outstanding, division of matrimonial property, fulfilling bequest in a will (if any) before distribution of the inheritance to the rightful heirs. According to Ralip (2013), matters such as mortgages, sell and purchase claims, caveats on land interests and others also need to be discharged prior to distribution of estate or inheritance. This is also occurred in the context of astrofiqh and cosmofiqh studies in Malaysia that required appropriate procedure as well (Safiai *et al.*, 2014, 2016; Ibrahim *et al.*, 2015).

Hence, the alternative solution for this predicament is the application of takharuj mechanism which comes in a multitude of shapes and schemes whereby the solution is still within the limits set in Fara'id. Takharuj in actual fact provides freedom to the heirs to divide the inheritance in the best manner. In fact, takharuj is part of Fara'id law itself as any refusal or withdrawal from getting the inheritance by any heir is done within the limits and measures as set by the Shari'ah (Mirwan, 2010).

A COMMENTARY ON THE DEFINITION

Takharuj means an heir takes out his portion of the inheritance to be given to other heir's through purchase and takharuj practice is done with regards to either property or debt. Terminologically, takharuj means the heirs agree (tasaluh) to exclude some of them from receiving the inheritance by accepting compensation payment taken from a tarikh or other properties. It can involve all heirs or some of them (Shalabi, 1978). Takharuj occurs when a beneficiary withdraws himself/herself from claiming the estate and forfeits his/her portion which is replaced by another property from a tarikh or another property. This is made permissible by Shari'ah as permissible as it is to surrender all his entitlements to the other beneficiaries, not taking any portion from the inheritance which is to forgo his or her rights from claiming the inheritance (Al-Sabuni, 1995).

Zuhrah and Ahmad (1923) defined takharuj as a compromise by some of the beneficiaries accepting certain valuation or payment in return for his or her withdrawal from claiming his or her right in the inheritance. This can involve all beneficiaries or some of them. The inheritors who pay the compensation shall take his portion in the inheritance. The compensation can be from the inheritance or other properties. Based on the definition proposed by the above Islamic scholars, it can be understood that takharuj is the act of an heir withdrawing himself or herself from receiving portion of the inheritance either in part or in whole by handing his portion over to another heir's either in return for certain payment or none.

Takharuj is permissible in Shariah for it is a form of sulh which is encouraged by Islam as in the words of Allah in Al-Quran, Chapter al-Nisa', Verse 128:

"There is no blame on them if they arrange an amicable settlement between themselves and such settlement is best"

In fact, there is prohibition of taking other's property except in a legitimate manner as spoken by Allah in al-Qur'an, chapter al-Nisa', Verse 29

"O you who believe, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent"

Therefore, takharuj must be carried out through a proper channel and receive approval and agreement from all beneficiaries. Takharuj is very much encouraged as it embodies the element of sulh which proves to be advantageous in handling arguments and disputes as mentioned in Al-Quran, Chapter al-Nisa', Verse 114:

"No good is there in much of their private conversation, except for those who enjoin charity or that which is right or conciliation between people. And whoever does that seeking means to the approval of Allah then, We are going to give him a great reward"

There is also a hadith of the messenger of Allah which touches on takharuj as reported by Imam al-Bayhaqi from Abu Hurayrah that The Messenger of Allah PBUH said:

"Sulh is permissible among Muslims except that in legalising what is forbidden (haram) and forbidding what is permitted (halal)"

The above Hadith shows that sulh is encouraged among Muslims. Takharuj is a form of sulh used by heirs to exclude an heir from inheritance in return for compensation. An athar concerning takharuj reported by Imam al-Bukhari from Ibn 'Abbas means (Hajar *et al.*, 1959): "Takharuj between two partners and the inheritors, one taking the goods while the other taking the debt as a solution, if payment has been made, it cannot be returned (annulled)".

Meanwhile, the evidence which is referred to by many imams of mazhab in the practice of takharuj is based on an athar which took place during the rule of 'Uthman ibn 'Affan (Al-Babarti):

On what is reported by Muhammad ibn Hasan from 'Amr ibn Dinar concerning one of the wives of 'Abd al-Rahman ibn 'Awf on whom Musalahah was carried out (with the wife's consent) who was paid 83,000 (dinar) to exclude her from the list of inheritors. The wife of 'Abd al-Rahman ibn 'Awf whose name was Tumadir was divorced by him while he was ill (before his death and at the time of 'Abd al-Rahman ibn 'Awf's death his wife was still in mourning period *eddah*). The companions disagreed on how the wife should receive the inheritance, so, they carried out *musalahah* on her. 'Abd al-Rahman ibn 'Awf had four wives and children. So, in normal distribution (following *Fara'id*) Tumadir would receive 1/4 of 1/8 portion from 32 parts of the property left by her husband, she accepted to receive half of it which was one part of the 64 parts equivalent to 83,000 (dinar) while this way of apportionment has never been outlined in Al-Quran

Ijma (consensus) of the companions who did not refute the action and decision made by 'Uthman ibn 'Affan in the case of Tumadir became *daleel ijma'* for *takharuj* which was carried out (Mansur, 2010). The contract or 'aqad of *takharuj*, meanwhile, depends upon the settlement agreed by the beneficiaries. It becomes *mubadalah* if the exchanged properties are of the same value and therefore, all involved parties must hand over the properties according to the mutually agreed value (based on the current value). According to the Hanafi school of jurisprudence if the value of the handed over property is less than that then it falls under the *hibah* category if equivalent or more than its value then it becomes a trade transaction (Mawardi, 1994). *Muawadah* in *takharuj* occurs when the waiver of inheritance right is done with a replacement from either another property from the inheritance or another property (not from the inheritance). This is so according to the view of the Shafi'i madhhab (Mawardi, 1994).

Views from the Hanafi madhhab meanwhile differ in that, if the exchanged property is from the inheritance, then the *takharuj* is either *mu'awadah* or *mubadalah* but if it is from other properties then it is a business transaction (Mansur, 2010). Furthermore, *takharuj* becomes *ibra* when an heir gives up some of his or her share of the inheritance and retains his or her right in other inheritance (Mansur, 2010). Also according to Mansur (2010), *hibah* in *takharuj* takes place when an heir relinquishes his or her entitlement without any compensation or payment

or exchange. *Takharuj* can be divided in a *muqasamah* manner should the heir who does *takharuj* without compensation impose a condition that his or her share of inheritance be divided equally to the rest of the heirs.

Takharuj is a *Muawadah* contract between beneficiaries on one side and withdrawn beneficiary (*mutakharaj*) or beneficiaries on the other. The property which is exchanged in this contract is the repayment by the heirs to the *mutakharaj* and their portion in *Tarikah* as agreed by both parties, so that, *mutakharaj* refuse his share in replacement for what he receives from other heirs. The implication of this type of contract is that the entitlement of *mutakharaj* from the inheritance is annulled regardless whether or not he or she knows the value of inheritance that he or she should own (Ahmad, 1992).

FORM AND DISTRIBUTION METHOD OF TAKHARUJ

According to Khudari (1966), there are three forms of *takharuj* normally practised, namely:

Takharuj between one heir and another: This is *takharuj* between one heir and another with the former's share becoming solely the latter's (Ahmad, 1992). For example, an heir waives his right by giving his share to another heir at a cost of RM1,000. The method of calculation of this problem: *tarikah* must be divided among all heirs. Then, the share of heir who withdraws is handed over to the paying heir. In this case the heir who withdraws has sold his portion to the paying heir. In another case, a deceased leaves behind a daughter and three sons as well 70 acres of land. The second son agrees to pay RM50,000 to his sister, so that, she withdraws herself from inheritance. The daughter's portion of the inheritance is 10 acres while each son gets 20 acres of the land. The 10 acre land of the daughter's share is given to the second son making his share increases to 30 acres.

Takharuj between an heir and other heirs: This is *takharuj* between an heir and other heirs in order for the heir to withdraw from claiming his share of inheritance with a payment of certain portion from a *tarikah* such as a house and his or her entitlement for other properties is wholly surrendered to other heirs. The house would be his solely and the remaining *tarikah* will be divided among the other heirs according to *faraid* as if the heir who withdraws does not exist (Ahmad, 1992). This is the most frequently occurring form of *takharuj*. Example: A deceased leaves behind a husband, a son and a daughter with a house and a 30 acre land. The husband agrees to

waive his portion to the children in exchange of the house being his alone. Firstly, each heir's portion needs to be determined. The husband gets 1/4 of the inheritance, the son 2/4 and the daughter 1/4. The husband is given the house and his portion is not considered in the calculation, resulting in the son getting 20 acres of land and the remainder 10 acres for the daughter (following the calculation of Asabah bi al-ghayr).

Beneficiaries agreement to pay a beneficiary with another property: Sometimes takharuj takes place when beneficiaries agree to pay a beneficiary who withdraws from claiming the inheritance with another property. The payment can be done equally among them or according to their portion of inheritance or any amount which has been agreed upon. The portion of inheritance of the beneficiary who withdraws himself or herself will be divided equally or according to Fara'id law or according to the compensation paid by each heir (Ahmad, 1992).

Annulment of takharuj: Takharuj is considered complete when a beneficiary who opts for takharuj receives his or her compensation, payment or replacement from other beneficiaries. He or she cannot withdraw himself or herself after taking the payment which he/she demands as he/she is bound by his/her contract. However, the heir who does takharuj has the right to place a condition to annul the offer of takharuj if within the stipulated period the other heir's fail to pay the agreed amount or any other conditions deemed necessary. If the condition is not met, the takharuj is then automatically void. According to Zuhrah and Ahmad (1923), there are three circumstances which can annul or prevent inheritance distribution and self-withdrawal, namely.

Debt claim on the deceased's property: When a debt claim is raised towards the properties of the deceased while his properties are not sufficient to cover the debt and the heirs are neither ready nor willing to settle the debt from their own property such debt claim can cause an immediate revocation of inheritance distribution or takharuj and if necessary it can stop any dealing with the inheritance.

Will set on the deceased's property: If a will is set on the deceased's property while at the time of inheritance distribution or an heir's withdrawal the will is not known, a suspension will be imposed on property distribution or self withdrawal due to the claim of will being raised, as it may cause a change of actual portion of the inheritance each heir should get.

Existence of unknown heir: When an heir whose existence is not known up to the time of inheritance distribution or withdrawal while his or her arrival or existence may affect the apportionment of the inheritance, distribution of the properties or self withdrawal is allowed after all rightful heirs and their shares have been ascertained (Rashid and Latif, 2009).

Therefore, if one of the above occurs, takharuj is then revoked because properties given up as takharuj have become invalid as they are not absolutely owned. In fact, other's rights and shares exist in them (fuduli). Takharuj in fuduli inheritance is invalid.

JUSTIFICATION FOR THE APPLICATION OF TAKHARUJ MECHANISM IN INHERITANCE CASES IN MALAYSIA

Islamic inheritance law (Fara'id) has already provided the best solution in inheritance-related cases. Therefore, we need to look at the uniqueness of Fara'id from various dimensions and in a holistic manner (Sulong, 2007). It is clear that, apart from inheritance distribution following the procedure according to faraid calculation, takharuj is a practical alternative solution which receives less exposure with regards to its significance. This situation is caused by a deeply-rooted adherence by some in the Muslim community in Malaysia to the idea that each inheritance property should mandatorily receive physical division via a method determined by Fara'id (Buang, 2009). In fact, takharuj in Islamic inheritance law provides options for eligible heirs to choose the best solution to dividing the inheritance in the interest of the ukhuwwah bond among them. This indirectly nourishes elements of Sulh, Shura and Rida embodied in the mechanism of takharuj which are positive values in Islam (Ahmad and Laluddin, 2010).

Justification for the application of takharuj mechanism as an effective alternative tool in solving problematic inheritance cases among the Muslims in Malaysia can be analysed based on the following matters:

Uneconomical estate partitioning: Even though all beneficiaries have the right on each inheritance, dividing the properties should be done in a wise manner. This is because in certain situations the type and form as well as area of the estates need to be considered. The consequence of dividing the properties physically according to faraid can be uneconomical such as in the case of co-ownership of a small piece of land, decreasing the size of the lot and reducing the value of the property which renders it unsuitable for development. In addition, this can lead to another problem, namely

difficulty in administrative matters of the property including change of title and payment of land tax (Awang, 2008).

For example, a case in Kampung Baru, Kuala Lumpur which involved a piece of land of 371.6 m² (4,000 ft²) carried 100 names entitled for it (Anonymous, 2007). If divided equally, each heir would receive an allocation of 3.7 m² of land (40 ft²). Situations such as this cause difficulties to all involved parties and if takharuj mechanism is not used, it may result in the distribution matter being delayed.

Distribution difficulties due to statute constraints: One of the problems which complicate matters of inheritance distribution is the existence of legal constraints which obstruct some rightful heirs from claiming their shares thus failing to achieve the objective of distribution using Fara'id. This situation justifies the application of takharuj mechanism as a proactive action in solving the issue. Among the legal constraints are:

Land (Group Settlement Area) Act (1960): Restrictions written in in the (Anonymous, 1960) (Act 530) may permit a rural holding to be held by way of undivided shares by a holder and his wife, ex-wife or next-of-kin as a co-holder as provisioned in Section 14 (2) of the act. This gives an implication on the title registration as a group for other inheritors who are eligible for the land title. Furthermore, Section 15, (Anonymous, 1960) (Act 530) states that, no land comprised in a rural holding may at any time be subdivided or partitioned or leased in part or in whole thus directly affecting physical division of the land via Fara'id.

Hence, the justification for the application of takharuj mechanism can be seen in the hearing process of inheritance cases at the Unit Pembahagian Pusaka Kecil (UPPK or Small Inheritance Distribution Unit), Department of Director-General of Lands and Mines (JKPTG) in determining two inheritors who will take over the ownership of land if there are many rightful heirs. At this stage, the process of meetings and negotiations as well as sulh will take place until an agreement is reached on the two heirs who will inherit the land. The two names will then be registered in the Buku Daftar Pegangan Desa (Rural Holdings Register). If an agreement fails to be reached, a hearing can be postponed to a suitable date and the mechanism of takharuj is still applicable when all involved parties are given another chance to negotiate to reach an agreement.

Malay Reserves Enactment 1933: Restrictions within the Malay Reserves Enactment 1933, also known as the Malay Reservation Enactment (FMS Cap 142) are one of

the problems inflicting heirs who are not under the 'Malay' category as provisioned under the States' Malay reservation enactments even though they are actually the rightful beneficiaries according to the Islamic inheritance law. The mechanism of takharuj is needed to tackle this issue, so that, all rightful beneficiaries receive the justice they deserve.

The definition of the word 'Malay' in Article 160 Section 2 of the Federal Constitution is deemed to be loose as compared to the 'Malay' definition in the States' Malay reservation enactments which is more stringent. Since, it was enacted according to Article 86 Section 6 of the Federal Constitution, it is however, superseded by the definition of 'Malay' in the Malay reservation enactments of the states which must be followed. Hence, the transfer of ownership title to eligible beneficiaries who are not categorised as 'Malay' as defined in the provisions of the Malay reservation enactments of states cannot be realised, even though they are the rightful owners according to the Islamic inheritance law, thus, denying them justice.

In tackling this issue, the mechanism of takharuj is viewed as capable of playing its role to assist in bringing back justice to side-lined parties. The impact from the implementation of this law provision serves as a hikmah to the canonisation of the Islamic inheritance law which proves to be a blessing to all mankind.

Double payment for registration: In this context, should the heirs decide to divide the inheritance according to faraid calculation, they have to go through the payment process twice. The first payment is imposed right after the order of small estate distribution at the small estate distribution section and the second fee is for transfer of ownership and entitlement in particular for the ascertained heirs (Ahmad, 1992). This proves to be a burden to all inheritors involved. The situation is different if the heirs agreed on deciding the case based on the mechanism of takharuj because there is only one fee to be charged which is imposed after receiving the order of small estate distribution at the small estate distribution section. They can then proceed to register their names and entitlement as decided by takharuj through the order at the lands and mines office without any charge. Hence, the above explanation highlights the justification for solving inheritance cases via takharuj to the rightful inheritors involved as it gives benefit to them in terms of reduction of cost borne by them and saving of time in handling the affair.

Delays in resolving inheritance issues due to heir's conduct: Problems linked with poor conduct of heirs such as disputes and rows among the inheritors who are not

satisfied with the value and location of estates divided according to Fara'id, complicate and make matters of resolving inheritance division difficult and this indirectly causes the occurrence of delay in resolving the cases (Said, 1987) apart from the lack of awareness on inheritance administration and eligible heirs being unaware of the existence of the inheritance property (Aziz, 2007). Indirectly, this predicament contributes to an increase in unclaimed real estate due to delays or unresolved cases (Aziz, 2007) which reached 42 billion Malaysian Ringgit until 2009 alone (Anonymous, 2009). This phenomenon is caused by inheritance issues which could not be resolved due to family disputes.

Therefore, heir's tendency to apply the mechanism of takharuj is high in solving inheritance disputes particularly for real estate to avoid delays in solving the matter which in turn can implicate cost and time to all parties involved. This was proven to be true in some states where the percentage of those who chose to apply takharuj was higher than that of those who chose the solution by Fara'id calculation. For example in Pahang some 73.6% used the mechanism of takharuj (Osman, 2001) while in Terengganu, 53.7% of respondents chose takharuj as opposed to other solutions (Najmiah *et al.*, 2013). Saifuldin and Hassan (2010) concluded in his research that the majority of munasakhat cases in the district of Kuala Terengganu were resolved by takharuj.

CONCLUSION

Takharuj mechanism which has already been readied within the Islamic inheritance legal framework is an alternative way to solving problems of inheritance cases. It is part of the Islamic inheritance law by which any self-withdrawal from claiming inheritance or surrendering of inheritance portion must be done within the limits and according to the proportion as stipulated by the law. Based on the principle of Sulh, Rida and compromise among the heirs, takharuj is a practical and most effective method as it gives the heirs opportunity to opt for the best solution for inheritance distribution in the interest of involved parties and for the sake of protecting their rights, thus serving justice to them all. Hence, inherited properties can be benefited from and utilised to their maximum.

In Malaysia, the justification for applying the mechanism of takharuj as an effective solution to problems in inheritance distribution lies in cases related to problems of uneconomical physical division of real estates, difficulties in allocation due to existing statute restrictions, double payment for matters concerning registration and delays in resolving inheritance disputes

due to negative attitudes of eligible heirs. Therefore, should the takharuj mechanism be successfully realised by the responsible institutions which manage and administer affairs related to Muslims inherited properties in Malaysia such as the Small Estates Unit, the Department of Director General of Lands and Mines, the amount of unclaimed Muslim real estates which currently stands at RM42 billions would be reduced.

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