

HIBAH AS AN ALTERNATIVE MECHANISM IN MUSLIMS ASSETS MANAGEMENT: A STUDY IN MELAKA TENGAH

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ABSTRACT

Hibah is a transfer of legal and beneficial ownership of the assets from the donor to the beneficiary on volunteer basis. i.e. without valuable consideration and compensation. Further, the proportion of distribution to heirs and non-heirs can be determined by the donor. Most hibah cases are decided by referring to the traditional legal opinions of Muslim scholars. No doubt these has been the practice and position to follow and adhere to the earlier rulings of the traditional scholars by the Syariah courts, however with the evolution and development of new issues and cases in hibah in either the preliminary up to the end of the legal process has contributed to difficulties of the assets distribution. Among others which often arise is that no specific law or enactment of how the hibah cases should be dealt with. Further, with lack of information regarding the procedural law on hibah in the Syariah court has brought to the difficulties in implementing and giving accurate and just decision(s) made by the court as well as the administration and the judiciary wise. This article tries to analyze and ascertain the possible legal and procedural reforms in the application of hibah with emphasis on its application in Melaka Tengah. The study is based on the relevant statutory, statistics on the registered hibah cases in Syariah Courts in Melaka Tengah and views of some authoritative persons in the area. Based on the findings, it revealed that most reported hibah cases were very minimal in which proven that most Muslims did not realized of its existence and importance although it can be the best alternative for them to manage the distribution of their assets rather opt for wasiyyah and faraidh. This discussion is not meant to say that wasiyyah and faraidh is no longer significant in muslim assets management but its practice was a bit haste with the interference from other institution(s) or parties i.e. confirmation or declaration from state land office, direct or indirect individuals involvement, management issues which contribute to the postponement and lateness resolution to the case(s) which may take years sometimes, as well as the jurisdiction of the courts to hear the case(s). Thus, the significant of this paper is to seek the best route i.e. to have a specific laws and procedural in hibah to address these issues or problems in Melaka Tengah and perhaps it could be extended and implemented to other states in Malaysia. By having a step to a step hibah procedure and clear law to it, somehow it may ease the difficulties and burden of both parties involved. Besides by enacting a specific hibah law, Muslims will be more aware of its existence and roles and opt to manage their assets by using hibah rather than involving themselves into unfortunate problems that may encounter in the future.

Keywords: Hibah, assets management, jurisdiction of Syariah Court, wassiyah, faraidh.

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INTRODUCTION

A property is a desired asset by all persons and it can be either acquired through a person's own effort or by way of inheritance. A person, acquiring a property or obtaining its possession, can sell or dispose of it in any way he likes, provided it does not go against the principles of the law and his transaction is given effect during his lifetime (Ali:1965). According to the Islamic law, the distribution of muslim's wealth or property can be basically categorized into three parts i.e. Wasiyyah-bequest or will, Faraidh-inheritance property based on determined portion as stipulated in Al Quran i.e. Surah An-Nisa':11 and Hibah-gift of property during the lifetime of the donor to the donor (gift inter vivos).

The discussion of this paper emphasises on Hibah (gift inter vivos). Hibah is an instrument in Islamic wealth planning. Hibah means giving wealth or property voluntarily to particular parties, done during the donor(s) lifetime. There is a presumption that the practice of hibah might be against the faraidh law or a will. However, this presumption is incorrect as it has been proven and considered as one of the most effective methods because the property owner is free to determine the beneficiary as well as the amount of property to be disposed off. Some don't even know of its existence. With the current development in Malaysia in muslims' property and asset management, plus with this realization and benefits, more asset and property institutions and agencies have introduced and encouraged the muslims for this method to be opted and used to avoid any prolong dispute in Syariah courts and conflict among the family when it comes to property distribution.

LEGALITY AND ESSENTIAL ELEMENTS OF HIBAH IN ISLAMIC LAW

In order to conclude a valid Hibah, the muslim scholars have agreed that certain requirements must be met and identified. They are:

i) Hibah Provider (Donor) – The donor must be a person of worthiness with a sound mind and has attained puberty (baligh). The donor must be the sole and genuine owner of the items intended for hibah. As a property owner has full authority over

his/her property, hibah can be made in unlimited rate and be given to anybody he/she pleases, including to non-Muslims, as long as the intention does not violate the Islamic law.

ii) Hibah Recipient (Donee) - A donee can be of anyone as long as he/she has the capability to own property, either accountable (mukallaf) or non-accountable. If the hibah recipient is not an accountable person such as has not reached puberty or disabled, the hibah is to be given to a guardian (wali) or a trustee on his/her behalf. The donee must receive the hibah property and has the authority to hold on to the property, i.e the ownership and control over the property must be given to the donee.

iii) Goods or property for hibah - Goods or property to be given as hibah should meet the following conditions:

- It must be lawful (halal) goods or property.
- It must be a type of goods or property which has value according to Islamic Law.
- The goods or property belong to the donor.
- The ownership is transferable.
- It must truly exist during the time of the hibah. For example, a hibah is void on non-existing goods or property such as giving an unborn calf or granting next year's paddy yield when it has yet to bear fruits, and the likes as hibah.
- The property is not connected to the donor's property which cannot be separated such as trees, plants and building excluding the land. In Islam, goods that are still in debt (like a house) can be given as hibah if consent can be obtained from the chargor or borrower.

iv) A contract of granting property ownership (from Donor) to a specific party(donee) – This is referring to hibah's pronouncement or an act which means giving and receiving of hibah. It is subject to the following conditions:

- There are continuation and similarities between ijab(offer) and qabul (acceptance).
- No specific conditions are imposed on.
- Not conditioned to a specific time period A conditioned hibah i.e. a specific time period is mentioned is void.

From the legal point of view, hibah is a practice that is favourable (sunnat) in Islamic law especially to the immediate family. This practice is based on the al-Quran, al-Sunnah and consensus of muslim traditional scholars (ijma'). Among the verses of the Al-Quran that encourage hibah are as Allah s.w.t. has said meaning:

"But if they give up willingly to you anything of it, then take it in satisfaction and ease."

(Surah An-Nisa": verse 4).

"...and gives wealth, in spite of love for it, to relatives, orphans, the needy, the traveller, those who ask [for help], and for freeing slaves."

(Surah Al-Baqarah: verse 177).

WITHDRAWAL OR REVOCATION OF HIBAH

When a completed hibah contract meets the terms and conditions, and there has been a surrender and acceptance of goods, then the property rightfully belongs to the donee even without repayment. However, whether or not the said hibah can be withdrawn has caused disagreements among the scholars as follows:

i) According to the Hanafi sect, a donor can withdraw the hibah but it is unfavourable (makruh) to withdraw a hibah that has been given away, and the person may cancel the hibah even though the hand-over has occurred, unless the hibah was made with repayment.

ii) In the opinion of Syafi'e, Hambali sects and some scholars from the Maliki sect, hibah withdrawal may occur solely with offer and acceptance. However, when accompanied with the delivery and acceptance of goods, then the hibah cannot be withdrawn unless the hibah is made by the father (including mother, grandfather, grandmother and other sources) to the children for as long as the property is not related to other people.

iii) According to Imam Ahmad and Zahiri sect, the donor are prohibited (haram) from withdrawing a hibah unless a hibah by the father (including mother, grandfather, grandmother and other sources) to his children. This is based on the Hadith of Prophet (pbuh) saying meaning:

“One who gets back his gift is like a dog which vomits and then swallows that vomit.”

(By Al-Bukhari and Muslim).

Generally, the experts agreed on the concurrence of cancellation of hibah if it is done in mutual agreement between the donor and receiver or by a judge's ruling.

Although the Islam ruling permits the revocation of hibah made by a father (including mother, grandfather, grandmother and other sources) on his children, however, it is bound by the condition that the property is still in the possession of his son (his grandson). If the property has gone beyond the jurisdiction and ownership of his son (grandson) such as it has been sold, wakaf or given as a gift to another person and the property has already been received by the hibah recipient (other people), then the hibah cannot be withdrawn

AN OVERVIEW ON THE LEGAL STATUS OF ISLAMIC LAW AND HIBAH IN MALAYSIA

According to the Federal Constitution of Malaysia, Islamic law is governed under the state law. Such is provided in the Item 1, List II of the Ninth Schedule of the Federal Constitution which states that:

“Except regarding the Federal Territory of Kuala Lumpur, Labuan and Putrajaya, the Islamic law and the self and family laws of the Muslims, including Islamic law with regards to inheriting intestate or non-intestate properties, engagement, marriage, divorce, dowry, maintenance, adoption, status of children, child custody, gift, division of property and non-charitable trusts; the endowments and definition as well as regulations of charities and charitable religious trust, the appointment of trustees and the corporation for those on the religious and charitable giving, foundations, trusts, charities and charitable foundations in operations, all in the State; Malay customs; Zakat, Fitr and Baitulmal or of similar Islamic earnings; mosque or any place of public worship for Muslims, to hold and punish offenses committed by a Muslim against the pillars of Islam, except on matters included in the Federal Register; membership, organisation and procedures for Syari'a courts, which will have jurisdiction only over Muslims and only over any item included in this paragraph, but did not have jurisdiction over offenses except as provided by the federal laws; control the development of iktikad and trust between Muslims; determine matters on Islamic laws, iktikad and the Malay customs.”

Based on the above provision above, it clearly shows that hibah is part of the state matters which are placed under the Islamic administration of every state and thus it directly falls under the jurisdiction of the Syariah Court. Consequently, Section 46 (2) (b) (v) and (vi), the Administration of Islamic Law (Melaka) Act 1993 (Act 505) provides that:

“Syariah High Court shall

(b) in its civil jurisdiction, to listen to and determine all actions and proceedings in which all parties are Muslims and are related to –

(v) a will or gift (alang) during marad-al-maut of a Muslim deceased person;

(vi) a gift during the lifetime, or settlements made without adequate compensation with money or money's worth, by a Muslim;”

From the provisions above, it is clear that Hibah takes into effect during the donor's lifetime as well as during marad al-mawt (death sickness) too. Since there is no specific hibah law enacted which means that the State Legislature and Parliament (for Melaka and other states in Malaysia) has never approved the special statute of hibah for Muslims to be implemented in the Syariah courts. The current status of Hibah cases in the Syariah Courts in Malaysia usually involves the verification of hibah, dispute on the extent or rate of hibah and withdrawal of hibah.

Thus far, all hibah cases are being heard and triad in each states of Malaysia. The cases were decided based on views and opinions of traditional muslim scholars sect (Madhab Shafei, Maliki, Hambali and Hanafi) of which is in par with the stand in Islamic law, but may create difficulties among the judges, the Syariah courts administration and relevant agencies and other state offices since there were no specific laws and procedural for them to follow to ease the process. Obviously, the only reliance are on the above and brief provisions whereby the above parties can anytime interfere and involve at any stages of hibah disputes which may lead to further difficult situation.

In the case of Eshah binti Abdullah and Five Others vs. Che Aminah binti Abdul Razak and Two Others [2004] XVIII (I) JH 47, the arising issue was whether or not the acceptance had been clearly stipulated after giving away or sufficient by other evidences to prove that there was an acceptance. In this case, the donor had died and there was no withdrawal of hibah. The hibah had also

been witnessed by other people, however the building in dispute still bore the name of the deceased. The Terengganu Syariah Appeal Court accepted the appeal made by the petitioners based on acceptance qarinah (evidence) from the receiver, whereby all three hibah receivers declared that they had received the tenancy of the disputed building even when the deceased was still alive. What is interesting in this case is the view of the Terengganu Syariah Appeal Court which stated:

“Assuming that if the gift was changed to the names of recipients, probably the case needed not be brought to court, because everything was clear and stated in the document.”

Based on the above cases and many other cases, a hibah can be challenged in a Syariah Court, regardless if it was made verbally or documented by an individual or a lawyer. However, it can only be questioned in terms of legality in accordance with Islamic law or if there is any beneficiary who disagrees with the content of the hibah after the death of the donor.

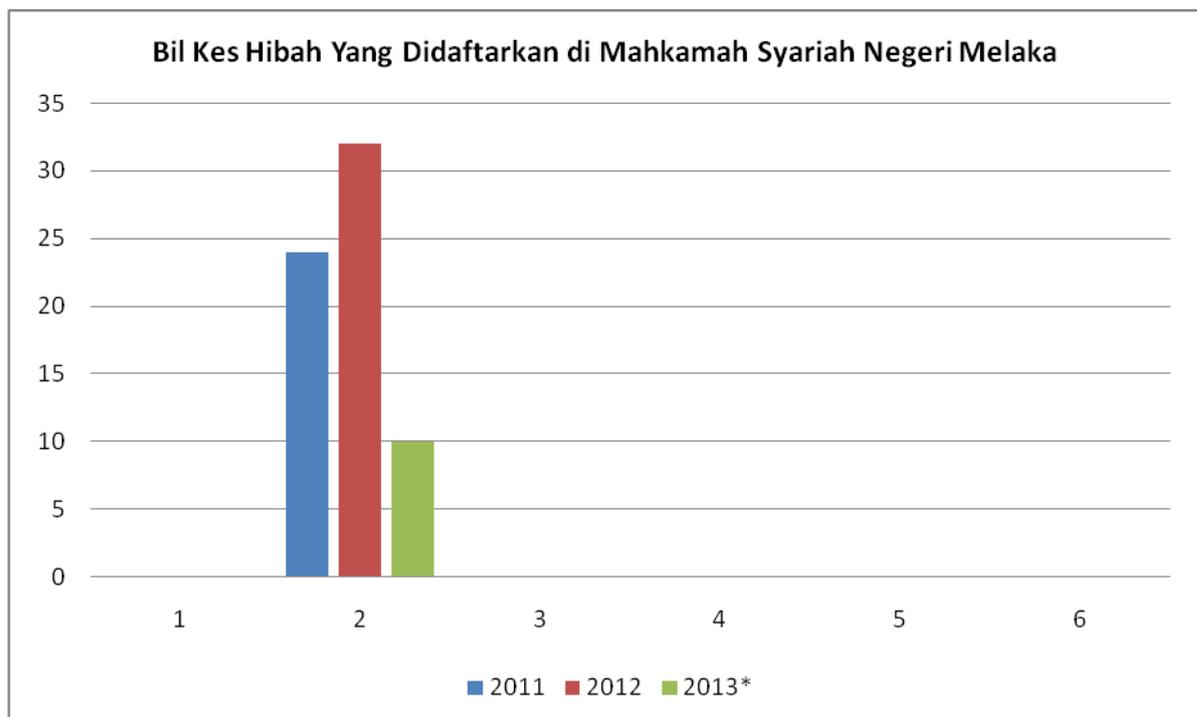
Today, various institutions and agencies are involved in documenting hibah and therefore various hibah methods have emerged from these agencies in expanding the scope of hibah such as trust hibah. Trust hibah is a cross between hibah and trust. It is a gift of property by a person on the basis of love with ijab and qabul (contract) during the lifetime of the donor. The hibah property will be held by the trustee and will be transferred to the hibah receiver after the demise of the donor or by consent from the parties concerned. Similarly, the hibah made by a donor to ensure that he still has control over his properties because of a concern that the hibah recipient may neglect him (donor) once all his properties have been transferred. In this case, the donor has made a separate agreement outside of the contract which entitles a donor to manage and use the property until his demise (Mohamad Zamro Muda: 2008:13)

APPLICATION OF HIBAH IN MELAKA TENGAH

Based on the report provided by the Syariah Court in Melaka Tengah from 2011- 4 September 2013, it was recorded in 2012 as the highest record compared to 2010 and 2013 i.e. 32 over 24 and 10 cases respectively. Whilst a report from Amanah Raya Berhad Melaka (since the opening of the agency in May 2013 until August 2013 in Melaka state), there were 11 cases (according to the officer in charge, all the 11 cases were only numbers of persons who came to their agency to collect the hibah forms and as of 5 September 2013, but none of them came back to the agency to do the proceeds). According to Puan Zainah (the Manager of Amanah Raya Berhad Melaka), hibah was a new product that was recently introduced in the agency in Melaka upon realizing that it is a best method to reduce difficulties as well as to create awareness in property distribution among the muslims in Melaka compares with will and inheritance. An alternative route in property distribution is important so that less property cases and disputes can be settled soonest possible. However, the issue on how hibah property to take its effect and to whom should it be gifted, a proper and clear law and procedure are needed so that muslims would be able to know of its existence, thus understand and opt for hibah.

Statistic on Registered Hibah cases in Syariah Court in Melaka

2011	24
2012	32
2013*	10



Statistic of Hibah Trust product in Amanah Raya Berhad Melaka from May – August 2013.

No.	Year 2013	Hibah trust
1.	May	1
2.	June	3
3.	July	1
4.	August	6
	Total	11

Based on the above reports, perhaps few considerations and suggestions can be taken into account to create awareness among the muslims on hibah product. An on-going information to the public on matters related to hibah either in both printed or electronic media is imperative. Similarly, each state needs to establish a uniform, refine and specific Hibah Act/Enactment to facilitate referencing when matters about hibah arise. This would be an important reference for the Syariah Court to decide on the validity of a hibah.

Apart from that, a clear fatwa or ruling should be issued by the National Fatwa Council as well to meet the current needs and the Islamic law requirements so it can be a clear guidance to be used and followed by the Muslims in Malaysia.

Since now that there are many agencies that manage Muslim assets be it hibah, will, and the likes, perhaps there should be a centralised monitoring and supervision to be implemented. Although the agencies already have their own Islamic law panel, a centralised monitoring and supervision is still necessary (Mohamad Zamro Muda: 2008:38).

All in all, from the discussion above, it is clear that a specific law relating to the provision of hibah and its administration is required. The existence of such specific law will be able to reduce confusion and uphold the integrity of the Syariah Court and strengthen its credibility in the community when deciding issues on hibah. In addition, it can be a guide to people who wish to practice comprehensive personal hibah and manage their wealth in a more orderly and organised manner.

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