

The Implementation of *Hibah Ruqba* in Malaysia Asset Management Planning Industry in Accordane to *Maqasid Shariah*

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To Link this Article: <http://dx.doi.org/10.6007/IJARBSS/v12-i9/14641>

DOI:10.6007/IJARBSS/v12-i9/14641

Published Date: 09 September 2022

Abstrat

Hibah ruqba is one of the asset transfer methods being pratied in agency's asset management planning in Malaysia. *Hibah ruqba* is onditional where a *hibah* (gift) to a reipient (an *aqad* person) shall be reverted to the giver (one other *aqad* person) if the reipient passes on before the giver. In the present ontext, *hibah ruqba* an be seen as a solution to resolve problems relating to asset management planning suh as trust funds joint aounts held by Muslims, and as an alternative in resolving onerous problems of estate inheritane administration these days. However, this motion falls short of approval from the relevant Malaysian authorities of its permissibility based on the opinions of the majority Sunni sets including the Shafiite, largely due to the element of *gharar* (unertainty) in oexistene. The objetive of this researh is to study the onept of *hibah ruqba* from the sholarly perspetive and *maqasid shariah*. This is a qualitative study. The method of data gathering onsisits of doument analysis both from the primary and seondary soures of *hibah ruqba*. The gathered data is analysed by using desriptive method. The result finds that the rejetion of *hibah ruqba* is largely due to the assoiated element of *gharar*, with a manifest that the passing on of the *aqad* parties is a matter of unertainty. Alas, this arrangement of *aqad* reates future onflit amongst the rightful heirs of the *aqad* parties. Hene, *hibah ruqba* is permissible if it is done in a transparent manner and fulfills the priniple of *maqasid shariah* along with onsent from both *aqad* parties (giver and reipient). *Hibah ruqba* is also seen as adhering to the needs of the Muslims based on the noble intention of *maslahah* i.e. to protet the properties of the *aqad* parties.

Keywords: Hibah Ruqba, Asset Management Planning, Gharar, Maslahah

Introduction

The industry of asset management planning for Muslims in Malaysia has been thriving with the emergence of various agencies and companies offering asset planning products such as *hibah*, wills and many others. *Hibah* is an *aqad* (contract) based on the concept of *tabarru*. The product of *hibah* was first introduced when it was seen as a solution to the shortcomings of wills and *fara'id* (inheritances). Further to this development, a recent condition imposed on certain *hibah* products namely the conditional *ruqba* as a basis in awarding a gift or as such has created dissensions among the scholars. The focus of this article is to evaluate conditional *ruqba* practiced by the relevant industry based on the scholarly views and *maqasid syariah*. The researcher has divided the discussion into various topics. It begins with a brief introduction on *hibah* as a product of asset planning and conditional *ruqba*. Detail attention is given to *hibah ruqba* with a brief analysis on the conditional *ruqba* which has now been widely practiced by the industry. This is a qualitative analysis study. The methods of data gathering consist of document analysis both from articles is based on the primary and secondary sources of *hibah ruqba* and the data analysis is by the descriptive method.

Definition of Hibah

According to al-Kasani (1997), all four imams of the Sunni sets gave more or less similar definition of *hibah* that is a giving of one's possession to another person without reciprocity. *Hibah* also means giving ownership without expecting a return like giving a present, a gift and scholarships without consideration (Ammar, 2001). There are various other similar definitions. However, the researcher is more inclined to the definition given by Imam Nawawi (1996) in *al-Majmu* that is *hibah* is a giving away of ownership of something without reciprocity voluntarily while one is still alive (Al-Nawawi, 1996). This definition clearly emphasizes the word "a giving while one is still alive". The definition gives a different meaning of *hibah* as to a will in terms of change of ownership. The change of ownership in *hibah* occurs when the donor is still living while the change of ownership in a will occurs when the testator passes on. This is also stated by Hisyam (2015) who explains that a gift without reciprocity can also mean a will. Thus, it is by requirement that the definition shall have time and date of transaction.

The main purpose of *hibah* is to foster love and affection (*mawaddah*). If one seeks for Allah's blessing and wishes to be rewarded in the after life, it is translated as one's charity (al-Majjaji, 2010). The researcher concludes that the factor that differentiates *hibah* and other deeds is intention. Besides the primary intention of fostering love and affection, today's *hibah* is with the objective to alleviate planning and distribution of assets while one is still living.

The completion of *hibah aqad* is the element of *al-wahib* (the giver of *hibah*), *al-mawhub lahu* (the recipient of *hibah*) and *al-sighah* (Al-Majjaji, 2010). This *aqad* is made to differentiate between gift and charity by the Islamic principle instruments of *tabarru* (Hassan, 2002; Hisyam, 2015). Hisyam (2015) opines on the disparity in the implementation of *sighah aqad* then and today. Today, all the declaration must be recorded and fully documented instead of verbal declaration as how it was previously practiced. To the researcher's view, this practice is none other to strengthen the present *hibah aqad* for future references and legal evidence.

Submission and Acceptance of Property (Al-Qabd)

According to the *jumhur fuqahas* of the Sunni sets of Hanafi, Shafie and Hanbali, the completion of *hibah aqad* is not absolute with only *ijab* and *qabul*. *Qabd* is required before the *hibah aqad*

an be made obligatory. Al-Kasani (1997) instane (*qias*) on *qabd* is of a person who is laden with debts; he or she must submit and make full settlement of his or her debts (*qabd*) before he or she an be free of that debts. It is likewise with *hibah*. Aording to this opinion, the exchanged vows of *ijab* and *qabul* are insuffiient to make good the exchange of ownership. As a matter of fat, the giver an still utilize the *hibah* property and an still do a *volte-fae* on his or her deision for as long as the property is still in the donor's possession. Therefore, the hange of ownership is disretionary unless until and after *qabd* is performed (Al-Bugha, 2009). However, aording to Ibn Qudamah (1996) of Hanbali set, *qabd* is only for goods whih an be measured and weighted. Other than that, a mere *aqad* is suffied in order to enfore the exchange of ownership. Therefore, the need for *qabd* is only required under the Hanbali set pertinent to goods that an be measured and weighted.

Imam Malik onurred with the aforementioned opinions. The only differene was that he did not make exlusion on goods that ould be measured and weighted (Al-Majjaji, 2010; Al-Marghinani 2000). In addition, it is the opinion of the *Malikiites fuqahas* that *qabd* (aeptane) is not a prerequisite to establish ompletion of *aqad*, and it is not necessary for submission to take effet. Thus, *qabd* is just a provision in order to signify a ompletion of submission (Al-Majjaji, 2010; Al-Zuhayli, 1989). Aording to the aforementioned opinion, *qabd* is the right of the *hibah's* reipient. The reipient may or may not wish to follow up the *ijab* and *qabul* with *qabd* beause the *mawhub* is already rightfully his/hers. Ibn Qudamah (1996) on the other hand opines on the irrelevane of *qabul* in the event of *qabd* for *qabd* supersedes *qabul* i.e. an indiation of the reipient's aeptane. The reserher is of the opinion that these views open the floor to flexible implementation of *hibah* depending on situations and requirement.

Hibah Produt in Malaysia Asset Planning

Asset planning is entral in promoting effeive ommunal harmony following whih a failure in planning while one is still alive ould ause losses to the Muslim ommunities (Hasbulah & Daud, 2015). Aording to Sadali (2006), asset planning refers to one's ation plan to transfer his or her asset(s) in possession to another person based on the Islami laws. One form of asset planning is through *hibah*.

In Malaysia, most *hibahs* are of private matters and onducted through intermediary agencies suh as trust ompanies and legal firms. There are several types of *hibah* often used as instruments in the exeution of asset transfer to another person namely absolute *hibah*, *hibah* via a trust, trust *hibah* and doumented *hibah* (Hisyam, 2015). The reserher will not elaborate on all of these *hibahs* except for *hibah ruqba*.

In term of the implementation of *hibah ruqba* in Malaysia, most of the asset planning agencies have already inorporated *hibah* produts with onditional *ruqba*. From the reserher's observation, onditional *ruqba* is widely available in various asset planning produts of the agencies suh as in real estates, vehile hire-purchase and as suh. This an be seen as a basis when the Seurity ommission Syariah Advisory ounil on 15th January 2003 adopted the *syariah*-based priniple of *hibah ruqba* in the implementation of *hibah* delaration form for trust funds joint aount transations espeially aounts held by the Muslims.

However, in the ourse of legal verdicts in Malaysia regarding *hibah* and onditional *ruqba*, the deision was the opposite. The verdict of the Muar Syariah High ourt in the ase of Hadijah

binti Hashim v Faisal bin Hashim was that the conditional *ruqba* was not a prerequisite (Lizza, 2014).

To understand the concept of *hibah ruqba*, the opinions of the *fuqahas* ought to be revisited to see the dynamism of those opinions as to influence court decisions; that is when to adopt and implement *hibah ruqba* and when to reject it. Apart from that, these opinions should be carefully examined of its appropriateness to correspond to the current needs of the Muslims in accordance to the Islamic syariah.

Hibah Ruqba According to the Views of Fuqahas

Ruqba is an Arabic word derived from the word verb *arqaba* which means waiting. Al-Kasani (1997) stated that it is originally from the word *ruqub* which has similar meaning with *intizar* which also means waiting.

From the Islamic Laws terminology, the *fuqahas* explain that *ruqba* takes place when a person (giver) says to another person (recipient) "my house is a gift by *ruqba* to you", meaning that, if the giver were to pass on before the recipient, the house belongs to the recipient. Likewise, if the recipient were to pass on before the giver, the house remains with the giver (al-Kasani, 1997). According to the Malikiites, *ruqba* is described as when a person says to another person "if I die before you my house is yours and if you die before me then your house is mine" (al-Majjaji, 2010). To the researcher's opinion, the case example of *ruqba* by al-Majjaji differs with the *jumhur fuqahas* because *hibah* never took place. It did not involve a transaction of ownership either in the form of *ain* (goods) or benefit while alive. When a property is not a *hibah* then it falls under the law of wills and *fara'id*. In this aspect, the researcher is more inclined to debate the law of *ruqba* from the view of consensus of Muslim jurists.

The jurists have differing views regarding its permissibility, the detailed are as follows

- i. The Shafiites (al-Nawawi, 1996) (*qawl qadim*), Abu Hanifah and Muhammad view *ruqba* as *batil* (unlawful) in terms of tangible and intangible assets (al-Kasani, 1997). The *ilat* (invalidity) on the matter is learned with relates to uncertainty on who will die first. In this regard, *aqad* becomes *fasakh* (terminated) before the demise of any *aqad* party and the property must be returned to the giver or the giver's rightful heirs.
- ii. The Shafiites (al-Nawawi, 1996) (*qawl jadid*) and Ibn Hazam opine that *ruqba* is a legal and complete *hibah*, the asset given to the recipient of *ruqba* is just like any other asset which can be sold, passed on as inheritance and shall not be returned to the original giver's rightful heirs. The *hibah* asset of the recipient remains as his/her own if he or she survives the giver and will be inherited by the recipient's rightful heirs after his/her demise (Ibn Hazm, 1997). This is based on the *hadith* of the Prophet Muhammad (peace be upon him):

Do not perform *ruqba* or *umra* (temporary benefit); if anyone performs it, the assets will become inheritance (to the recipient).¹

Thus it is with understanding that, *aqad ruqba* is valid; while the only thing void is the condition and the asset can be utilized by the recipient as he wishes.

¹ Abu Daud, *Sunan Abu Daud*, the book of *buyu'* chapter *fi al-'umra*, No Hadis 3556.

- iii. Al-Zuhri is of the opinion that *hibah ruqba* is subjected to the law of wills; hence the law of *hibah* is not applicable. Under the condition of a will, the amount cannot be more than 1/3 of the total asset, cannot be given to the rightful heirs to the inheritance and other conditions where applicable (al-Nawawi, 1996).
- iv. Al-Qasim bin Muhammad, Abu Salamah and other *tabiin* are of the opinions that if during the *aqad* the giver stated the condition that the donation will be void and reverted to him if the recipient dies before the giver, or that the donation will be owned by the recipient if the giver dies first, then the condition must be upheld. This is because men must keep to their words and bound by the conditions imposed on them when it comes to asset matters (Ibn Qudamah, 1996). According to al-Ghaznawi (2011), Abu Yusuf also opines on permissibility of *ruqba*, conforming with the understanding of *ruqba* as explained by the *jumhur fuqahas* and as narrated from Imam Malik on permissibility of *ruqba* as well as *umra* according to them (Al-Qayrawani, 1999).

Analysis on the Views of Fuqahas

In general, most of the *fuqahas* acknowledge *hibah* with conditional *ruqba* as legal. The only contention among them is whether the condition is void or enforceable. Therefore, the view that says the *aqad* is void is the view of few *fuqahas*. Lizza (2014) is of the opinion that the existence of *gharar* element in *hibah aqad* with conditional *ruqba* is the factor of *fuqahas'* differing opinions of its permissibility. Waiting for someone who enters into *aqad* to die in order to gain possession of a given asset is a twist event of uncertainty. The researcher opines that the element of *gharar* is perceived as to create disputes and squabbles among the rightful heirs of both *aqad* parties especially with regards to *hibah* legal status. Therefore, it is best not to enforce such conditions.

However, there are *fuqahas* namely al-Qasim bin Muhammad, Abu Salamah and Ibn al-Arabi who permit the use of conditional *ruqba* with reasoning that men hold firmly to their oaths when it comes to asset matters and give aways (Ibn Qudamah, 1996). Even the narration from Imam Malik permits the practice of conditional *ruqba* by equating it to *umra* with an *aqad* that is legally binding and enforceable.

The researcher sees this permissibility parallel with the concept of *ariyah* (loaning) as the basis for permissibility in *umra* and *ruqba* of Imam Malik. In this respect, what is given is not *ayn* but instead the benefit of assets (Hisyam, 2015). The life long benefit is given to the recipient of *hibah* with the condition the property is reverted to the giver of *hibah* if the former dies first. Without this condition the property will forever belong to the recipient of *hibah*. In this aspect, Hisyam (2015) is of the view that such arrangement must be clearly mentioned and pronounced and not just merely uttering the term *ruqba* without mutual clarification.

From these differing of opinions, the researcher finds that the element of *gharar* on the uncertainty of death is one main factor that some *hadiths* prohibit *hibah ruqba*. This element creates differing of opinions among the *fuqahas*. Looking at an angle, if the condition is not implemented with clarity, it may create dispute and misunderstanding among the heirs thinking that the property belongs to the demise when in actuality the *aqad* says otherwise. This misunderstanding can be overcome with clearly stated implementation in the beginning of

aqad. The researcher sees that the prohibition to these conditions is peculiar to the situation then. In the olden days, contractual matters were done verbally and by physical actions (Hisyam 2015). However, will there be a misunderstanding if the *aqad* were to be clearly documented? Of course that won't happen.

Analysis on the Implementation of Conditional *Ruqba* in Asset Management Planning

After studying the abovementioned views of the *fuqahas*, the researcher is of the opinion that the position of conditional *ruqba* must be relooked from a wider perspective. A broader look is to be meted out on the general principles of Islami *muamalat* system and the current issues and reality which surround it today. Hence, the researcher finds that there are two interrelated issues should be addressed in order to implement conditional *ruqba* in asset management planning industry. These two issues will contribute towards huge potential development and application of conditional *ruqba* in managing assets of the Muslims.

The *hibah* property will belong to the *hibah* giver if the giver survives the recipient. As mentioned earlier, there have been differing of opinions among the *fuqahas* regarding conditional *ruqba*. Probably the main contention is the existence of *gharar*. In reality, the concept and practice of *hibah ruqba* of the olden days as per discussed by the *fuqahas* were of totally different perspectives. Today, the conditional *ruqba* are clearly stated without much ambiguity. This implementation of *hibah* today follows its fundamental principles with complete documentations on details and particulars of the *hibah* givers, the *hibah* recipients and the *hibah* asset(s) and reinforced with the presence of witnesses during the *aqad*, signatures and other regulated procedures required by the agencies. Therefore, both *aqad* parties' rightful heirs and the relevant parties involved are fully aware of the arrangement of *aqad*. Thus, the element of *gharar* is eliminated with stipulated standard of procedures undertaken by the *aqad* parties and amenable to the terms and conditions therein. Therefore, the possibility of future dispute and conflict is diminished.

Regarding the *hadiths* which prohibit it, Lizza (2015) explains that such prohibition in actuality is not absolute in entirety because there are chances by the *fuqahas*' interpretation of *hibah aqad* permissibility if it is for the best interest of the Muslims. The prohibition of *gharar* can actually be lifted or at least minimized if documented proof of *aqad* undertakings can be produced (Hisyam, 2012).

Based on the general principle of *aqad* (contract) in Islam, the contract must dissociate itself from the elements of *riba* (usury), *gharar* and *maysir* (gambling). The researcher perceives that conditional contract of *hibah ruqba* of today adheres to the relevant Islami principles. It is also based on the views of the *fuqahas* such as Qasim bin Muhammad, Abu Salamah, Ibnu al-Arabi and those few who share the same view (Ibn Qudamah, 1996; Lizza, 2015).

The contract of *hibah* with conditional *ruqba* is perceived to guarantee the *hibah* asset from falling into the hands of others through inheritance if the recipient of the *hibah* passes on before the giver of *hibah*. Example, a husband enters into a *hibah* contract and conditional *ruqba* with intention to pass down a house which belongs to him as a *hibah* to his wife if she were to survive her husband. The purpose is to facilitate the distribution of inheritance to the wife on the demise of her husband. In the absence of *hibah ruqba*, the house will be an inheritance to her family which would be unfortunate to the husband. The house which is originally his would

probably be sold and the proceeds distributed among her heirs. Hardship will be onto the husband when Islam abhors such adversity befalling any Muslim for such misfortune can be prevented. The *fiqh* methodology (Syibir, 2007) states that:

Adversity must be avoided/removed

According to Syibir (2007), it is the duty-bound of all Muslims to prevent any harm before it happens or if in any case it happens. He adds that *maslahah* is the desirable form by *shara* for any Muslim to safeguard his or her religion, life, intellectual, lineage and property. Therefore, the researcher perceives for this matter as a *maslahah* which relates to property. The researcher has a belief that such adversity will befall any person belonging to any community if the abovementioned example were indeed to take place. Hence, a way of precaution is by adopting conditional *ruqba*. The researcher also views the permissibility of conditional *ruqba* is based on the methodology;

Adversity brings about good things

The researchers believe that in the absence of conditional *ruqba* whereby a contract is not made obligatory creates hardship to the parties involved in *hibah*. Future possibility of mismanagement of *hibah* property will lead to disputes and squabbles among the heirs which should be avoided. Therefore, leniency and flexibility in considering the adoption of *hibah ruqba* is appropriate in order to avoid escalation of more severe mishaps.

a. The giver of *hibah* can use the *hibah* property while still living

In asset management planning of a company, the *hibah* products offer conditional *ruqba* with terms of agreement between two contracted parties allowing the giver of *hibah* to use all benefits from the property while still living. In *fiqh muamalat*, there is the term of *ibahah* which means permission to make use of property by the consent of the owner, permission by *syara* or a judge (Badran Abu al-Aynan et. al.). For this case of *hibah*, the recipient of *hibah* submits to the fatwa for the *hibah* property to be used at the disposal of the giver while still living. The researcher also opines of nonissuance of *qabd* not being undertaken or of wealth ownership not being exchanged, for by the virtue of *syarak* the exchange of wealth has already taken place once both parties enter into *hibah* contract be it in terms of actuality or *hukmi* (submission of *hibah* documentations). What actually transpires is the recipient of *hibah* gives full consent to the right of use of the property to the giver of *hibah* during the life of the giver. However, one's insight tells that the permission given is subsequent to the precondition imposed by the *hibah* giver. The question is that if this is permitted by *shara*?

According to al-Sanhuri (et.al.), an enforceable condition is the one that fulfills the general rules. As such, given the condition that is impossible to undertake or implement, the condition must be clearly stated and does not go against the laws and moral etiquettes. The matter is also confirmed by (Hisyam, 2015). Therefore, according to the researcher the adoption of conditional *qabd* should be permitted. Moreover, the adoption of this condition is currently perceived as important as it can guarantee the obligation of *hibah* giver to make good of his promise while at the same time derives benefits from the *hibah* property while he is still living. Their objective is to ensure alleviation of wealth distribution during the lives of both parties.

The matter of attaching caveats from performing *tasarruf* on the property such as to sell, to give away as endowments and the likes should not arise because it is a conditional *hibah*. The

researcher does not see this matter as impliating adversity to the reipient of *hibah* due to the ause that the said property is a *tabarru* (donation). Aording to Al-Yaqub (1986), restritions to perform *tasarruf* on the property are permissible and the authority an be assigned under the supervisions of the giver, reipient or a third party. Hene, the ondition of a aveat is relevant so as to elevate the *maslahah* of the giver of *hibah* by assuring the rights to benefits of the *hibah* property while still alive.

Based on the above disussions, the priniple use of onditional *ruqba* is viewed from a broader perspetive of objetivity and not just as onditions per se. Assessment on the ondition requires a look at the *maqasid shariah* (the objetive of *shara*) together with the dynamisity of *fiqh* priniples in problem solving and flexibility in order to elevate the hanges of times and plaes. Hene, the researcher oncludes that the onditional *ruqba* in *hibah aqad* an be enforced following these requirements:

- a. The ondition is with a purpose to protet the right of *hibah* giver, the *hibah* reipient or other relevant parties besides the *aqad* parties.
- b. The ondition must not deny the meaning and legal purpose of *hibah* and must fulfil the prerequisite general ontrat in Islam.
- c. The ondition must be made lear and made known to the reipient of *hibah* in order to avoid future disputes. This larification is to avoid the oexistene of *gharar* in the ontrat whih an be easily disputed.
- d. There are full submissions of both *aqad* parties to the ondition imposed for ompletion of onditional *hibah* is upon the submissions and aeptanes of both parties.
- e. The proedures and doumentations must be omplete and learly onduted.

Conlusion

The researchers onlude with the purview of Muslims' ompliance to Islami onditions when it omes to the administration of assets and property of the Muslims. As far as the researchers is onerned, the view that asserts on termination of *hibah aqad vis a vis* termination of onditional *ruqba* is with a benevolent intention to safeguard the well being of mankind pertinent to speifi situations or the time of era when verbal *aqads* were performed without doumentation leading to disputes and squabbles. History has narrated ourrenes of disputes and misunderstandings and they still happen today. The situation would be different with lear proofs and doumentations well preserved for future referenes. To that note, the *maqasid shariah* will be upheld under prudent property management planning.

Islam provides solutions to faithful followers of Islam at all times; therefore it is inumbent in hoosing the views that offer solutions to the Muslims today. We should not aept only one view and rejets the views of others without examining the *maslahah*. There is a huge sope for *ijtihad* in *fiqh* espeially relating to *maslahah* of mankind and asset management planning. Adhering to the Islami *syarak*, ontravene solutions are worthy of reevaluation.

Aknowledgement

This artile is part of the research study funded by GGPM-2015-024, Universiti Kebangsaan Malaysia.

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