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 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 (qabd tabarru'). The hibah contract must meet the basic principles drawn up by fuqaha' because hibah is an 'aqad (contract). This is also true for other Islamic contracts such as purchase, rental, lending, wills and others. Hibah has 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 the enforcement is after 'aqad (offer) and qabul (acceptance) is made between the two parties.

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On the other hand, the majority of fuqaha' said that hibah is effective after the fulfilment of three 'aqad elements which are agreement (qabil) and qabil 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 qabla - yaqidu 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 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 figh view on qabd will affects the legal position of hibah when discussing the cancellation of hibah. In this case, for fuqaha' who believe qabd is a necessary condition to hibah, hibah can only be cancelled before qabd. As for fuqaha' 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 jab and qabil), 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 qabd (al-tamakkun min al-asam fi al-maqul) (al-Kasani 1986: 8/108). In general, there are two views among the fuqaha' about qabd position in hibah.

3.1 Qabdas a requirement for Hibah


Moreover, according to Ibn Qudamah, qabil 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 Sahabah that8 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 qabil (Qudamah 1405H: 6/280).

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4 This is because mawhub (is a maqbudor goods) and mawhub lah is (qabil or the person holding) corresponding to each other when associated with qabil.

5 According to Ibn 'Abd al-Barr that Muhammad bin Nasr al-Marwazi said, “Has agreed to Abu Bakr, Umar, Uthman and Ali that qabil 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)


8 Sayings, actions and consent of the Sahabah, 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 holdsthe 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 Sahabi 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 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 concensus because there are still disagreement by some Sahabi, tabiin and tabi' tabi'in like Malik, Shafi'i in qabd qadam (older opinions), Abu Thawr, Hasan al-Basri who believes that hibah is effective after qabd. Likewise the Sahabi expressed that qabd cannot be used as a strong argument because there remains disagreement between themselves. Thus, the opinion of Sahabi 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 madhab 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 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 (sahih) and giving indication (qadhib) (al-Kasani 1986, 8/106). Transparent consent is obtained when donor allow the beneficiary to take or own them mawhub with words like 'take', 'i let you take', 'i give' and other similar phrases. Qadhib this situation can be done both inside or outside qabd ceremony. 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).

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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'inn in Islam

12 The legal based by istisna method. However, based on the qiyas, qabd must be done in the hibah council. As recommended by Zufar, a scholar of the Hanafi madhab. 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. In addition to these measures, the Islamic law also recognizes ijab from donor as consent to beneficiary undertaking qabd with the condition that the donor does not prohibit qabd from being done after ijab.

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 (mutur al-dah), 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 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 fiqh comprising Abu Thawr, Maliki, Zahiri madhhab and al-Shafii in qabd qabim Ahmad bin Hanbal in a famous history, stated that qabids 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 valid once both sides of donor and beneficiary have agreed through qabim. According to Malik, qabd is only a requirement for the completion of hibah (sah al-tamami). 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 cancelled. Also note that the consent of donor is not required for qabd Malik 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 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 'acepd is an agreement that must be obeyed as with other 'acepd. Therefore, compliance to this 'acepd does not require the parties to complete qabidi 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: 1490). (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 is taking back gifts in hibah which is similarly forbidden. Hence, the hadith quoted in an absolute condition without limiting either already done qabids or not, it is necessary to keep these hadith in an absolute condition. Therefore, the validity of hibahs dependent on the 'acepd with or without qabid (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 qabid 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 qabid (al-Wahhab 1998: 2/498). Therefore, the ownership of mawhubis 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 (taham), the transference of ownership of mawhub is valid before the qabids as in the case of wills and endowments (wajib) (al-Kasani 1986: 8/3688). Malik also made comparison between qabd of hibah and qabim for sale (bay') in which the transfer occurs in the transaction without qabim. These views hold on to the idea that "At the beginning of contract('acepd, qabd is not required as a condition of validity, until there is evidence (chil) to suggests otherwise" (al-Wahhab 1998: 498).

13 Consent to this dilalah is to be based by istisihan 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-'Adliyah.

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

15 See Article 13 and 863 in Majallah al-Ahkam al-'Adliyah.
In addition, they back up this matter with the words of Sayyidah and Tabûn narrated by 'Ali and Ibn Mas'ûd that they require sâkidh (voluntary charity) without qabîlî. The qabîlî has taken effect after the qâdî is made. This is also narrated by Ibrahim and Sûfîyân (al-Sân'în 1970: 9/122-123). However, the arguments put forward are weak where hadiths mentioned do not indicate the enforcement of the hîbîh after qâdî and do not clearly indicate the prohibition to take back gifts before qâdî. However, the hadith only clearly indicates the prohibition of taking back gifts after qâdî.

In addition, comparing hîbîh and will is misleading for two reasons, namely, first, that the will is a contract of ownership after death while hîbîh 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 hîbîh cannot be compared to a will because hîbîh is changeable before qâdî while the will is changeable before death of the testator. In this case also, the jurists (furqînî) 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, Qudâmahl 1405H: 6/133-134). There is also argument that hîbîh does not require qâdî as in commercial transaction, but this comparison is misleading (qîṣâs mî’a fāriq) simply because commercial transaction is changes of ownership with repayment (‘îwâd), while hîbîh is changes of ownership without repayment.

So on this matter, the researchers support the views expressed by the majority of furqînî that qâdî is a requirement for hîbîh because the arguments put forward are strong and in accordance to the concept of mâqâsid al-Sâriyâh. It needs to be stressed that if qâdî is completed via ijab and qâdî 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 Qur’an (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 thrust.’ (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 thrust.” (Narrated by Ahmad, Hadith Number: 22757)

4.0 Law and Fatwa concerning Qâdî in Islamic Countries

The question of qâdî 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 furqînî where hîbîh take effect after qâdî. Examples of law and fatwa include Egyptian Civil Law in Item 487 of 1948 which states that "Hîbîh 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’îr (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 qâdî.19

In Malaysia, although there is no specific law concerning hîbîh 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).

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16 Majâlîh al-Buhûth al-Islâmîyyah, no. 73, year 1425 H, see:
(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%D9%84%D9%87%D8%A8%D8%A9&MofitIds=
(accessed on 12/2/2016)

18 Fatwa issued on 27/5/2012, bil. 2724, see: http://ifta.ly/web/index.php/2012-09-04-09-55-16/2012-10-08-30-03/331-
2012-11-06-14-15 (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 Iismail, 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. Kalsom Dahan, 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 Muhib Hj Jaafar & Another vs. Perak 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. Shamardin bin Awang & Another ((1998) 6 MLJ 231). In the case of Mohd Muhammad b Hj. Abdullah & Fadhliah b 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 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 in qabd which is the benchmark to determine whether an action is considered qabul or otherwise. In other words, if 'urf of a society states that an action is qabul, then that can be considered qabul. As for trust companies that manage products related to hibah, they generally possess own mechanisms to fulfill the need for qabul (Nasrul 2011: 96).

The institutions aligning with the opinion of the minority of fuqaha' are Tunisia Family Law known as Majallat al-Alwal al-sakhsiyyah (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 'arfijab and qabul." This provision is similar with the official madhab 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 dicember 2015).

5.0 Fatwa Standardisation Initiatives concerning Qabul of Hibah In Malaysia

The different fatwa concerning qabul 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 (siyasa sariyyah).

In today’s administration of Islamic law, the fatwa standardisation approach issued by referring to specific to madhab opinions. In countries other than Perlis, Fatwa State Committee is required to refer mainly to the Shafii madhab based on the provisions of qawul mutamad (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 qawul mutamad Syafii madhab based on al-Quran, Hadith, Ijma’ Ulama and Qiyas. Unless the Fatwa Committee considers that following the Shafii madhab will produce a situation against public interest, then the Fatwa Committee may follow qawul mutamad Hanafi madhab or Malik or Hanbali after obtaining the consent of His Majesty the Sultan. Similarly, if the Fatwa Committee viewed that none of the qawul mutamad of the four madhabs can be followed without leading to a situation against the public interest, the fatwa committee may be decided by themselves without being bound by qawul mutamad from any of that four madhabs (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 madhab recognized by the Ahl al-Sunnah wa al-jam'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 Fatwa and then Shara'iah Committee when giving its opinion under sub-section (2) shall follow the Quran and Sunnah or Sallal Rasul Allah Allah ‘Beautiful allaahi. Provided that where the following of such tends 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, justified fatwa decisions (rajiah) can be made. The fatwa decisions must be aligned with maqsid al-syar'iyah so that the fatwa goal can be achieved. Thus, in addition to referring to the views of different maqsid, the emphasis and rajiah (outweighing) should be on public interest and maqsid (purposes). This is because of the possibility that the opinion of the Shafi'madhhab may be rajiah (not justifies) and opinions of other madhhab may be more rajiah (justified). The freedom to refer to different madhab 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 madhab 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 maqsid (purposes) for as longs 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 fiquih. Thus, according to the provisions of the existing law, there is no problem for the states to unify their opinions on qadi issue because this is a justifiable opinion based on the qaw mutamad in Shafi'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 Qaw Mutamad Shafi'i Madhab Reference

Reference to the opinion of the Shafi'i madhab should be prioritised to realise social benefits and attain maqsid al-syar'iyah. Reference for developing fatwa should not be narrowly defined to include only the views of Shafi'i madhab. Therefore, the provisions of relevant enactment should be understood at all clause (i), (ii) and (iii) in respect of Qaw Mutamad 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-Shafi'iyah and Furu' al-Shafi'iyah

Although State Fatwa Council is bound by the with fatwa administration enactment in issuing fatwa such as the need to prioritise Shafi'i madhab 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-Shafi'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-Shafii, but also need to take into account local circumstances and maximize public interest. In this case, *ijtihad* 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-'Irsyadi). Second is doing a new *ijtihad* to find current solutions to new problems faced (al-'Irsyadi). Both of these local approaches are very important because since the time of al-Shafii 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 regard, 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 (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. 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, UPPKPTGP, JKS, LEPAI and the National Land Council to examine and advise on matters which are under the authority of the State (Siti Zalikha 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 States 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).

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22 An Islamic legal term that means “independent reasoning” or “the utmost effort an individual can put forth in an activity
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 Piaw 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 Multi 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-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 (Abdurrahman 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 fatwabecause 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 qad 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 (taqdis) must be in accordance with the social benefits and maqasid syar'iyyah. In such cases, all state mufti referring to maqasid syar'iyyah must also consider social benefits and maqasid syar'iyyah.

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