

## Examining Hibah Contracts in Islamic Law: Insights from the 2021 Selangor State Fatwa

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### Abstract

Hibah is an essential mechanism for wealth transfer in Islamic law, distinct from wills, zakat, and waqf. The 2021 Selangor State Fatwa on Hibah provides structured guidelines for the validity of hibah contracts, particularly regarding conditions imposed within the agreements. This study analyzes ten key fatwas concerning conditions such as hibah taking effect after the donor's death, conditional return of the property (hibah al-'umra), delayed possession (hibah ruqba), and hibah involving pledged or mortgaged assets. The study highlights the alignment of these fatwas with classical and contemporary scholarly opinions, demonstrating a balance between adherence to Islamic jurisprudence and practical financial applications. By examining these conditions and their justifications, the research underscores the fatwa's role in ensuring legal clarity and compliance with shariah principles. The findings contribute to a deeper understanding of conditional hibah and its application in Malaysia, reinforcing its role in financial planning and estate management. This paper serves as a crucial reference for legal practitioners, scholars, and financial institutions involved in Islamic wealth distribution.

**Keywords:** Hibah, Islamic Inheritance, Conditional Hibah, Selangor State Fatwa, Shariah Compliance, Islamic Wealth Transfer

### Introduction

Hibah is a highly encouraged practice of giving in Islam. It is one of the primary methods of transferring wealth, alongside wills, charity, and waqf (Maybank, n.d). According to Dewan Bahasa & Pustaka (2017), hibah is defined as the voluntary giving of a right to another person with good intentions while the giver is still alive.

In addition, some fuqaha have defined hibah as the voluntary and unconditional giving of ownership of something by one person to another during the giver's lifetime (al-Nawawi, 1344H/1926; al-Sharbini, 1994). Therefore, transactions like rental agreements, loans, zakat, kafarah, sales, and wills are excluded from the definition of hibah (Noor Lizza & Mohd Zamro, n.d).

Based on the general definition above, the ruling on hibah linked to conditions is invalid because it contradicts the purpose and nature of the hibah contract (Kamila Tyabji 1949). However, fuqaha have allowed hibah with conditions, and its practice can be found in some Islamic countries' laws (Lizza & Zamro, n.d).

According to Syahirah et al. (2017), the ruling on hibah linked to conditions depends on whether the conditions are valid or invalid. The conditions imposed should align with the essence of hibah, not be impossible to fulfill, and must be in accordance with ethics and laws. Therefore, if conditions that violate these principles are imposed, the hibah itself is valid, but the conditions are annulled (al-Sharbini, 1994).

Hibah plays an important role in strengthening ties and promoting the spirit of sharing within the Muslim community (Syariah, 2020). There are many verses from the Quran and hadith that encourage Muslims to give hibah, such as the verse from chapter Al-Baqarah 2:177

*“And [they] give their wealth, despite their love for it, to relatives, orphans, the needy, the wayfarer, those who ask [for help], and for freeing slaves.”*

Similarly, the Prophet Muhammad (PBUH) said

*“Give gifts to one another, and you will love one another”* (al-Bukhari, 1993).

Based on these texts, the fuqaha are unanimous in stating that giving hibah is a requirement for a Muslim (Anonymous, 1427H/2006).

Despite its significance in Islam, the practice of hibah often faces practical challenges in contemporary contexts, particularly regarding its legal enforcement and validity under the Islamic law and civil framework. In Malaysia, misunderstandings surrounding the conditions and procedures of hibah have led to disputes over property distribution, necessitating judicial interventions. Therefore, it is crucial to examine and clarify the principles and conditions governing hibah to ensure its correct application. This study is significant as it offers a comprehensive analysis that can benefit legal practitioners, policymakers, Islamic financial institutions, and the Muslim community by enhancing their understanding and application of hibah according to both Islamic and local legal standards.

In practice, hibah issues frequently arise within the Malaysian context, particularly in state of Selangor, where Islamic society often seeks ijihad from the judiciary to resolve specific cases (Syahirah et al., 2017). As such, the religious authorities in Selangor, namely the Fatwa Committee of the State of Selangor, issued a fatwa on hibah in 2021 (Selangor, 2021). This fatwa includes, among other things, the conditions for a valid hibah according to the views of the majority of fuqaha (Selangor, 2021).

Therefore, this paper will analyze the Fatwa of the State of Selangor from the perspective of the conditions set for hibah. The discussion will cover the legal justification behind these conditions based on the shariah proofs and the opinions of the scholars.

*Analysis of Fatwa Regarding Conditions in Hibah Contract Based on the Views of Fuqaha*

The 2021 Hibah Fatwa in Selangor (Selangor, 2021) is a specific schedule that was enacted to regulate hibah, providing clear guidelines for judges in court cases involving hibah and also setting a precedent for other states in Malaysia in issuing similar fatwas. This fatwa is particularly significant with the rise of agencies offering hibah preparation services (Ansari, 2021).

Through a detailed review of the 2021 Hibah Fatwa in Selangor, it was found that 10 fatwas addressed certain conditions in hibah contracts. These fatwas relate to various forms of hibah, including hibah idafah, tawqit, ta'liq, with conditions such as 'umra, ruqba, and exchange conditions. These conditions were discussed based on the views of fuqaha regarding their legality. Below, the analysis of fatwas concerning these conditions in hibah contracts, based on the fuqaha's opinions, will be elaborated upon seven subtopics.

*Hibah that Takes Effect After the Death of the Donor*

Fuqaha have differing opinions on the legality of hibah contracts that include a condition that the hibah will take effect only after the donor's death. Some scholars argue that such hibah resembles a will (wasiyah), thus falling under the laws of wasiyah (al-Bahuti, 1982; al-Sanhuri, n.d). According to Haydar (n.d), there is a view that such hibah resembles hibah during the donor's terminal illness (*marad mawt*), while others see it as a hibah ruqba, where the transfer of ownership occurs after the donor's death. The Selangor fatwa follows the first view, as stated by al-Bahuti and al-Sanhuri, which deems such hibah invalid, as the condition of it taking effect posthumously is not acceptable.

*Hibah that Allows the Donor to Still Enjoy the Benefits of the Gifted Property (Mawhub)*

In this case, the donor can retain control over the gifted property, even after the hibah. However, the validity of this condition is subject to certain requirements, such as it being for a justified purpose, ensuring the donor's future security and preventing potential betrayal by the recipient (Yusof, 2009). It is also crucial that the duration is reasonable, for example, during the donor's lifetime or as determined by the court (Syahirah et al., 2017). Furthermore, the condition must align with Islamic principles (Noor Lizza & Mohd Zamro, n.d).

The fuqaha have generally agreed that such a condition in hibah contracts is permissible, although it may seem to limit the recipient's complete control over the gifted property (Syahirah et al., 2017). However, the recipient must agree to the condition for the hibah to be valid (Noor Lizza & Mohd Zamro, n.d). This ruling is reflected in the Selangor Hibah Fatwa, which permits such conditions allowing the donor to retain benefits from the gifted property.

*Hibah with the Condition that the Property Is Returned to the Donor After a Specified Time*

This refers to hibah al-'Umra, where the property is gifted for the duration of the recipient's life, with the condition that it returns to the donor after the recipient's death. The property is returned to the donor if they outlive the recipient, or to the donor's heirs if they predecease the recipient (Muda, 2008; Hisyam, Ahmad, & Norazila, 2017).

In general, fuqaha agree that hibah al-'Umra is valid, but they disagree on the acceptability of the condition of returning the property after the specified period. The

majority of scholars from the Hanafi, Shafi'i, and Hanbali schools of thought accept hibah al-'Umra but reject the return condition, as the hibah contract remains valid despite the invalidity of the condition (Ibn Qudāmah, 1997; Mohamed Said Noor Lizza & Mohd Zamro, n.d). However, the Maliki school and al-Layth allow such a condition, considering it akin to a loan (al-'ariyah), which is governed by the rules of loan contracts (Lizza & Zamro, n.d). The Selangor fatwa adopts the Maliki and al-Layth schools' opinion, allowing hibah al-'Umra with the return condition.

*Withdrawal of Hibah Under a Condition that it Becomes Effective after the Death of the Donor*  
In this case, the fatwa follows the ruling of hibah ruqba, where the condition of the hibah is dependent on the death of one of the parties (Muda, 2008). Regarding the withdrawal of hibah before the property is received (qabd), fuqaha have three different views (Lizza, Ridzuan, & Husin, 2010).

The Hanafi, Shafi'i, Imamiyyah, Zaiydiyyah, and some Hanbali scholars permit the withdrawal of the hibah before the property is received, based on the general consensus of the sahabah (Ibn Qudāmah, 1997). Meanwhile, the Maliki and Zahiri schools do not allow the withdrawal before qabd, arguing that the hibah contract is binding once the ijab and qabul are exchanged, in accordance with the command to fulfil promises in the al-Qur'an, chapter al-Maidah, verse 1. The Selangor fatwa adopts the opinion that allows the donor to withdraw the hibah if qabd has not yet occurred.

### **Hibah of Mortgaged Property**

In Islamic commercial law, a property given as a guarantee or mortgage (al-rahn) can also be involved in hibah. Under this concept, the borrower retains ownership of the property as collateral until the debt is settled (al-Sharbini, 1994).

The fuqaha are divided on this issue. The Shafi'i and Hanbali schools do not permit the transfer or hibah of mortgaged property without the consent of the pledgee (al-Nawawi, 1991; al-Ramlī, 1937). However, the Hanafi and Maliki schools allow the hibah but with conditions that it is postponed (mawquf) until the pledgee's consent is obtained, meaning the gift will not be valid until the pledgee agrees (al-Zuhayli, 1989). The Selangor fatwa accepts hibah of mortgaged property as long as it is protected by insurance, such as MRTT and MLTT, or with the pledgee's consent (Lizza & Adli, 2021).

### **Hibah of Land**

The discussion regarding hibah of land is similar to that of mortgaged property. However, when the gift involves land, it must comply with the legal provisions outlined in the Land Code (Kawasan Penempatan Berkelompok) 1960 (Lizza & Adli, 2021).

In the case of mortgaged property or land with bank loans, the transfer of ownership will only be executed once there are no objections from the pledgee. The land registration office will not process the ownership transfer until approval is obtained from the pledgee (Farahwaheda, 2015). Hence, for land hibah to be validated, it must meet the requirements of hibah and obtain approval from the relevant authorities, as stated in the Selangor Hibah Fatwa 2021.

*Hibah Ruqba*

Through detailed research, the study found four fatwas in the Selangor Hibah Fatwa 2021 that employ the concept of hibah ruqba. Hibah ruqba is the gift of property to another, with the condition that it will only become effective after the death of the donor or recipient (Haydar, n.d).

The fuqaha have three views on hibah ruqba. The first, from Imam al-Shafi'i and Imam Hanbali, states that hibah ruqba is valid, but the condition is not accepted, meaning the property gifted becomes the recipient's, and after their death, it becomes part of the inheritance (Ibn Qudāmah, 1997). The second view, from some tabi'in scholars, such as al-Qasim bin Muhammad and Ibn al-Arabi, permits the condition, seeing it as consistent with the principles of asset management (Noor Lizza & Mohd Zamro, n.d). The third view, held by the Maliki and Hanafi schools and other classical scholars, rejects hibah ruqba because it involves uncertainty (gharar), which is not permissible in Islamic contracts (al-Zuhayli, 1989). The Selangor fatwa incorporates hibah ruqba in specific cases, particularly with four type of property involved (mawhub).

*Hibah between Joint Account Holders*

The 56th meeting of the Syariah Advisory Committee of the Federal Territory on October 5, 2000, decided that conditions are permissible between the donor and recipient of hibah after the ijab and qabūl (Mohd Zamro Muda, 2008).

The principle of conditional hibah ruqba became the focus as the fundamental syariah principle used in the completion of hibah account forms, especially involving joint accounts in unit trust funds, particularly accounts held by Muslim individuals, based on the decision by the Syariah Advisory Council (MPS) of the Securities Commission (Nurul Syahirah et al., 2017). Thus, it can be concluded that hibah between joint account holders is conditional hibah ruqba (Nurul Syahirah et al., 2017; Siti Rashidah & Noor Lizza, 2018).

*Hibah on Takaful Benefits*

A study by (Siti Rashidah & Noor Lizza, 2018, 2019) showed that hibah practices offered by the takaful industry are conditional hibah, tending toward the ruqba condition related to the death of the participant (donor) and the maturity period of the certificate. The hibah will be revoked if the participant is still alive when the takaful certificate matures.

*Hibah through Trustees*

A trustee or wasi is someone who acts as the manager and distributor of the gifted property on behalf of the recipient (Nur Safina & Noor Lizza, 2022). Hibah ruqba mostly involves close family members based on hibah declaration documents, whether written or verbal. However, other forms of hibah can also be carried out through a trustee, especially when the recipient is someone who is not legally capable (Jabatan Kehakiman Syariah, 2020; Mohd Zamro Muda, 2008; Noor Lizza & Mohd Zamro, n.d).

*Hibah of Savings or Unit Trust*

Hibah ruqba is also mostly related to savings or unit trust funds (Nur Safina & Noor Lizza, 2022). This is based on the decision by the Syariah Advisory Council of the Securities Commission in its 44th meeting on January 15, 2003 (Noor Lizza & Mohd Zamro, n.d).

## Conclusion

Overall, the analysis of the 2021 Selangor State Fatwa on Hibah from the perspective of the conditions outlined in hibah found 10 fatwas in the fatwa schedule related to specific conditions in hibah contracts, such as conditional hibah effective after death, conditions for the donor to enjoy the gifted property, conditions for the return of property (hibah al-‘umra), conditions for qabd after death (hibah ruqba), hibah of property under pledge, hibah of land, and others.

In each fatwa regarding the conditions of hibah, the religious authorities of the State of Selangor have chosen the views of the fuqaha that are deemed appropriate to be practiced. Therefore, this fatwa is seen as an important guideline for the practice of valid hibah according to syarak. It also provides a comprehensive understanding of the true concept behind the conditions allowed in hibah.

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