

Fatwa concerning *Qabd* in Hibah and the insertion of *Qabd* element in States Fatwa in Malaysia

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Abstract

Hibah is an instrument in Islamic laws dealing with the voluntary transfer of property (*tabarru'*). Islamic scholars have reached consensus that in the act of transfer of property, *hibah* requires offer (*ijab*) from the donor and acceptance (*qabul*) of offer from the grantee to ratify the transfer of property (*Mawhub*) to the grantee. The fuqaha' hold two contrary views on the need for actual transfer of property (*qabd*) as a requirement to ratify the transfer in grants. The first group sees *qabd* as a requirement of the *hibah* contract and the other group hold that *qabd* is not necessary to complete the *hibah* contract. From the legislative perspective of law, the existence of differing *Fuqaha'* opinions which directly result in unstandardised Islamic laws will in turn lead to uncertainties in the implementation of legislation and injustice. Therefore, this research explore the application of both sides of the opinions through examining the fatwa decided by each State Mufti Department in Malaysia. This is because, in the administration of law and the enforcement fatwa, only one opinion should be selected for inclusion as the adopted opinions to ensure consistency in the implementation of law. This research was conducted qualitatively by referring to the debate in the books of *fiqh*, Malaysian legal provisions, state fatwa, interviews conducted with Mufti from different states and scholarly works. The study found that the majority of the fuqaha' opined that *qabd* element is a requirement to complete the *hibah* contract and therefore this opinion is considered the right opinion (*rajih*). The study also found that the majority of Muslim countries adopt *qabd* element in their *hibah* law as stated in the fatwa of the respective countries. Hence, *qabd* is an important element and is a precondition to confirm the *hibah*. Any *hibah* made is not valid *qabd* has took place. According to findings from this study, each state should enact standardised fatwa so that there is uniformity and consistency in the enforcement of fatwa and in the making of related decision regarding the *hibah*.

Key words: Fatwa, difference (*khilaf*), Mufti, Hibah, *Qabd*

1.0 Introduction

Hibah is a gift of asset(s) made voluntarily by a donor during his or her lifetime to the beneficiary without any consideration of the benefits (*'aqad tabarru'*). The *hibah* contract must meet the basic principles drawn up by *fuqaha'*³ because *hibah* is an *'aqad* (contract). This is also true for other Islamic contracts such as purchase, rental, lending, wills and others. *Hibah* as a contract has specific principles and conditions in order to differentiate between *hibah*, donations and gifts which are also instrument *tabarru'* in Islam. In general, there are two views about *qabd*. The minority of *fuqaha'* believe that *hibah* enforcement is after *'aqadijab* (offer) and *qabul* (acceptance) is made between the two parties.

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On the other hand, the majority of *fuqaha*⁴ said that *hibah* is effective after the fulfilment of three '*aqad*' elements which are agreement *ijab*, *qabul* and *qabd*. Therefore, this study was conducted to examine this matter for the purpose of fatwa standardisation.

2.0 The concept of *Qabd* In *Hibah*

Qabd is a derivative of the word *qabaḍa* - *yaqbidu* which means taking, grasping, holding and mastering (Ibn Manzur 2003: 233, Fayyumi n.d.: 488). *Qabd* can be defined as the action of *hibah* receiver receiving goods, hold, control, and making the goods as his or her property. *Qabd* is one of the conditions that must be met at *mawhub*⁴ or can also be regarded as a condition to receive *hibah* (al-Kasani 1986: 8/104-105). Discussions on *qabd* is important in *hibah* because fiqh view on *qabd* will affect the legal position of *hibah* when discussing the cancellation of *hibah*. In this case, for *fuqaha*⁵ who believe *qabd* is a necessary condition to *hibah*, *hibah* can only be cancelled before *qabd*. As for *fuqaha*⁶ who argue that *qabd* is not a necessary condition to *hibah*, the right to cancel *hibah* has expired after an agreement has been reached (after *ijab* and *qabul*), without the need for *qabd* (al-Nawawi 1985: 15/379, Ibn Rusyd 2004: 5/323, Ibn Hazm n.d.: 8/71).

3.0 Differing views of scholars regarding *Qabd*

Qabd requirements in *hibah* is to put *hibah* in effect, *mawhub* must be held, received or be managed by the recipient to allow the recipient to use *qabd* goods or at least *hibah* receiver has the ability to use *mawhub* (*al-tamakkun min al-tasarruf fi al-maqbud*) (al-Kasani 1986: 8/108). In general, there are two views among the *fuqaha*⁷ about *qabd* position in *hibah*.

3.1 *Qabd* as a requirement for *Hibah*

This is the opinion of the majority of *fuqaha*⁸ which consists of Abu Bakr, 'Umar, 'Uthman,⁵ Mu'az, al-Zuhri, Hammad Ibn Masruq, Ibrahim al-Nakha'i, Sufiyan al-Thawri, Ibn Syabramah, Ishaq, Hasan bin Salih, al-'Anbari, 'Ubaidullah bin al-Hasan, Abdul Razzaq, Shuraih, 'Ata', 'Umar bin 'Abd al-Aziz al-Sya'bi, Abu Hanifah, al-Shafi'i and Hanbali⁶ *fuqaha*⁷ who said *qabd* is a condition to enforce *hibah* '*aqad* (*syart luzum*) and opinion of current scholar as 'Ali Mahyu al-Din al-Qurah Daghi.⁷ According to this view, with only *ijab* and *qabul* from donor and beneficiary, *hibah* cannot yet be enforced. Thus, *mawhub* remains owned by donor and the donor is free to do business with the goods as long as *qabd* has not been carried out including cancellation of *hibah* (al-Nawawi 1985: 15/370-377, al-Kasani 1986: 8/105, al-Khatib 2010: 4/67, al-Bahuti 1641H: 4/301, Haydar n.d.: 350, al-Dusuqi n.d.: 4/101, 'Abd al-Barr 1986: 7/239, al-Marwazi 2000: 574, al-Tahawi 1996: 4/137, Sabiq 1987: 4/290-291, al-'Adawi n.d.: 2/203). According to 'Ali Haydar, *qabd* is not required to confirm the *hibah*, but *qabd* is required to validate ownership of *mawhub* (Haydar n.d.: 350). The importance of *qabd* can be seen where *fuqaha*⁸ Hanafi *Madhhab* put it on par with *qabul* in any transactions. Thus, *fuqaha*⁸ Hanafi *Madhhab* does not require *qabul* in *hibah*, but instead requires *qabd*.

Moreover, according to Ibn Qudamah, *qabd* can only be condition to *hibah* *luzum* for *mawhub* which can be measured and weighed only (Qudamah 1405H: 6/274, al-Kasani 1986: 13/304). As for *mawhub* which cannot be measured and weighed, two different views are held. First, the same law is applied as *mawhub* that can be measured, based on the generality of the *Sahabaha* *thar*⁸ which make no distinction between the two categories of *mawhub*. While the second group view *hibah* as effective for ownership of *mawhub* that cannot be measured and weighed once '*aqad*' even without *qabd* (Qudamah 1405H: 6/280).

⁴ This is because *mawhub* (is a *maqbud* or goods) and *mawhub* *lah* is (*qabid* or the person holding) corresponding to each other when associated with *qabd*.

⁵ According to Ibn 'Abd al-Barr that Muhammad bin Nasr al-Marwazi said, "Has agreed to Abu Bakr, Umar, Uthman and Ali that *qabd* is a requirement in the *hibah*." See; (al-Marwazi, 2000: 574)

⁶ Agreement the al-Salaf al-Salih it can be said that it was within the consensus (*ijma'*) as claimed by Ibn Qudamah and al-Kasani, see: (Qudamah, 1405H: 5/649, al-Kasani, 1986: 8/3688)

⁷ http://www.qaradaghi.com/portal/index.php?option=com_content&view=article&id=228:2009-07-04-08-23-11&catid=38:2009-07-04-07-30-22&Itemid=13 (accessed on 5/6/2015)

⁸ Sayings, actions and consent of the *Sahabaha*, the companions of the Prophet Muhammad, may the peace and blessing of Allah be on him and them.

Based on the view of the majority of these *fuqaha'*, *mawhub* is only legally owned by the beneficiary after *qabd*. One effect of this view is that donor may revoke the *hibah* before *qabd*. This opinion is based on a history which states that Abu Bakr r.a donated part of his property to Aisha R.A. However, according to the history, the dying Abu Bakr told 'Aisha that the property should be distributed to his heirs in accordance with the law of inheritance (*faraid*) because Abu Bakr find 'Aisha has never received and control the property (*qabd*) (al-Syaukani 1993: 5/424). This opinion is also backed by the history of Umar, a man who has decided to give a gift to his son, but the man still holds the gift (not *qabd*). If the child dies, the man said that this property is his property, but when the man is dying, he said that the property belongs to his son because he had given him a long time ago. This is unlawful as the condition for the grant is to *qabd* (Narrated by al-Baihaqi, Hadith no. 11949). In addition, *qabd* condition for *mawhub* ownership is also attributed to the history of Prophet SAW giving to Najashi. It was said that Najashi did not receive *qabd* before his death and therefore, *mawhub* is given to Umm Salamah (al-Syaukani 1993: 5/421).

Sahabi have reached consensus (*ijma'*) based on the *fatwas* of the *Sahabah* who are not in disagreement, such as Umar, 'Uthman Ibn 'Umar, Ibn 'Abbas, 'Aisha, Mu'az and Anas (al-Baihaqi 2003: 6/170). *Qabd* requirements in *hibah* is similar to the concept of *qiyas*⁹ to *qard* (debt) which does not apply unless with *qabd* (al-Khatib 2010: 4/67). However, there are arguments that *qabd* has not reached a point of consensus because there are still disagreement by some *Sahabah*, *tabi'in*¹⁰ and *tabi' tabi'in*¹¹ like Malik, Shafi'i in *qawl qadim* (older opinions), Abu Thawr, Hasan al-Basri who believes that *hibah* is effective after '*aqad*. Likewise the *Sahabah* expressed that *qabd* cannot be used as a strong argument because there remains disagreement between themselves. Thus, the opinion of *Sahabah* and *tabi'in* cannot be used as strong argument in this matter (Zuhaili 2005: 2/156).

In terms of the implementation of *hibah*, the requirement of *qabd* is important to legally transfer the right of the property to beneficiary. When the transaction is complete, the other parties cannot deny the right of ownership of beneficiary and they also have no right to claim that property has not yet been handed over to anyone. In addition, the agreement made by the two parties, namely donor and beneficiary is legally binding. This bond gives the impression that donor can no longer withdraw its giveaway. The requirement of *qabd* aims to ensure that *mawhub* dedicated to a beneficiary does not go in vain and really benefit the supposed beneficiary. As property owners who are sincere in giving his or her property without any returns, they require assurance that the beneficiary has totally agreed and wish to receive it as his or her property (Nasrul 2011: 87). For Maliki *madhhab fuqaha'*, though somewhat loose in imposing *qabd* requirement, but donor should take immediate action to transfer *mawhub* or beneficiary must take immediate action to demand *mawhub*. This is because, in case where the donor falls under bankruptcy, sickness, psychological illness or death before doing *qabd*, the *hibah* will be cancelled. In addition, legal action and coercion can be imposed if the donor deliberately delay the transfer of *mawhub* (Ibn Rusyd 2004: 5/363, al-Aziz 1999: 3/1607).

The willingness of the donor to do *qabd* need to be considered. According to this condition, *qabd* made without obtaining the consent of the donor is not valid, and thus cannot enforce the transfer of *mawhub* to the beneficiary (al-Kasani 1986: 8/106, al-Khatib 2010: 4/67). Donor's permissions can be done in two ways, namely transparently (*sarih*) and giving indication (*dilalah*) (al-Kasani 1986, 8/106). Transparent consent is obtained when donor allow the beneficiary to take or own the *mawhub* with words like 'take', 'i let you take', 'i give' and other similar phrases. *Qabd* in this situation can be done both inside or outside '*aqad* ceremony.¹² Authorization shall be valid as long as the donor does not prohibit beneficiary from taking ownership of *mawhub* after giving consent (Haydar n.d.: 360).

⁹The process of deductive analogy in which the teachings of the Hadith are compared and contrasted with those of the Qur'an, in order to apply a known injunction (*nas*) to a new circumstance and create a new injunction.

¹⁰ Are the generation of Muslims who were born after the passing of the Islamic prophet Muhammad but who were contemporaries of the *Sahaba* "Companions".

¹¹ The generation after the *Tabi'un* in Islam

¹² The legal based by *istihsan* method. However, based on the *qiyas*, *qabd* must be done in the *hibah* council. As recommended by Zufar, a scholar of the Hanafi *madhhab*. See (al-Kasani 1986: 8/106)

Permission by giving indication (*dilalah*) occurs when the beneficiary take ownership of *mawhub* in *hibah* ceremony and the donor did not protest the beneficiary's action.¹³ In addition to these measures, the Islamic law also recognizes *ijab* from donor as consent to beneficiary undertaking *qabd*¹⁴ with the condition that the donor does not prohibit *qabd* from being done after *ijab*.¹⁵

Meanwhile, according to Ibn Hajar al-Haytami, *qabd* consent can be revoked by the donor before the beneficiary has done *qabd*, by withdrawing his or her consent, claiming psychological illness, barred from doing business (*mahjur 'alayh*) and death of either the donor or beneficiary (Haytami 2001: 2/525). However, al-Syarbini holds the view that in cases where the beneficiary become psychologically ill or unconscious, the beneficiary can do *qabd* when he is conscious. Similarly, a guardian (*wali*) of the beneficiary who has become psychologically ill can do *qabd* for him when he is still in a mentally ill condition (al-Khatib 2010: 4/68). In cases where donor or their heirs has withdrawn *qabd* consent, they can create new permissions to enable the beneficiary or his heirs to do *qabd* when the beneficiary has recovered (al-Khatib 2010: 4/68).

3.2 *Qabd* not a requirement for *Hibah*

This is the opinion of a minority of *fuqaha'* comprising Abu Thawr, Maliki, Zahiri *madhhab* and al-Shafi'i in *qawl qadim*. Ahmad bin Hanbal in a famous history, stated that *qabd* is not required for *mawhub* that cannot be measured and weighed (Qudamah 1405H: 6/280). Based on this view, *qabd* is not a requirement to *hibah*. Therefore *hibah* is valid once both sides of donor and beneficiary have agreed through '*aqad*'. According to Malik, *qabd* is only a requirement for the completion of *hibah* (*syart al-tamam*). Consequently, donor can be forced to submit *mawhub* to the beneficiary. However, if the beneficiary postpone *qabd* until the donor falls into bankruptcy or illness, then the rights become invalid and the *hibah* is cancelled. Also note that the consent of donor is not required for *qabd* in Maliki *madhhab* (Wahhab 1998: 2/397, Ibn Rusyd 2004: 5/363). Based on this, it demonstrates that *qabd* is for Maliki *madhhab* a part of the process only and is not a necessity in the formation of *hibah* (Nasrul 2009: 243).

Abu Thawr, Ibn Hazm and Ahmad opinions are more open in this regard which states that *qabd* is not a regulation, not even a requirement for the completion of *hibah* or legal requirements of *hibah* (Ibn Ruysd 2004: 5/363, al-Khalid 1993: 4/345, Ibn Hazm n.d.: 8/62, Qudamah 1405H: 6/281). This opinion is based on the general meaning of the Qur'anic verses about Allah's command that his believers should be faithful to agreement. Based on this verse, *hibah* '*aqad*' is an agreement that must be obeyed as with other '*aqad*'. Therefore, compliance to this '*aqad*' does not require the parties to complete *qabd*. Moreover, this opinion is also based on the hadith of the Prophet Muhammad, which says, "The man who takes back his gift is like a dog who licks back its vomit," (Narrated by Muslim, Hadith Number: 1620) Also the Hadith of the Prophet Muhammad, which says, "The man who takes back his gift is like the one who swallows back his own vomit." (Narrated by al-Bukhari, Hadith Number: 1490)

According to the lectures of al-Hafiz and al-Syaukani, hadith mentioned that eating vomit is a forbidden act, thus so is taking back gifts in *hibah* which is similarly forbidden. Hence, the hadith quoted in an absolute condition without limiting either already done *qabd* or not, it is necessary to keep these hadith in an absolute condition. Therefore, the validity of *hibah* is dependent on the '*aqad*' with or without *qabd* (Ibn Hajar n.d.: 5/235, al-Syaukani 1993: 6/14). For Malik and those who agree with him, this hadith shows that *ijab* and *qabul* has created a *hibah* binding (common) both sides. Likewise, this hadith does not distinguish between the withdrawal of *mawhub* carried out either before or after *qabd* (al-Wahhab 1998: 2/498). Therefore, the ownership of *mawhub* is considered to have been transferred from the donor to the beneficiary and the act of withdrawal by the donor is prohibited. In addition, since *hibah* is a voluntary agreement (*tabarru'*), the transference of ownership of *mawhub* is valid before the *qabd* as in the case of wills and endowments (*waqf*) (al-Kasani 1986: 8/3688). Malik also made comparison between *qabd* of *hibah* and *qabd* for sale (*bay'*) in which the transfer occurs in the transaction without *qabd*. These views hold on to the idea that "At the beginning of contract ('*aqad*'), *qabd* is not required as a condition of validity, until there is evidence (*dalil*) to suggest otherwise" (al-Wahhab 1998: 498).

¹³ Consent to this *dilalah* is to be based by *istihsan* method, but it contradicts the *qiyas*. See (al-Kasani 1986: 8/107). Unlike *qabd*, it should be expressly the consent, the *dilalah* consent is not valid if it is done after the *hibah* ceremony. See Article 844, Majallah al-Ahkam al-'Adliyyah.

¹⁴ For example, see article 843, Majallah al-Ahkam al-'Adliyyah.

¹⁵ See Article 13 and 863 in Majallah al-Ahkam al-'Adliyyah.

In addition, they back up this matter with the words of *Sahabah* and *Tabi'in* narrated by 'Ali and Ibn Mas'ud that they require *sedekah* (voluntary charity) without *qabd* as *sedekah* has taken effect after the 'aqad is made. This is also narrated by Ibrahim and Sufiyan (al-San'ani 1970: 9/122-123). However, the arguments put forward are weak where hadiths mentioned do not indicate the enforcement of the *hibah* after 'aqad and do not clearly indicate the prohibition to take back gifts before *qabd*. However, the hadith only clearly indicates the prohibition of taking back gifts after *qabd*.

In addition, comparing *hibah* and will is misleading for two reasons, namely, first, that the will is a contract of ownership after death while *hibah* is a contract of lifetime ownership. Second, that a will is not valid before death, and the testator may revoke his will when he is still alive. Thus, when it is argued that *hibah* cannot be compared to a will because *hibah* is changeable before *qabd* while the will is changeable before death of the testator. In this case also, the jurists (*fuqaha'*) have agreed that the testator who has written his will may revoke the will. Thus, the cancellation of will or take back the rights expire at the time of death (Ibn Hazm n.d.: 112, Qudamah 1405H: 6/133-134). There is also argument that *hibah* does not require *qabd* as in commercial transaction, but this comparison is misleading (*qiyas ma'a fariq*) simply because commercial transaction is changes of ownership with repayment (*'iwad*), while *hibah* is changes of ownership without repayment.

So on this matter, the researchers support the views expressed by the majority of *fuqaha'* that *qabd* is a requirement for *hibah* because the arguments put forward are strong and in accordance to the concept of *maqased al-Syar'iyyah*. It needs to be stressed that if 'aqad is completed via *ijab* and *qabul* where the donor said 'i give it to you', and the beneficiary said 'i accept', then it is obligatory for donor to fulfil his promise. This is because it is immoral for a person to deny the contract and his or her promise where many verses of the Quran (al-Maidah: 1, al-Baqarah: 40, al-Nahl: 91, al-Isra': 34, al-Anfal: 27) and the hadith of the Prophet Muhammad says "the signs of the hypocrite are three: whenever he speaks, he tells a lie, whenever he promises, he always breaks it (his promise), when he is trusted, he betrays his trust." (Narrated by al-Bukhari, Hadith Number: 33) Also the hadith of the Prophet Muhammad, which says, "be assured to me against six things, I would assure paradise for you, be honest when you talk, keep your promise if you promise and do not betray the trust." (Narrated by Ahmad, Hadith Number: 22757)

4.0 Law and Fatwa concerning *Qabd* in Islamic Countries

The question of *qabd* is received differently in the Islamic administrative system of different Islamic countries. Based on the available data, a large proportion of the responsible institutions accept the opinion of the majority of *fuqaha'* where *hibah* takes effect after *qabd*. Examples of law and fatwa include Egyptian Civil Law in Item 487 of 1948 which states that "*Hibah* is not complete except after received by the beneficiary or his representative". Likewise, Syria Civil law copied Egypt provisions in item 455 of 1949. Similar provisions are provided in the Kuwaiti Civil Law (Item 525, 1980), UAE (Item 615, 2006), Jordan (Item 558, 1976), Sudan (Item 268, 1984), Iraq (Item 601, 1951), al-Jaza'ir (Item 206, 1984) and Lebanon (Item 509, 1995). Additionally, the official fatwa issued by the Saudi state,¹⁶ Egypt,¹⁷ Libya¹⁸ and Jordan take similar stance on *qabd*.¹⁹

In Malaysia, although there is no specific law concerning *hibah*, but there are institutions ruling this issue, for example, Fatwa Department of Perlis²⁰ and Perak (Interview with Ustaz Kamaruddin Bin Adam on 23 Disember 2015).

¹⁶ Majallah al-Buhuth al-Islamiyyah, no. 73, year 1425 H, see:

<http://www.alifta.net/Fatawa/fatawaDetails.aspx?BookID=2&View=Page&PageNo=1&PageID=10782&language=> (accessed on 12/2/2016)

¹⁷ Fatwa issued on 16/9/1937, bil. 4215,

<http://www.daralifta.org/AR/ViewFatwa.aspx?ID=4215&text=%D8%A7%D9%84%D9%87%D8%A8%D8%A9&MoftiId=> (accessed on 12/2/2016)

¹⁸ Fatwa issued on 27/5/2012, bil. 2724, see: <http://ifta.ly/web/index.php/2012-09-04-09-55-16/2012-10-10-08-30-03/331-2012-10-11-06-14-15> (accessed on 12/2/2016)

¹⁹ Fatwa issued on 1/11/2012, see: <http://alifta.jo/Question.aspx?QuestionId=2724#.VqoVkfI97IU> (accessed on 12/2/2016)

²⁰ Date of decision: 1 Jan, 1999, see: <http://www.e-fatwa.gov.my/fatwa-negeri/adakah-boleh-bagi-seseorang-untuk-menghibahkan-hartanya-kepada-ahli-ahli-waris-semasa-0> (accessed on 12/2/2016)

This view is also adopted by the Syariah Court in Malaysia that refers to a variety of situations, including cases which adjudicated in the case *Eshah bt Abdul Rahman vs. Azuhar bin Ismail*, the court ruled that the withdrawal of *hibah* claims made by the plaintiff on the ground was rejected because the land has been transferred (*qabd*) by *hibah*. Thus, it becomes the legitimate rights of the defendant in accordance with national law and Islamic law (Rusnadewi, Noor 2010: 21). In the case of *Siti Aisyah bt vs. Kalsom Dahlan*, the *hibah* of immovable property made without the change of ownership from donor to the beneficiary is considered invalid because the *qabd* condition is not fulfilled (No Case: 14200-004-00058-2008). In the case of *Tengku Muda Hj Jaafar & Another vs Pahang Government* ((1987) 2 MLJ 74), the court ordered that for *hibah* to be valid in Shariah, there are three elements that need to be fulfilled, and one of them is the occurrence of *qabd*, the same judgment also appeared in the case of *Awang bin Abdul Rahman vs. Shamsuddin bin Awang & Another* ((1998) 6 MLJ 231). In the case of *Mohd Mokhtar b Hj. Abdullah vs. Fadhilah bt Hj. Abdullah & Four Others* ((2005) 1 JH 138), the appellant lodged an appeal against the decision of the Syariah High Court judge who refused the withdrawal of *hibah* made by the mother to the four respondents. The appellant claimed that the *hibah* is not valid in Islam because the four respondents did not occupy and manage (*qabd*) the property since they were given until the death of his mother. However the court rejected the appeal stating that it has been transferred to all four of these respondents.

In the case of *In the Matter Nang Lijah Megat bt Stan* (Kanun, September 2006, 169), claimant demanded for the land of a deceased, who is her uncle and adopted father. During the life of the deceased, he gave two lots of land to the claimant but did not change the ownership legally due to old age. The court ruled that the *hibah* made by the deceased is valid and meet all rules and conditions. This case proves that if *qabd* can be proven, even without the transfer of legal ownership, the *hibah* is deemed valid. In addition, it is also the opinion of *al-Majallah al-Fiqh al-Islami* (1990, 1/585) and the Shariah Advisory Council of the Securities Commission (2006: 125) to include the element '*urf*'²¹ in *qabd* which is the benchmark to determine whether an action is considered *qabd* or otherwise. In other words, if '*urf*' of a society states that an action is *qabd*, then that can be considered *qabd*. As for trust companies that manage products related to *hibah*, they generally possess own mechanisms to fulfill the need for *qabd* (Nasrul 2011: 96).

The institutions aligning with the opinion of the minority of *fuqaha'* are Tunisia Family Law known as *Majallat al-Ahwal al-syakhsiyyah* (No. 17/1964). Article 203 provides that, "If the transfer of *mawhub* is not completed (by donor), the beneficiary may request the donor to do so." Similarly, in Morocco family law in 274 cases in 2011, which provides that, "That the *hibah* agreement is in force after '*aqad, ijab and qabul*.'" This provision is similar with the official *madhhab* of the country. Similar provision is stated by the Fatwa Department of Penang (Interview with S.S. Dato' Dr. Hj Wan Salim bin Wan Mohd Noor and Ustaz Mohd Haniff bin Omar on 30 December 2015).

5.0 Fatwa Standardisation Initiatives concerning *Qabd of Hibah* In Malaysia

The different fatwa concerning *qabd of hibah* have caused conflict among state governments and between state governments and the Federal Government. This is because Malaysia legislative framework states that the administration of Islam in Malaysia is under the state, this led to differing ways of administration within the country. This has serious implications as implementation of different fatwa between differing states caused injustice in Islam, and is not in line with good governance (*siyasah syar'iyah*).

In today's administration of Islamic law, the fatwa standardisation approach issued by referring to specific to *madhhab* opinions. In countries other than Perlis, Fatwa State Committee is required to refer mainly to the Shafi'i *maddhab* based on the provisions of *qawl mu'tamad* (conclusive opinion) in the Enactment of Islamic administration in every Islamic states (As example in section 42, Melaka Islamic Religious Administration Enactment No. 7 year 2002). For example, the provisions of the Mufti act and Kedah State Fatwa 2008, Section 26 provides that in considering any fatwa under section 21 or certifying any opinion under section 25, the Fatwa Committee must follow *qawl mu'tamad* Syafi'i *madhhab* based on al-Quran, Hadith, *Ijma' Ulama* and *qiyas*. Unless the Fatwa Committee considers that following the Shafi'i *madhhab* will produce a situation against public interest, then the Fatwa Committee may follow *qawl mu'tamad* Hanafi *madhhab*, Maliki or Hanbali after obtaining the consent of His Majesty the Sultan. Similarly, if the Fatwa Committee viewed that none of the *qawl mu'tamad* of the four *madhhabs* can be followed without leading to a situation against the public interest, the fatwa committee may be decided by themselves without being bound by *qawl mu'tamad* from any of that four *madhhabs* (Section 26, Mufti and Fatwa Enactment (Kedah Darul Aman) No. 10 Year 2008. See also section 14, Sabah State Fatwa Enactment No. 7 Year 2004).

²¹ Arabic Islamic term referring to the custom, or 'knowledge', of a given society

In the case of Perlis, the state allocates references for fatwa more broadly by allowing the committee to refer to the al-Quran and al-Sunnah based upon the public interest or benefit (*maslahah*). This is a comprehensive reference sources that is within the scope of the opinions of *madhhab* recognized by the *Ahl al-Sunnah wa al-Jama'ah*. Section 7, Law Enactment Perlis Islamic Religious Administration 1964 provides (Section 7, Perlis Islamic Religious Administration Law Enactment No. 3 Year 1964):

(4) *The Council when issuing a Fetwa and then Shara'iah Committee when giving its opinion under sub-section (2) shall follow the Quran and Sunnah or Sallal Rasulal Allah Allah 'Beautiful allaihi. Provided that where the following of such tenets would be opposed to public interest.*

The Perlis state's approach implies that the results of a fatwa must look into the changing public interest which varies according to the current realities in addition to referring to core Islamic reference. Based on the comparison of these two different types of enactment provisions in Malaysia, the reference of Islamic law should give priority to public interest and core Islamic reference because only when these conditions are fulfilled, just fatwa decisions (*rajih*) can be made. The fatwa decisions must be aligned with *maqasid al-syar'iyah* so that the fatwa goal can be achieved. Thus, in addition to referring to the views of different *fuqaha'*, the emphasis and *tarjih* (outweighing) should be on public interest and *maqasid al-syar'iyah*. This is because of the possibility that the opinion of the Shafi'i *madhhab* may be *bemarjuh* (not justified) and opinions of other *madhhab* may be more *rajih* (justified). The freedom to refer to different *madhhab* and find justified opinion is consistent with the view of al-Qaradawi who suggested the following methods in ensuring standardisation of fatwa (al-Qaradawi 1988):

- i. Freeing fatwa from tying it with certain *madhhab*, focusing on the strength of the arguments and justified opinions.
- ii. Maintain simplicity and do not complicate the implementation of fatwa. If there are two views, the first is prudent and the second is simple, then second way should be picked.
- iii. To focus on the needs, welfare and public interest. Therefore, each fatwa must have an explanation, brings benefits to public and a strong justification and achievable.
- iv. Refuse all that is meaningless to human.
- v. Prioritize modesty (*i'tidal mutawassit*) by being neither too rigid nor too loose.

This demonstrates that, each fatwa shall prioritise in finding *maslahah* (social benefit) and meeting *maqasid* (purposes) for as long as there are strong arguments from core Islamic reference to support it. Taking considerations of the social benefit and the public interest will lead to convergence of the making of fatwa among the *fuqaha'*. Thus, according to the provisions of the existing law, there is no problem for the states to unify their opinions on *qabd* issue because this is a justifiable opinion based on the *qawl mu'tamad* in Shafi'i *madhhab*. It has strong backing from Islamic reference and it will bring social benefit. In addition, the majority of Muslim countries apply this method in developing their legislative framework.

Therefore, to achieve uniformity in Malaysia, the following initiatives should be considered by the responsible party in deciding reference for Islamic law and developing fatwa, they include:

a) Review the Practical *Qawl Mu'tamad* Shafi'i *Madhhab* Reference

Reference to the opinion of the Shafi'i *madhhab* should be prioritised to realise social benefits and attain *maqasid al-syar'iyah*. Reference for developing fatwa should not be narrowly defined to include only the views of Shafi'i *madhhab*. Therefore, the provisions of relevant enactment should be understood at all clause (i), (ii) and (iii) in respect of *Qawl Mu'tamad* in states enactment so that it truly realise the meaning of *maslahah* (social benefits) in legislation. If this is practiced, judgements drawn from fatwa will be more systemic and at the same time enhance justice by basing the judgement on Islamic law.

b) Consider *Usul al-Syafi'iyah* and *Furu' al-Syafi'iyah*

Although State Fatwa Council is bound by the with fatwa administration enactment in issuing fatwa such as the need to prioritise Shafi'i *madhhab*, members of the council should maintain openness in interpreting the enactment instead of just seeing the fatwas that have been decided by al-Shafi'i or al-Syafi'iyah ulama (scholars) who became law treasures, but also examine the methodology of al-Shafi'i in issuing fatwas.

This approach is highly recommended because fatwa should not be decided based solely on the methods of al-Shafi'i, but also need to take into account local circumstances and maximize public interest. In this case, *ijtihad*²² can occur in two forms. First, do a comprehensive literature review to explore the available existent opinions in Islamic reference to ensure accuracy and relevance of solutions to an Islamic approach (*al-Intiqā'i*). Second is doing a new *ijtihad* to find current solutions to new problems faced (*al-Insya'i*). Both of these local approaches are very important because since the time of al-Shafi'i they have been taken into account (Mahmood Zuhdi 2007, Mahmood Zuhdi 2010: 150).

c) Consider the Opinions shared by the Majority of *Fuqaha'*

When an opinion is supported by many *fuqaha'*, then it is probable that this opinion is almost right. This is because it implies that every dimension of the issue has been argued and discussed by many *fuqaha'*. Not to mention the *fuqaha'* who approve are esteemed scholars (*mujtahid*). Therefore, in this *qabd* issue, it is appropriate to prioritize the opinion of the majority of *fuqaha'*. This is in line with the words of Ibn Mas'ud who states that what is seen by a group of Muslims as good, then so will Allah agree (ما رآه المسلمون حسنا فهو عند الله حسن) (Ali Hasbullah 1997: 84-85).

d) The drafting of the *Hibah* Statute in each state

To this day, a special statute of *hibah* remains unallocated. Drafting of the law written specifically about the *hibah* or its equivalent is important because it will be able to include all issues and solutions on the matter of *hibah* in the form of uniform legal provisions that have legislative power. Difference of opinions can be avoided because only selected opinion (*rajih*) and public interests will be taken into consideration in the making of legal provision. This standardisation of Islamic law concerning *hibah* will ensure the administration of law can be carried out in a fair and orderly fashion.

e) Fatwa made by the National Fatwa Committee should be accepted by every State

In Malaysia, there are two forms of the fatwa committee which consist of the National Fatwa Committee established at the federal level and the Fatwa Committee / Islamic Law established at the state level (For example, see Section 11, Mufti dan Fatwa Enactment (Kedah Darul Aman) No. 10 Year 2008. See also Section 6, Fatwa Sabah State Enactment No. 7 Year 2004). Members of the National Fatwa Committee composed of all the muftis in the country.²³ Thus, the decision made at the National Fatwa Committee level are consensus reached by the representatives of muftis from all states. The decisions made collectively by the state representatives should be accepted and enforced in all states so that standardisation of Fatwa can be achieved and administration of Islamic law can be implemented in a uniform, consistent and fair fashion. These are actually the original goals of setting up a central committee at the national level.

f) Federal Institutions to advise *Hibah*-related matters

In accordance with Federal power conferred by Article 74 and 75 of the Federal Constitution, the Federation has the power to standardise law between the State and the Federal. With this authority, the Federation has established several institutions or advisory councils at the Federal level such as JAKIM, JAWHAR, UPPJKPTGP, JKSM, LEPAL and the National Land Council to examine and advise on matters which are under the authority of the State (Siti Zalikah 2015: 55). Thus, the spirit of cooperation between the State Fatwa Committee and the Federal shall be encouraged so that administration of Islamic laws can be standardized between the State and the Federation by basing it on the framework of existing fatwa enactment. Even the existence of the Committee of the Rulers at the federal level could also play a role in highlighting the issue of different fatwas between different states so it can be brought to the attention of Tuanku Al-Sultan for further actions.

g) State Fatwa Department should take into account Fatwa of other states

State Fatwa Department should review the fatwa of other State to draw best practices from other states. This is because reviewing fatwa from other states can save the time and cost to fund similar research which has been carried out before. In addition, constant reviewing of each other's fatwa also has the potential to minimise the differences of Fatwa between different states (Interview with Irwan bin Subri on 16 December 2015).

²²An Islamic legal term that means "independent reasoning" or "the utmost effort an individual can put forth in an activity"

²³<http://www.e-fatwa.gov.my/jawatankuasa-fatwa-majlis-kebangsaan-bagi-hal-ehwal-ugama-islam-malaysia>, accessed on 19 November 2015

h) Members of Fatwa Committee should have attained the highest possible educational qualification

Fatwa Department is the authoritative body in issuing fatwa (Noor Naemah & Others 2005). It is the main source of reference by all parties. Thus, it is necessary for members to be among those who specialize in the field of religion, particularly Islam *Usul al-Fiqh*. But in reality, there is a lack of Islam experts among Fatwa Committee members and the different number and composition of members of the council that varies from state to state also contributed to the problem. This can be clearly seen in the organisational structure of each fatwa states institution. According to the writings of Mohamed Azam about mufti organization and department (2004), of 129 fatwa committee members in the entire nation, only 27 are academicians (20.9%) (Mohamed Azam 2004: 51). Therefore, it is important for members of the fatwa committee to be those with higher education background in Islamic studies in order to generate research-based fatwa. According to Rashid Rida as quoted by Yusuf al-Qaradawi, the purpose of ijtihad is not to complicate things and the effort required is similar to one undertaking a degree in the current knowledge field of law, medicine or philosophy (Mahmood Zuhdi 2010: 27).

i) Strengthening fatwa methods research and smart collaboration

Research are undertaken to search for the answer or solution of a problem or issue (Chua Yan Piau 2012: 3, Rahimin 2002: 5). Effective research methods is capable of producing quality research and credible outcome. In conducting research to produce fatwa, fatwa committee members or istinbat officers should enhance the application of effective legal research methodology to improve the quality of fatwa. In addition, the research methods of law or fatwa should be standardised so that uniformity of fatwa can be realised and reduce conflict among Malaysian fatwa. Regular seminars and workshops should be held by the responsible party, for instance, JAKIM, to discuss fatwa research methods to the fatwa committee members in each state. This will ensure application of research methods which are consistent and current in fatwa institutions in Malaysia. Collaboration can also be applied in fatwa research to solve contemporary issues by involving the state fatwa authority with research centre in public and private higher education institutions. This kind of cooperation could reinforce the findings of a fatwa issued (Ikhlas Rosele & Others 2013).

j) To establish the post of National Mufti and National Mufti Department

In handling fatwa-related conflict, there is a need to establish an institution that functions like Dar al-Ifta 'in Egypt (Abdul Monir 1998: 140), so it is recommended that a National Mufti Department or Federal Mufti Department be established in Malaysia (Mohd Mohadis 2007: 134). The roles and responsibilities of the department will include:

- a) Standardising fatwa at the national level.
- b) Conduct research and development, publication, reporting and enforcement of fatwa in Malaysia.
- c) Establish cooperative relationship with other Fatwa institutions at the regional, national and international levels (Mohd Mohadis 2007: 134).

In line with the establishment National Mufti Department, a National Mufti should be appointed with his main task to issue fatwa which concern Islam and public interest. This has been the practice of some Islamic countries such as Saudi Arabia, Egypt, Syria, Oman and others. For example, in Saudi Arabia, there is a position called al-Mufti al-'Am (General Mufti) currently held by Shaykh 'Abd al-Aziz Al al-Shaykh. General Mufti is the highest position in the religious authority in Saudi Arabia. Saudi judicial system is also bound by the views of the General Mufti (Abdulrahman 2010: 28-29). Therefore, it is reasonable to create the post of National Mufti to coordinate fatwa in Malaysia (Ikhlas Rosele 2013).

k) Amendment of the legislation

Certainly, there are some legislative constraints in standardising the fatwa in Malaysia, especially in the Federal Constitution which indicates that fatwa is exclusively under the power of the state. As the provisions of Article 74 (2) and item 1, List of state, Ninth Schedule of the Federal Constitution states that all Islamic law, and determination of all matters concerning the Islamic laws, and Islamic doctrine including fatwa are under the authority of the state. Similarly, contained in Islamic Religious states Administration Enactment and laws of the National Council for Malaysia Islamic Religious Affairs.

For example, according to section 36 of Act 505, mufti may amend, modify and revoke any fatwa that was issued earlier by him or by any previous mufti. This condition made it difficult to standardise fatwa because mufti has the authority to amend the state fatwa. Therefore, to resolve this issue further research should be carried out to study the enactment of Islamic law. If necessary, the laws should be amended accordingly (Arik Sanusi 2010: 86, Ikhlas Rosele 2013). There might also be a need to include the use of fatwa provision in civil court when the case concerns Islam and Muslims.

All the above suggestions relies on the jurisdiction which has binding power on the parties who are involved in issuing fatwa, with the ultimate objective to standardise fatwa. Irrelevant party's could pay heed to some of these suggestions, the differences of opinion and the ensuing conflict will be minimised and there will be greater possibility of standardising fatwa.

6.0 Conclusion

The discussion first problematise the issue of *qabd* which different mufti from different states has differing opinions and then indicates the importance of standardisation of fatwa to deal with this matter. This will allow the administration of *hibah* to be carried out fairly and impartially, and safeguard the economy and the welfare of Muslims. Hence, the government should take some of the suggestions whether by the State or Federal government to ensure that the Islamic legislative framework of the nation is moving towards standardisation, particularly in the production of a fatwa.

The first step is to create comprehensive written laws to fill all lacuna in the legislation regarding *hibah* property. The existence of a specific statutory provision can prevent divergence of fatwa between states in the nation and lead to consistency in decisions related to the administration of *hibah* property. As for cases where there is no existing legal provision which can be referred, reference to core Islamic texts and scholars' opinions (*tarjih*) must be in accordance with the social benefits and *maqasid syar'iyah*. In such cases, all state mufti referring to *qawl mu'tamad* in Shafi'i *madhhab* must also consider social benefits and *maqasid syar'iyah*.

Acknowledgement

This research was sponsored by Ministry of Higher Education under Fundamental Research Grant Scheme Phase 1/2014, No. 203/PHUMANITI/6711392. And this paper was proofread by Mr. Heng Wen Zhuo.

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