

HIBAH: A CASE STUDY IN SYARIAH HIGH COURT OF KOTA
BHARU

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**Perpustakaan
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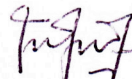
AUTHOR DECLARATION

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

I hereby declare that this academic project is my own except for quotations and summaries which have been duly acknowledged.

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

In the name of Allah, the Compassionate, the Merciful

Praise is to Allah Almighty, the Cherisher and Sustainer of the Universe. May the peace and blessings of Allah Almighty be upon Muhammad, the Seal of the Prophet s. a.w. In completing this academic project report I have contracted many debts. I am grateful to many people without whose sincere help and encouragement, I would not be able to complete this research.

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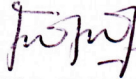
In particular my thanks are to my parents; my father, Ghazali bin Latiff who persuaded me to learn and always emphasized the importance of education as a means of achieving a happy life and my mother, (*may Allah bless his soul and award him paradise*). Praise is to Allah Almighty, when my sibling come to my life and gives me a moral support to complete it.

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In conclusion, I must say that all merit of conveying the message of Allah in this project is entirely due to the bounty of Allah and if, in it, there are faults and mistakes they are entirely mine and I seek Allah’s forgiveness for any such inadvertent error.

May Allah help us all to work together for His sake.

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ABSTRAK

Kajian ini bertujuan untuk mengetahui dengan lebih mendalam tentang pelaksanaan *hibah* di mahkamah tersebut banyak didaftarkan atau tidak. Untuk memperoleh maklumat, penulis telah melakukan penyelidikan di beberapa perpustakaan, melayari internet untuk meneliti buku-buku dan maklumat yang berkaitan dengan perpustakaan dan menemuramah kakitangan di mahkamah tersebut. Dalam tempoh lima tahun tersebut iaitu bermula dari tahun 1999 hingga 2003 hanya 15 kes sahaja yang didaftarkan. Hasil daripada kajian tersebut, tidak banyak kes *hibah* yang didaftarkan di mahkamah tersebut. Sehubungan dengan itu juga, kajian ini menghuraikan dan mengenalpasti sejarah penubuhan Mahkamah Tinggi Syariah Kota Bharu sejak dari zaman penjajahan British hingga ke hari ini samada dari sudut pentadbiran, bidangkuasa dan prosedur mahkamah dan Qadhi. Di samping itu juga, penulis juga mencadangkan agar mahkamah tersebut melakukan perubahan selari dengan pembangunan negara agar segala proses dan aktiviti di mahkamah tersebut berjalan lancar.

ABSTRACT

The aim of this research is to know deeply about the implementation of *hibah* in the Syariah Court of Kelantan whether it has been registered or not. To complete this research, the researcher had conducted an intensive step such as making a library research including reference to relevant books, through surfing the internet and also handling interviews with the officers and staff at this court. In period of five years, started from 1999 until 2003 only 15 cases had been registered. That means, there a lack of *hibah* cases, which registered at this court compared to other cases. According to this research, the researcher also has explained and determined the history of the establishment of Syariah High Court since the British colonization until today either from its administration, jurisdictions and procedure of court and Qadhi. However, the researcher also makes a suggestion to the court to make reformation streamline to the development of this country to ensure that all of the processes and activities in court become smoothly.

ملخص البحث

تقوم هذه الدراسة على معرفة تطبيق الهبة بالدقة في المحكمة الشريعة العليا بكويتا بهاروا سواء كان مسجل أم لا. ولتحقيق ذلك، اعتمدت الباحثة على منهج البحث المكتبي الذي يتضمن الرجوع إلى الكتب والمصادر التي لها صلة بالموضوع. وجدير بالذكر، أن الباحثة أيضا استعملت الحاسب وأجراء المقابلة الشخصية في هذه المحكمة. لمدة خمس سنوات ابتداء من سنة ١٩٩٩م إلى ٢٠٠٣م توجد مس عشرة حالة مجلة في المحكمة. ونتيجة هذه البحث، قلة الحال بالمسجلة للهبة في المحكمة. وإضافة إلى ذلك، يوضح هذا البحث نبذة تاريخية لهذه المحكمة. ابتداء من عصر الاحتلال حتى يومنا هذا سواء من ناحية الإرادة والسلطة وإجراءات المحكمة. وتقترح الباحثة أن على المحكمة لابد من تغيير وتطوير الوضع إلى الحلي وفقا لتطور وتقدم الدولة حتى تكون جميع الإجراءات سهلة وميسورة.

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GLOSSARY

<i>'asabah</i>	Consanguinity.
<i>'ulama</i>	Plural of <i>'alim</i> , Islamic jurists.
<i>adil</i>	Virtuous.
<i>al- Quran</i>	The Holy Book revealed by Allah to Prophet Muhammad SAW
<i>Al-Bayyinah</i>	<i>Evidence.</i>
<i>Al-Sunnah</i>	<i>The tradition of Prophet Muhammad SAW including his deeds, saying and approval.</i>
<i>ayah</i>	Signs.
<i>ayāt</i>	Plural of <i>ayah</i> , verses of the <i>Qur'an</i> .
<i>Baitulmal</i>	Treasury.
<i>baligh</i>	Of the age of majority.
<i>faraid</i>	Rules of inheritance, the portions allotted to heirs. The relative of a deceased.
<i>Fatwa</i>	Formal legal opinion issued by a <i>Mufti</i> .
<i>fiqh</i>	Islamic jurisprudence.
<i>hadīth</i>	the tradition of the Prophet Muhammad s.a.w.
<i>harta sepencarian</i>	Property jointly acquired by husband and wife during the subsistence of marriage in accordance with the conditions stipulated by Hukum Syara'.
<i>hibah</i>	The donation of a thing from which the donee may derive benefit.
<i>hukum</i>	Ruling of Shari'ah.
<i>hukum syara'</i>	practical laws of Islam.
<i>Ijma'</i>	<i>Consensus of the 'ulama.</i>
<i>Iqrar</i>	Admission.
<i>Istihzar</i>	The oath is administered by the judge without an application.
<i>khobar</i>	News or information.
<i>maradal maut</i>	the disease which causes death
<i>mukallaf</i>	Persons with full legal competence.
<i>Mutaah</i>	A consolatory gift that is reasonable according to Hukum

	Syara' , given to a divorced wife.
<i>nasab</i>	Paternity or lineage.
<i>Nazar</i>	To vow.
<i>Peguam Syarie</i>	<i>Syarie</i> lawyer.
<i>qarinah</i>	Circumstantial evidence.
<i>qhadi</i>	Judge.
<i>r.a.</i>	Abbreviation of " <i>Radhi Allahu 'An Hu</i> " meaning " <i>Upon him the Blessing of Allah</i> ".
<i>s.a.w.</i>	Abbreviation of " <i>Sallallahu 'Alaihi Wa Sallam</i> " meaning " <i>Peace be upon him</i> ". It is compulsory for a Muslim to utter this blessing whenever he hears the Prophet Muhammad's name mentioned.
<i>s.w.t.</i>	Abbreviation of " <i>Subhanahu Wa Ta'ala</i> " meaning The Almighty God.
<i>shahadah</i>	Testimony of a witness.
<i>shar'iah</i>	The collection name for all the laws ordained by Allah SWT for His servants through Prophet Muhammad SAW including the Islamic systems of <i>'aqidah</i> , <i>akhlaq</i> , <i>'ibadah</i> and <i>mu'amalah</i> .
<i>Sudakah</i>	<i>Whatever is given and sanctified to God's service as alms or tithes.</i>
<i>sulh</i>	Compromise.
<i>sunat</i>	Commendable.
surah al-Baqarah	Chapter two of al-Quran.
<i>surah al-Maidah ayat</i>	Chapter five of al-Quran.
<i>Surah Al-Nisa</i>	Chapter Four of al-Quran.
<i>ta'zir</i>	Discretionary punishment for offences not amounting to <i>hudud</i> .
<i>sighah</i>	<i>Expression.</i>
<i>Wakaf</i>	Charitable endowment.
<i>Yamin</i>	Certain beyond any doubt.
<i>yaqin</i>	Certain beyond any doubt.

ABBREVIATIONS

i.e.	that is to say
n.a	no author
n.d.	no date
n.pb.	no publisher
n.pl.	no place
no.	number
p.	page
pp.	pages
r.a.	Radhi Allahu ‘An Hu
s.a.w.	Sallallahu ‘Alaihi Wa Sallam
s.w.t.	Subhanahu Wa Ta’ala
trans.	translated
vol.	Volume

CHAPTER

1

CHAPTER ONE

INTRODUCTION

Research Background

Nowadays, *Hibah* has been practised by Islamic community, which was actually had been practiced during Prophet s.a.w lifetime. However, local communities have practised *hibah* in their life, such as in the case of transfer of property by parents to their child while alive. Nevertheless, it is not practised widely.

Hence, the issue has been discussed more often nowadays. Furthermore, there are a lot of inheritance matters, which cannot be settled due to lack of property planning in the Muslim community. By the way, the knowledgeable public tried to claim the ownership of property through the right ways. Thus, the right ways are the through court, which has its own jurisdiction to hear the case.

The Problem Statement

The issue being raised is whether the judgment of *hibah* are carried out or done justly and not being abused by any parties involved. So, could the court account the *hibah* exactly as a part of requirement and conditions? What is the explanation or illustration to support the fact, which will be faced by the public? Besides that it is to ensure whether *hibah* is practised based on syariah rules and the publics are satisfied on the actual jurisdiction of Syariah Court.

Aim Of Research

The widely, the goal here is to inculcate the Muslim community with understanding and knowledge about *hibah*. Besides, the writer is responsible to develop her self and to achieve the aim research.

Research Objective

The objectives of research are:

- a. to look at the issue on whether *hibah* is practised based on *hukum syara'* by Muslim community.
- b. to investigate whether the judge has jurisdiction to settle *hibah* problems and cases, which are filed and registered in the court.
- c. to know whether the practice in the Muslim community have knowledge actually related to inheritance aspect and the ownership of property. Hence, the effect is that it can prevent the problems facing by community nowadays and get peace and harmony life.
- d. to inform the community of *hibah* as the best way to avoid crucial problem in the distribution of inheritance and it is a commendable practice.

1.1 Definitions Of Hibah

A “*Hibah*” or simple gift *inter vivos* (between living person) has been variously defined. Literally it means ‘the donation of a thing from which the donee may derive benefit. In its technical sense it is defined as “unconditional transfer of property, made immediately and without any exchange or consideration, by one person to another and accepted without consideration”¹.

The depth of definition laid down by groups of Jurists stated that:

عقد يفيد التملك بلا عوض حال الحياة تطوعا

Which means: the consent to cause the right of property, without compensation by one person to another voluntarily in their life.²

¹ Aqil Ahmad. 1976. *Text Book of Mohammedan*. Eighth edition. P.137 Allahabad. Central Law Agency.

² Asy-Shabaini al- Khatib ,1978. *Mugni al-Muntaj* , Jilid 2. page 296. Beirut:Dar al-Fikir .

In order to ensure the public practices that *hibah* correctly, it must follow the steps underlined by the law. The groups of Jurist were unanimously agreed on the requirements of a valid *hibah* on few similar elements. There are four requirements, which are fundamental or essential for a valid *hibah*:

1. Donor: the capacity of making a gift; like any other contract, depends on the condition.
2. Donee: any person capable of holding property, which includes a Juristic person may be the donee of a gift.
3. Subject matter of a gift: what property can be given.
4. The pronouncement of *ijab* and *qabul* (offer and acceptance) An offer: is a declaration of the gift by the donor. An Acceptance is of the gift by the donee.

Doctrine of *Mushaa'* means: *Mushaa'* is an Arabic word derived from the word "*shuyum*" which means "undivided share in a property³."

1.2 The Authorities Of Implementation

Hibah was deemed as a way to help each other. Its nature is welfare and to close the relationship of mankind. The *ulama fiqh* have laid down the *hukum* of implementation of *hibah* as *sunat*. As Allah says in following of *surah*:

1. al – Quran

Allah s.w.t says:

...فان طبن لكم عن شيء منه نفسا فكلوه هنيئا مريئا.....

Which means: ...But if they, with their own good pleasure, Give back any part of it to you, Take it and enjoy it with right good cheer. (Al-Qur'an. Al-Nisa 4: 4)⁴.

³ Anwar Ahmad Qadri. 1963. Islamic Jurisprudence In The Modern World(A Reflection Upon Comparative Study of the Law). First edition. P.205. n. pb.

⁴ All Quranic translation in this writing are based on Professor (dr.) Syed Vickar Ahamed

In another *ayah* Allah says:

وءاتى المال على حبه ذوى القربى واليتىى والمساكين وابن السبيل

Which means: to spend from your (own) wealth, Out of love for Him, for your kin, for orphans, for the needy, for the wayfarer, for those who ask, and for the ransom of slaves. (Al-Qur'an. Al-Baqarah 2:177)⁵

2. Sunnah

In a *hadith* to the effect:

عن ابى هريرة رضى الله عنه يقول الرسول (ص): " تهادوا تحابوا "

Which means: The Prophet said, "exchange the gift with someone, and will be love him".⁶

The above *hadith* stresses the honestly exchange of gift whit someone; as a result will be truly love him as a humankind.

In another *hadith* of the Prophet s.a.w. have been reported to have said to the effect:

من جاءه من اخيه معروف من غير اشراف ولا مسألة فليقبله ولا يرده فانما هو رزق ساقاة

الله اليه

Which means: someone who receive the benefit or right thing from her heir without consideration and have not intention to required, must received and not push it. Deemed and presumptions it as are consideration from Allah.⁷

Holmded.1999 .Research, Writing and Translation. Cairo, Egypt: Percetakan Yayasan Islam Terengganu Sendirian Berhad. Translations from other sources will be cited accordingly.

⁵ All Quranic translation in this writing are based on Professor (dr.) Syed Vickar Ahamed Holmded.1999 .Research, Writing and Translation. Cairo, Egypt: Percetakan Yayasan Islam Terengganu Sendirian Berhad. Translations from other sources will be cited accordingly

⁶ Sayid Sabiq, 1978 h.*Fiqh Sunnah*, Cetakan 1, Birut : Dar al-Khuttub al-Arabi, h. hlm 388

Which means: someone who receive the benefit or right thing from her heir without consideration and have not intention to required, must received and not push it. Deemed and presumptions it as are consideration from Allah.⁷

The Prophet s.a.w asked his creatures to take any gift which giving for them although it is no expensive. Thus, some other *ulama'* gave their views about receive any gift which any person an accepted without any consideration. Based on *Syara'*, there are not have any barriers to received any gift and there are ample evidence to support this view. In *hadith* of the Prophet s.a.w. have been reported to have said to the effect:

عن انس قال : قال رسول الله (ص): لو اهدي الي كراع لقبلت ولو دعيت عليه لأ جبت

The Prophet s.a.w said, I shall accept the invitation even if I were invited to a meal of a sheep's trotter and, shall if it were an arm or a trotter of a sheep.⁸

وتعاون على البر والتقوى ولا تعاون على الإثم والعدوان

Which means: You help one another in righteousness and in Holy deeds, but do not help one another in sin and evil. (Al-Quran, Al- Maidah 5: 2)⁹

Thus, the Muslim who have the nature to help one another will be in close relationship, which already has in one another.

However according to al-Quran and as-Sunnah and majority of *ulama'*, Islam clearly encourages the Muslim to receive the gift from someone. The purposes are to build close relationship and to avoid the jealousy.

⁷ ibid. Hlm 388

⁸ Badran Abu al-Aini.1987.Al-Mawaris Wa al-Wasiat Wa al- Hibbah Fi Syariat Islamiyyah Wa al-Qanun,.Jamiah Iskandariah , hlm. 223

⁹ All Quranic translation in this writing are based on Professor (dr.) Syed Vickar Ahamed Holmded.1999 .Research, Writing and Translation. Cairo, Egypt: Percetakan Yayasan Islam Terengganu Sendirian Berhad. Translations from other sources will be cited accordingly.

1.3 The Requirements And Conditions Of *Hibah*

In order to ensure that the public practices *hibah* correctly, it must follow the steps underlined by the law. The groups of Jurists were unanimously agreed on the requirements of a valid *hibah* on few similar elements. There are four requirements, which are fundamental or essential for a valid *hibah*:

1. Donor
2. Donee
3. Subject matter of a gift
4. The pronouncement of *ijab* and *qabul* (offer and acceptance)

Donor

Donor: is the capacity of making a gift; like in any other contract, it depends on the following conditions .The donor must satisfy these conditions:-

- I. Majority: The donor must be a major that is he must have attained the age of majority.
- II. Sound mind: The donor shall be a person of sound mind because an insane person or a child cannot held accountable for their words or their deeds under the syariah. In order words they are not considered as a *mukallaf* persons.
- III. Understanding: The donor must have full understanding meaning thereby that should be conscious of the act, which he is doing.
- IV. Freedom: The donor should have the freedom of disposing of the property by way of give. There should not be any legal hindrance.
- V. Ownership of the subject matter of disposition: The property to be disposed by the donor by way of gift should be of no conflicting nature so far the ownership is concerned. Donor should be the owner of the property.¹⁰

¹⁰ Aqil Ahmad. 1976. *Text Book of Mohammedan*. Eighth edition. P.137 Allahabad. Central Law Agency.

Donee

Donee: any person capable of holding property, which includes a Juristic person, may be the donee of a gift. Thus sex, age, creed or religions are no bar to the taking of a gift. However, the donee must be in existence at the time of making the gift.

Some particular instances: -

i. Unborn persons.

Gift in favour of an unborn person is invalid. However, a person who is born within six months of the date of gift or who is in the womb is supposed to be in existence and hence is a competent donee. But the Shi'ah Law is different on this point and life estates in favour of an unborn person can be devised, provided the commencement is made with a person in case.

ii. Mosque.

Mosque or any other institution, being Jurist persons is competent donee.

iii. Non- Muslims.

A gift to a non-Muslim can be validly made. And after the gift is complete, the property will be subject to the personal law of the donee and not to that of the donor.

iv. Fiduciary relationship.

A gift to a donee who stands in fiduciary relationship to the donor is valid only when it is proved that it was not vitiated by the exercise of undue influence. When the donee stands in a fiduciary relationship to the donor or the relation between the parties is such that the donee is in a position to dominate the will of the donor. The presumption of undue influence arises and on that account such a gift can be held to be void and in such circumstances it is incumbent on the donee to satisfy

the court that the donor had competent and independent advice in making the gift.¹¹

Subject Matter Of A Gift

Subject matter of a gift: refer to what property can be given.

The general principle is laid down in the following words:

- i. anything over which dominion, or right of property may be exercised, or
- ii. anything which can be reduced to possession, or
- iii. anything which exists either as a specific entity or as an enforceable right, or
- iv. anything which comes within the meaning of word "Mal".

Form the above; it is clear that to be valid subject of gift the thing must be "Mal", *i.e.* it must be a thing of some value in the eye of law.¹²

Elements of subject matter of gift. Mohammedan Law recognizes and insists upon the distinction between the two elements of a property: the *corpus* and the usufruct. 'A leading distinction in Muslim Law is that between: -

- a) *ayn*, or *mal*, or the substance of a thing, or its corpus, or thing itself,
- b) the *manafi* of such a thing, or its services or what it produce, or fruits or usufruct, or use, or right to take its benefits, or its services or what it produces.¹³

By a *corpus* is meant the absolute right of ownership over the property – a right of ownership over the property, which is heritable and is unlimited in point of time. By *usufruct* is meant the right of a person to use and enjoy the property. This right is limited in point of time and is not heritable.¹⁴

¹¹ *ibid.* p.139-140.

¹² *ibid.* p.140.

¹³ *ibid.* p.140.

¹⁴ *ibid.* p.140.

The policy of the Mahomedan law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specific portion. Their Lordships of the Privy Council have adopted and approved of the following passage in Ameer Ali that lays down the three conditions necessary for valid gift:

- i. Manifestation of the wish to give on the part of the donor.
- ii. The acceptance of the donee, either impliedly or expressly.
- iii. The taking possession of the subject matter of the gift by the donee, either actually or constructively.

The Pronouncement Of *Ijab* And *Qabul* (Offer And Acceptance)

The pronouncement of *ijab* and *qabul* (offer and acceptance) An offer: is a declaration of the gift by the donor. An Acceptance is of the gift by the donee. "Even when the declaration and acceptance are not express in words, so long as the intention is evidenced by conduct, it would be sufficient "

There are several of the conditions for the validity of the Pronouncement Of *Ijab* And *Qabul* (Offer And Acceptance):

- i. There must be a clear and unambiguous intention of the donor to make the gift. When there is no real or bona fide intention on the part of the person making of the gift; the alleged gift will be void. It is on this basis that it has been held that a gift with intent to defraud creditors is avoidable at the option of the creditors. The intentions must be real and *bona fide* and the manifestation or the declaration of such intention must be clear and unambiguous. But a gift made with a view to disinherit other heirs is not illegal.
- ii. There must be an acceptance of gift, by or on behalf of the donee. It may be either actual or constructive, according to the circumstances of the case. However, in an Allah bad case it has been held that where a father or other guardian makes the donation in favour of his minor son or other ward, acceptance is not necessary.
- iii. The third essential for the validity of a gift is delivery of possession. The other elements of *hibah* will have no legal effect unless they are accompanied by

delivery of possession. One point to be noted here is that the term 'possession' under Mohammedan Law of gift means "Only such possession at the nature of the subject is capable of". Thus the real test of the delivery of possession is to see, whether the donor or the donee reaps the benefit of the property ; if the donor or the donor reaps the benefit of the property ; if the donor , the possession is not transferred and if the donee, it is transferred and the gift is complete.

1.4 The Power Of Implementation

Firstly, gift of immovable property by husband to wife. The delivery of possession and the formalities regarding it, *viz.*, those of vacating the house or removing the goods of the donor from it are not essential. When the gift is made by the husband to the wife and *vice versa*, provided it can be inferred from the surrounding circumstances that he real and *bona fide* intention to make the gift.

The fact that the husband continues to live in the house after donation and receives the rent thereafter, will not invalidate the gift as it is presumed that such acts of the husband, after the gift, are on behalf of his wife and not on his own account.

Secondly, gift to minor by father or other guardian. No transfer of possession is required in case of gift by father to his minor child or by a guardian to his ward. All that is necessary is to be established *bona fide* intention to give.

The guardian referred to in the above paragraph is the guardian of the property of the minor, namely:

- i. father,
- ii. his executor,
- iii. grandfather,
- iv. his executor.

- a) Gift by father (or his executor) to his minor son.

No change of possession is necessary in this case for the father himself is the person to receive possession as the guardian of his son.

b) Gift by grandfather to his minor grandson provided the father is dead.

In this case also have no delivery of possession is necessary as in the absence of father, grandfather is authorised to receive property on behalf of the minor grandson as a guardian.

c) Gift by grandfather to his minor grandson occurs when the fathers are alive and have not been deprived of his rights and powers as guardian.

In this case there must be delivery of possession by the grandfather to the father as guardian of the minor son, otherwise the gift is not complete even though the minor and his parents are living with the grandfather.

Thirdly, where donor and donee both reside in the subject matter of the gift. No physical departure or formal entry is necessary in case of a gift of immovable property in which the donor and the donee both reside at the time of the gift. In this case only a clear intention is enough.

Fourthly, a gift by one co-sharer to another co-sharer who already in possession of the house on behalf of all the co-sharer is valid, there being a constructive transfer of possession.

Fifthly, when the property is in possession of the donee as *bailee* or trustee or legatee or mortgage. The gift may be completed by declaration and acceptance without formal delivery of possession.

But when he holds it is a mere manager or agent, his possession is not such as would render formal delivery unnecessary.

1.5 Hibah Made During Death-Sickness (*marad al-maut*)

The term *maradu' maut* means 'the disease of death', or 'the disease which causes death', the disease which causes weakness to patient (man) to be seen the benefit and will be weakness to woman to be seen the benefit.

In decide, someone who in the situation of *Maradul maut* must be seen several condition as follows¹⁵: -

1. The deceased, which due to dies,
2. The death which be caused by certain the disease in the time one years or after one years (in the disease time increase heavy)
3. The disease can forget and careless one of the patient from the need and nature earthly.

Thus, *hibah* at the *Maradal Maut* is giving which is done by painful tired which can be to die. In Islamic Laws the gift have two varieties of law, which is law of hibah and law of will. The concept had similarity with the principle of donotis causa in the English law.

In Islamic law, if the donor meet last day (during *maradal maut*) following with the pronunciation the gift, so that the gift same like gift by will and must satisfied the rule of will namely¹⁶: -

1. The gift not more than one-third from the deceased property
2. The gift not is given to the member of heir except the others members had agreed.

¹⁵ Mohd Ridwan Awang. 1994. *Undang-undang Mengenai Pentadbiran dan Pengurusan Harta Orang Islam di Malaysia: Konsep Keadilan Dalam Pusaka Islam*. Jabatan syariah UKM.p.19

¹⁶ Ibid, p.20

But, if the giver live the *hibah*, it is include in the rule of *hibah* and must satisfied the rule of *hibah* during live (*inter vivos*) that is delivering the possession of right by the donor to the donee¹⁷.

Within the *Majalah al-Ahkam al-Adiliyyah* has explained several provided on the *hibah*, the condition and the rule. The provided of *hibah* as follows: -

1. When someone do not have member of heir is delivering the possession of right through *hibah* to the other person during *maradal maut* and the gift be accepted. The rule of *hibah* is lawful. After his death the leader of treasury (*Amil Baitulamal*) cannot put the as inherited properties¹⁸.
2. When the husband had made *hibah* all his properties to his wife or vice versa during the *maradal maut* and the *hibah* already been acceptance while they do not have the other member of heir except one of them the rule of *hibah* is lawful¹⁹.
3. When someone who has many owes had make *hibah* all his property to the heir or vice versa and is accepted. So, the *hibah* is invalid. That mean the person who has owed can nullifies the *hibah* and the property can divide to the owe person²⁰.

¹⁷ Asaf A.A Fyzee. Op.Cit.p.370

¹⁸ *Majalah al-Ahkam al-Adiliyyah*. perkara 877

¹⁹ *Ibid*. p. 878

²⁰ *Ibid* .p. 880

CHAPTER 2

CHAPTER TWO

SYARIAH LAW IN KELANTAN

2.1 BEFORE BRITISH COLONIZATION

The history of the establishment of Syariah Court of Kelantan streamline with the colonization of British to Malay State and were introduced their law. Nevertheless, the Malayan have not respond. Although, the Islamic judiciary systems were practiced from previous descend and started from government of Sultan Muhammad (1836-1886). Therefore, the law was accepted in the government of Sultan Muhammad II (1886M-1905M). He was followed the government of Almarhum Sultan Muhammad I which guilty and murder punishment for those who made the murder guilty except requested by their family to extenuate the punishment. As the result, the offence imposed the ta'zir.²¹

Nowadays, the law included personal-law, property, moral and management law. The law enforce today are union law, custom law and Islamic law. Furthermore, the law was taken form substantive law and book and classics book law such as Bughayat al-Mustashidin²². However, it has change from time to time. This circumstance was continuing until the colonist interfere come, which introduced their law.

2.2 AFTER BRITISH COLONIZATION

After that they were success to stay in Kelantan through Anglo Siamese Treaty 1909 in which most change were made including trial for minimize court jurisdiction which were practiced Islamic Jurisdiction System previously due to build and create the systematic system. Therefore, they were introduced the law into rule system which

²¹ Mohd Zain Bin Salleh, 1985. *TuanKu Tonggk Kedaulatan Islam Kelantan, Majlis Agama Islam Dan Adat Istiadat Melayu Kelantan* . Cetakan A &D Printing And Stationery Co. Sdn. Bhd. Kota Bharu. Kelantan.p 45

²² Ibid. p.50

enforce at that time and were ignored Islamic law little bit for time to time through enactment related to the implemented Syariah Court law until have family law only²³.

The main step is taken over the jurisdiction of inheritance of property and jurisdiction of non-Muslim. Although they were support to build District Qadhi court and become about 8 courts, which build before and after the independence²⁴.

The British Colonization accurately gives two effects to Islamic Judiciary System in Kelantan. The positive effect is up grade the position of Syariah Court before that have bad quality and not knowing by the society. The negative effect is decrease Syariah Court Judge with take over in both of Judiciary of Jurisdiction was stated. For example Syariah Court have not jurisdiction in inheritance aspect nowadays. Meanwhile Syariah Court as a seal to heir and civil court as a trial court only. Besides, the conflict exist between heirs also in case, which involve the Muslim, party only²⁵.

2.3 THE ESTABLISHMENT OF SYARIAH COURT OF KELANTAN

Before the existence of Syariah Court in 1998, the task were taken over by the Department of Qadhi starting from 1996, the administration of Syariah Court were separated from the administration of Mufti office and all office administrations included financial department were under the administration of Qadhi Besar.

The effort establish the Syariah Court of Kelantan is made stream line with the establishment of Syariah Court in the others states which can be seen at the chronological development as follows²⁶: -

²³ Abdullah Hj. Alwi.1996 *The Administration Of Islamic Law In Kelantan 1909 – 1978*, Dewan Bahasa Dan Pustaka: Ampang / Hulu Klang Selangor p. 126

²⁴ Ibid. p.128

²⁵ Ibid. p.135

²⁶ Dato' Hj Daud b. Muhd. (Ketua Hakim Syarie Mahkamah Tinggi Syariah Kota Bharu Kelantan).2002 *Asal Usul Mahkamah Syariah Negeri Kelantan*. Jabatan Penyelidikan, Jabatan Kehakiman Mahkamah Syariah Kota Bharu: Kelantan.p.10

DATE	DEVELOPMENT
4 / 12 / 1972	National Council Conference of Islamic Affairs (<i>Mesyuarat Majlis Kebangsaan Bagi Hal Ehwal Agama Islam</i>) were agreed to establish the committee. The chairmanship of the late Allahyarham Tan Sri Syed Nasir Ismail to look into the position and suggest measures to be taken to raise their status and position.
30/4 / 1983	<p>National Council Conference of Islamic Affair (<i>Mesyuarat Majlis Kebangsaan Bagi Hal Ehwal Agama Islam</i>) was considering the committee report and seal to be accepted by the country, which involved.</p> <p>The report on : -</p> <ul style="list-style-type: none"> a) Organization structure of Syariah Court, jurisdiction, procedure and the duty of Qadhi. b) The obligation of every state to have the organization of Syariah Court complete with structure and have responsibility within judiciary only. c) The arrangement of organization court structure in three tiers, the Syariah Subordinate Court, the Syariah High Court and the Syariah Appeal Court. d) The establishment of Syariah Judicial and Legal Service scheme of each state.
2 / 3 / 1990	Public Service Department and Treasury of Malaysia (<i>Jabatan Perkhidmatan Awam dan Perbendaharaan Malaysia</i>) to provide professional training to the public officers of the Syariah Court.
9 / 6 / 1991	Conference of Planning Financial and Personnel Committee Council (<i>Mesyuarat Jawatankuasa Perancang, Kewangan dan Perjawatan</i>) were agreed with this suggestion.
3/ 11/ 1991	Government Assembly Council (<i>Majlis Mesyuarat Kerajaan</i>) were discuss paper Government Assembly Council Number 22 / 862 / 91(25) and agreed that committee satisfied but the appointment of committee based on the ability of financial and must set the seal from Government

	Assembly Council previously.
16/1 / 1995	The decision have been informed to the Public Service Department for consideration and confession to Exchequer of Malaysia to seal appointment of committee based on section 112 Federal Constitutions.
2 / 5 / 1996	Special Committee Assembly (<i>Mesyuarat Jawatankuasa Khas</i>) to study the Highest Level (<i>Tingkatan Tertinggi (JKTT)</i>) were agreed with the suggestion the implementation to the separation overall of committee Syariah Court of Kelantan and the exist of committee Chief Syariah Judge, Syariah High Court Judge and Syariah Subordinate Court Judge and support committee Syariah Court of Kelantan.
11 7 /1996	The Treasury (<i>Perbendaharaan Malaysia</i>) court realize consent Number 67 Year 1996 were enforcement started on 15 July 1996 the appointment Syariah Court of Kelantan.

Although in 15 January 1997 Government Assembly Council for 3/97 was made decision as follow²⁷: -

- a) Agreed to accept the seal of appointment no. 67 and no. 75 in 1996 to exist Syariah Court of Kelantan and to annulment Qadhi Office.
- b) Agreed to use the activity within the plan of income and expenditure for Syariah Court of Kelantan uses.

Therefore, on July 1998 Syariah Court of Kelantan to substitute Qadhi Court from²⁸: -

1. Syariah Appeal Court at Kota Bharu and Y.A.A Chief Syarie Judge as a chairman.
2. Syariah High Court which chief by YA Syariah High Judge.
3. Syariah Subordinate Court which chief by Tuan Hakim Syariah Subordinate Court.

²⁷ Ibid. p.15

²⁸ Ibid. p.15

Syariah Court were established under Kelantan Syariah Judiciary Department within Jurisdiction of Syariah and the implementation and law enforcement and others ways as follows²⁹: -

- a) Administration of the Syariah Courts Enactment No. 3 /1982
- b) Syariah Criminal Procedure (II) Enactment 1985
- c) Syariah Criminal Offences (ix) 1983
- g) Syariah Civil Procedure (v) 1984
- h) Islamic Family Law Enactment No. 1 1983
- i) Syariah Court Evidence No. 1 Tahun1991
- j) Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan No. 4 Tahun 1994 (berhubung dengan kesalahan-kesalahan)
- k) Kaedah Hukum Sebat 1987
- l) Peguam Syarie Rules 2000 (Kelantan).

Besides, the list of committee has also changed when the Chief Syariah Judge as Chief Qadhi of Kelantan Syariah High Court Judge substituted a Chief Department existed. Meanwhile the existing of Syariah Subordinate Court Judge actually were the joining of two Special Qadhi Court and Country which the administration of both court hand over by Syariah High Court Judge.

The objective and motto the establishment of Syariah Court as follows³⁰: -

1. regularly, the objective of the establishment of the Syariah Court is similar to the motto and objective of the establishment of the Civil Court which is to establish justice and to punish the offender in order to have good attitude and good quality of society and to give back the rights to whom it belongs.
2. beside that, to give the justice service based on Islamic law with fairness , efficiency and effectiveness.
3. others, the Kelantan motto to be Syariah Court of Kelantan is a union or an agency to implement the *Hukum Syara'* to Muslim especially in

²⁹ Ibid. p. 17

³⁰ Ibid. p. 19

Kelantan based on Islamic law according to the al-Quran, Al-Hadis, Ijma' and Qias.

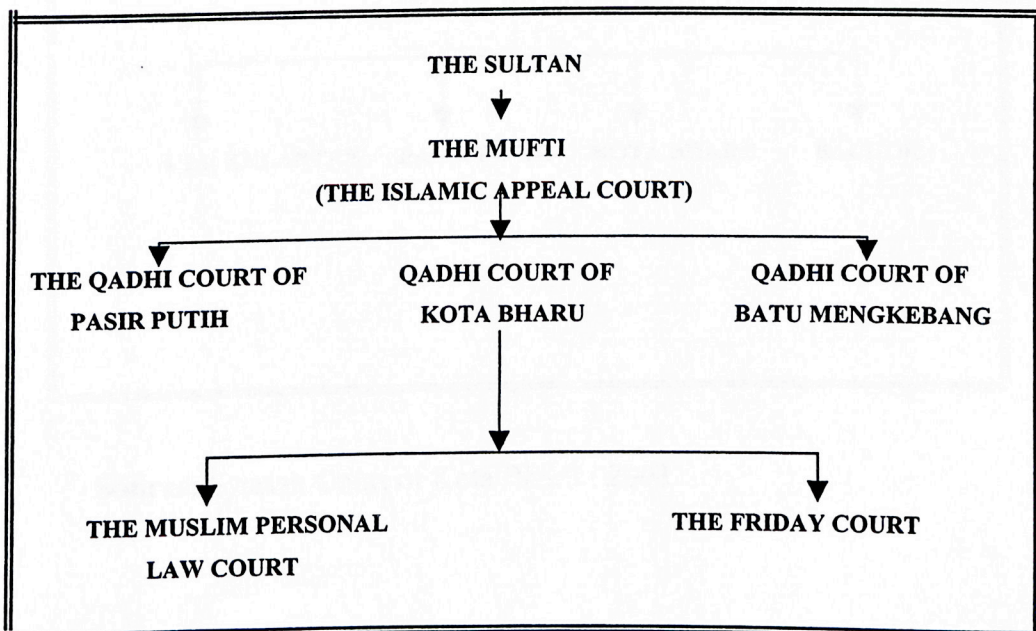
Therefore, the jurisdiction of the Syariah Court under Federal Constitutions is provided as follows: -

1. Article 121(1A) of the Federal Constitutions laid down that the courts referred to in clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Court .
2. Clause 1 under the List 2 of Ninth Schedule, of the Federal Constitutions stated that “the constitution, organization and procedure of Syariah Court which shall have jurisdiction only over persons professing the religion of Islam by state law.

2.4 THE DEVELOPMENT OF COURT ADMINISTRATIN STRUCTURE

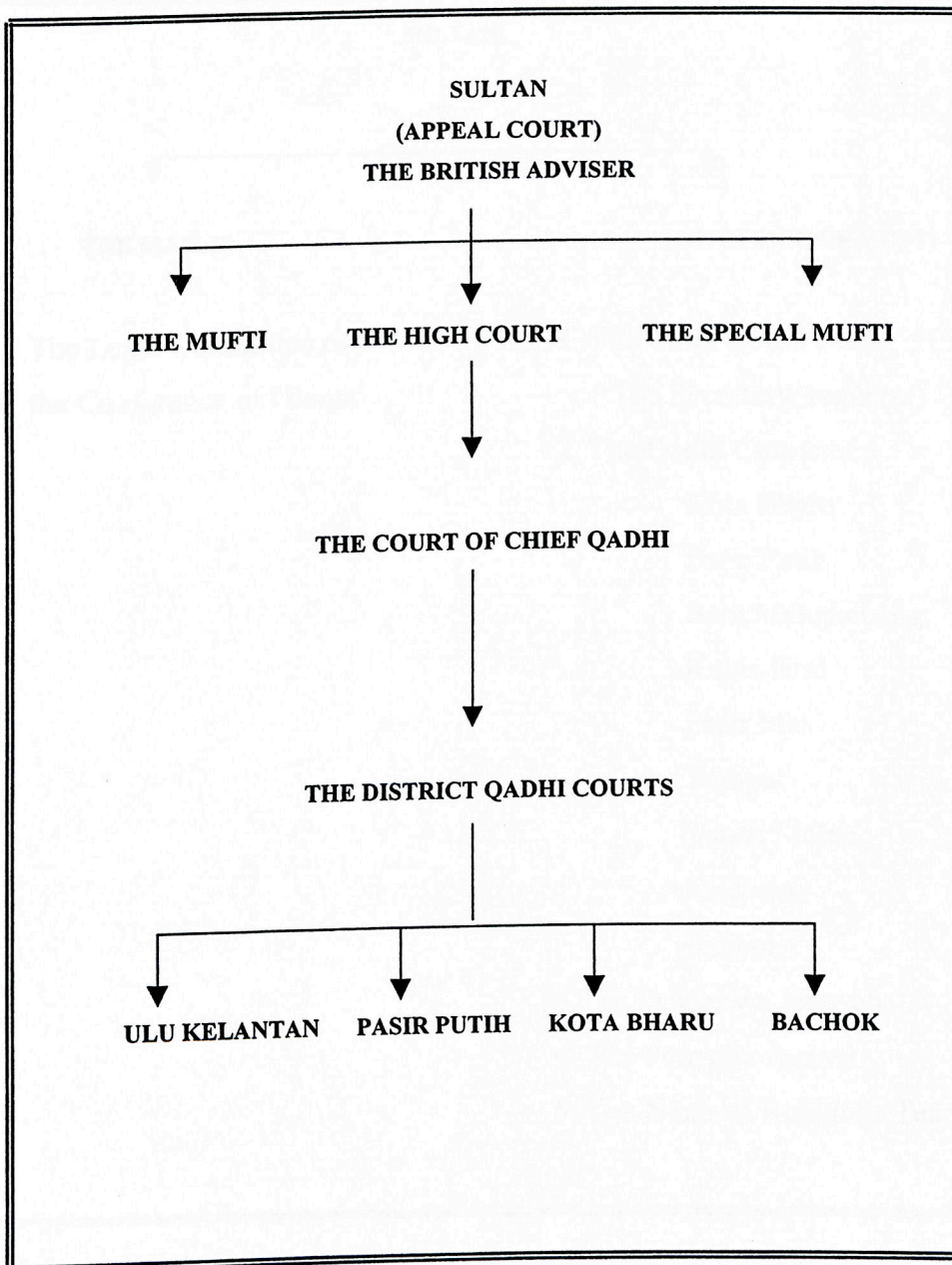
The administration or governance structure has change until have Syariah court nowadays. The steps of developments of Syariah Court as follows: -

I. BEFORE THE ESTABLISHMENT OF MAJLIS



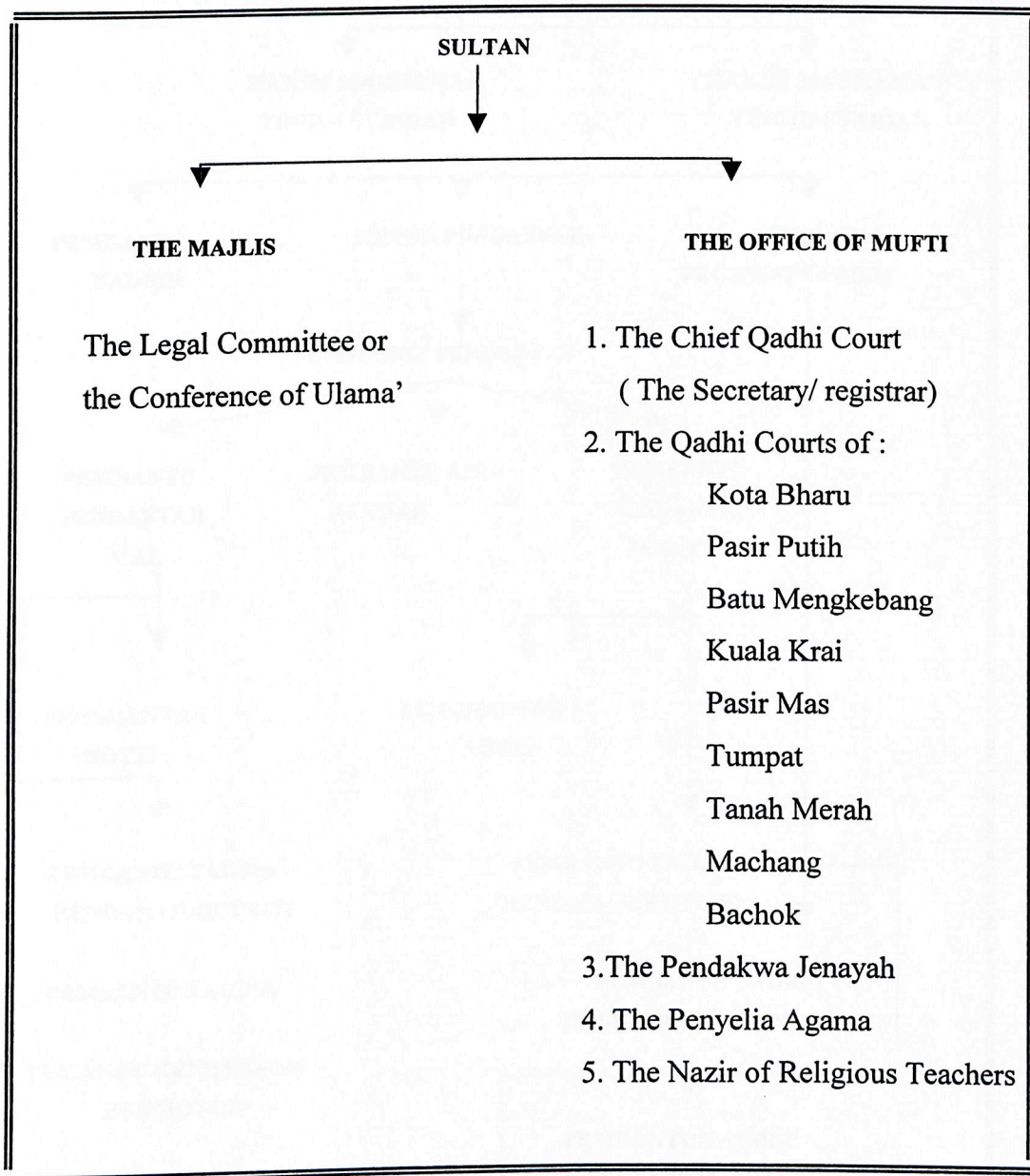
Source: Syariah Court of Kota Bharu : 200

II. THE ESTABLISHMENT OF SYARIAH COURT BASED ON THE ENACTMENT NO. 31 – 1938



Source: Syariah Court of Kota Bharu : 2003

III. BEFORE INDEPENDENCE UNTIL 30 MAY 1996



Source: Syariah Court of Kota Bharu : 2003

2.5 JURISDICTION OF SYARIAH HIGH COURT IN KELANTAN

Based on act 121(1A) of Federal Constitution provided the courts referred to in clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Court. Thereby, the government has responsibility to make laws in own state although it must not have different with the matter, which provided in Federal Constitutions and it annulled in different part in Federal Constitutions of Malaysia.

List 2, of Ninth Schedule of Federal Constitutions provided that the Syariah Court must have its own jurisdiction. The jurisdiction which provided must related with the personal rule of persons professing the religion of Islam including the Islamic Law relating to succession, such as a marriage, any division of property on divorce, inheritance, administration of mosque, *wakaf*, *nazar* and other matters in respect of which jurisdiction is conferred by any written law.

Administration of the Syariah Court Enactment (3) 1982(P/4 1995) was provided within section 9 of the jurisdiction of Syariah Court shall: -

1. in its criminal jurisdiction, try any offence committed by a Muslim and punishable
2. in its civil jurisdiction , hear and determine all actions and proceedings in which all the parties are Muslim
3. to division of or claims to *harta sepencarian*
4. the maintenance of dependants, legitimacy or guardianship or custody of infants
5. division and inheritance of testate or in testate property
6. *hibah* or nullity
7. inheritance, *nazar* or *wakaf*
8. in any other case, if the Syariah High Court gives leave to appeal
9. in a criminal matters, dismiss appeal, convict and sentence the appellant, order the trial court to call for the defence or make further inquiry, enhance or alter

the nature of the sentence, order the retrial or alter or reverse of any order of the trial court

10. in civil matters, confirm, reverse or vary the decision of the , exercise any such powers as the trial court could have exercised, make such order as the trial court ought to have made, or order a retrial.

Therefore, absolutely *Hibah* ones the matters provided under the jurisdiction of Syariah Court which provided under the Administration of the Syariah Court Enactment (3) 1982 (Kelantan) section 9(2)(vi):

“it is civil jurisdiction to hear, determine all actions and proceeding in which all parties are Muslims includes hibah or nullity”.

However, the jurisdiction of Syariah High Court were limited to hearing and determining all actions and proceedings which involve the amount or value of the subject matter in dispute not exceeding fifty thousand ringgit or is not capable of estimation in terms of money.

2.6 CONCLUSION

The Islamic judiciary systems were practiced in Kelantan since the previous time. This way of ordering the life with all precepts and moral standards is based on divine guidance through his Prophet and the last of such guidance is the Quran and the last messenger is Mohammad SAW whose conduct and utterances and revered. The Islamic judiciary systems were practiced since the reign of Sultan Muhammad I (1836-1886).

After British colonization, the implementation Islamic law was revoked. They took over the matters were previously under the jurisdiction the Syariah Court. However, the colonization of British has changed the status of the Syariah Court nowadays even not of the same status with civil courts.

CHAPTER THREE

THE JURISDICTION OF *HIBAH* IN KELANTAN SYARIAH COURT

3.1 INTRODUCTION

Every living man on this earth is in need of spiritual guidance in order for him to perpetuate his or her life in this world or the world after it. This guidance can come in many form and shapes, for example for those who are in faith with Islam. Muslim holds by the believes and the teachings of the Quran and the Al- Hadis. Another example is the Christian who holds closely by the Bible and so are the Hindu's who their holy book is the Book of Vedha. All of the faiths that the writer has mention above are very faithful and when they are in need of guidance or reference they will each study and tries to implement all of the teachings of God from this books. Even though each of this religions ate in a way different from each other but they share a common similarity which is each of them wants peace and tolerance and also to have justice uphold on this earth.

As the same with faith and spiritual guidance in order for us to uphold the law we also have our reference and guidance as to solve or to summit judgment to the guilty ones. With this guidance the retributions of power can be precise and strict as to justice courts to implement a more efficient and trust worthy law to the citizen.

3.2 JURISDICTION OF *HIBAH* BASED ON RULES OF LAW

1. *Hibah* based on Syariah Law

Based on Article 121(1A) of Federal Constitution provided the courts referred to in clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Court. Thereby, the government has responsibility to make laws in own state although it must not have different with the matter, which provided in Federal Constitutions and it annulled in different part in Federal Constitutions of Malaysia.

Therefore, to ensure the administration of Syariah Court will be straight, the Administration of the Syariah Court Enactment (3) 1982(P/U 1995) was provided within section 9 (2)(iv) of the jurisdiction of Syariah Court shall: -

1. in its criminal jurisdiction, try any offence committed by a Muslim and punishable
2. in its civil jurisdiction , hear and determine all actions and proceedings in which all the parties are Muslim
3. to division of or claims to *harta sepencarian*
4. the maintenance of dependants, legitimacy or guardianship or custody of infants
5. division and inheritance of testate or in testate property
6. *hibah* or nullity
7. inheritance, *nazar* or wakaf
8. in any other case, if the Syariah High Court gives leave to appeal
9. in a criminal matters, dismiss appeal, convict and sentence the appellant, order the trial court to call for the defence or make further inquiry, enhance or alter the nature of the sentence, order the retrial or alter or reverse of any order of the trial court
10. in civil matters, confirm, reverse or vary the decision of the , exercise any such powers as the trial court could have exercised, make such order as the trial court ought to have made, or order a retrial.

Therefore, based on section 9(2)(vi) of the Administration of the Syariah Court Enactment (3) 1983 (Kelantan) was provided within civil jurisdiction to hear, determine all actions and proceeding. The Syariah High Court is authorized to hear and determine in which the amount or value of the subject matter in dispute does not exceed RM50 000 or is not capable of estimation in terms of money.

Therefore, Syariah High Court des not try any offences or hear or determine all such action and proceedings was provided under the jurisdiction of Syariah Subordinate Court.

The jurisdiction of Syariah Subordinate Court was provided within section 11 (1) of the Administration of the Syariah Court Enactment (3) 1983 (Kelantan) was provided within civil jurisdiction to hear and determine all actions and proceeding. The amount or value of the subject matter in dispute does not exceed RM50 000 or is not capable of estimation in terms of money.

From the above criteria the writer have given the writer find that every power of the court has been justified by enactments which every one of them can not be overpowered from the stated being, so for every claim it must done in accordance with the power by each court.

Some of the examples from the above statement can be seen in the *Suzanna Abdul Syukur v Mohd Noor Idris*³¹ case regarding wealth and property. The plaintiff filed a report for RM 66,666.66 for one property; a RM 49,000.00 for a double story house and a wooden house file for RM 7000.00 and the amount totaled RM 122,666.66.

Looking by this statement, which is over the limit of RM 50,000.00, this case has been put under the Syariah High Court Jurisdiction.

Another same like scenario is in the case *Amar b. Mahmood v Aminah bt Thambi & others*³², which takes place in Kelantan. This case is about the *Hibah* property, which is being claim by the Plaintiff and the Defendant over a piece of land costing about RM 17,000.00, a house worth RM 48,000.00 and a motorcycle worth RM 2,500.00. All of these claims come to a total of RM 67,500.00.

So it is obvious here that with the correct jurisdiction and the balance of power distributed to the court, this criteria can help the court to solve cases in a fraction of a time.

³¹ Kes Mal bil.32 tahun 2000

³² Kes Mal bil 19 tahun 1998

1. Civil law under hibah

According to this research, the writer has found that all the cases which were on trial from 1999 to 2003 are cases which involve land ownership either *hibah* which was done under oath or the oath with the necessary documents which is an instrument on the 14A form (a transfer of land form)³³.

That is why when there is any case involving land it must be under the National Land Code³⁴. According to section 2 of the National Land Code all legal matters relating to land in Tanah Melayu are govern by this act. Nevertheless under the section 4 (2) (e) of the National Land Code there is some acceptance to any land, which involve under the *Wakaf* and *Baitulmal* law.

Even in this problem specific jurisdiction must be clarified in matters, which have some relation with *Hibah*. Muslim followers because *hibah* is a term use this only, by this statement this law must be under the civil jurisdiction even though it involves matters concerning land ownership. Based on Act 121 (1A) and List II of nine schedules Federal Constitutions provided the constitution, organization & procedure of Syariah Court, which shall only have jurisdiction over citizens professing e religion o Islam. This is thus evident with actions taken form judge of Magistrate Court in Kota Bharu for the case such as the *Nik Salma Zaidah bt. Hj Wan Zain v Nik Hasnah Nik Din*³⁵ to be trial at Kota Bharu Syariah Court. The transfer of this case is because of factors involving Will and *Hibah*. This to show the proof that civil law has no power to trial the case, which has relation with *Hibah*.

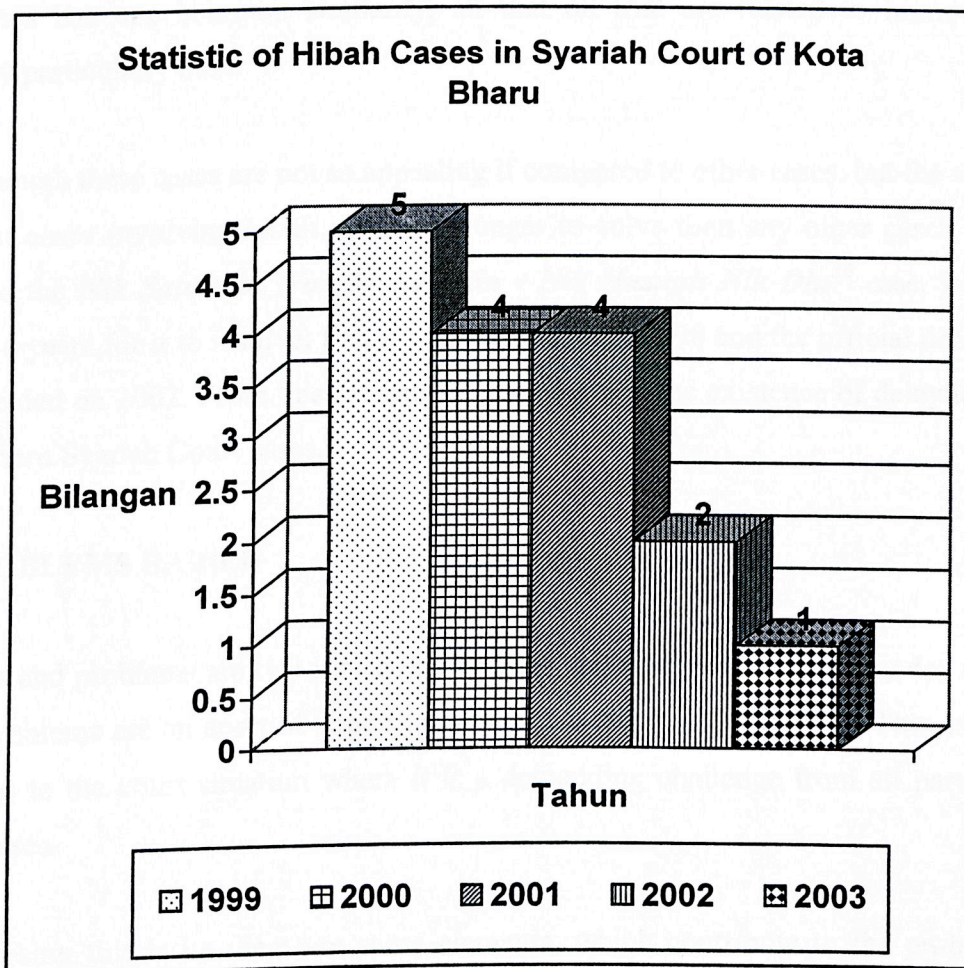
Other than that under Section 421 A National Land Code is also given the mandate to Syariah Court and Syarie Judge to order any Land Administer and Registration office (Pendaftar Pentadbir Tanah) to execute any punishment which have been mention in any trials involving land.

³³ Perkara 215 (1) KTN [No.56 TAHUN 1965]

³⁴ Section 2 KTN [No.56 TAHUN 1965]

³⁵ Kes bil 17 tahun 1998

3.3 STATISTIC OF HIBAH CASES IN SYARIAH COURT OF KOTA BHARU



Source: Syariah Court of Kota Bharu : 2003

In the state of Kelantan alone *Hibah* cases is being put under the Mal jurisdiction. For this part of the analysis the writer will focus on cases dated from 1999-2003.

For this research in the specific statistics regarding cases related to *Hibah* at Kota Bharu Syariah High Court are not given. To get the right information the writer have to refer back to registered records of courts form the year 1999-2003.

From this focus of research the writer was able to gather around 15 cases that was on trial such as from 1999 a total of 5 case, in 2000 and 2001 both around 4 cases each, in 2002 there are 2 case and in 2003 one case. According to this numbers it is obvious to show that *hibah* cases at Kota Bharu Syariah Court alone has reveal a variety of

cases in this filed such as division or claim to matrimonial property, *mutaah* and the inheritance o property and many others. Other than that the writer also find that all of this cases has one common similarity, all that on trial are related to immovable property particularly land.

Even though these cases are not so appealing if compared to other cases, but the writer feel that cases involving *hibah* are much longer to solve than any other cases. For example the *Nik Salma bt Wan Mohd Zain v Nik Hasnah Nik Din*³⁶ case, it took around 4 years for it to resolve, first it was registered on 1998 and the official decision was decided on 2002. From this example we can there is the existence of delaytion in Kota Bharu Syariah Court cases.

3.4 PROBLEMS RAISED

Humans and problems are two issues that become synonymous in our every day daily lives; problems are an apart of nature on which we struggle to live by it. This can be implying to the court situation where it is a demanding challenge from all parts for *hibah* cases.

In discussing this issue there are some elements, which contribute to the problems resulting in the deletion the court period of time and cases, which are unable to resolve. From the registered reports the writer have found out from 15 cases registered from 1999-2003 only 5 cases were able to solve. Some of the factors are: -

1. Overdue cases.

According to the research being conducted, some overdue cases are the result of the court imbalance of number of judges and the number of cases received every day³⁷. This overdue is not just happening in Kota Bharu Syariah Court but also the whole of Malaysia Syariah Court. This analysis is being supported by Zaleha Kamaruddin a famous writer in her article “ the overdue cases in Syariah Court “ between Perception

³⁶ Kes bil 17 tahun 1998

³⁷ Interview, YAA Dato' Haji Daud b. Muhammad, Chief Syarie Judge, Mahkamah Syariah Kota Bharu Kelantan on 29 July 2003 at 3.30 p.m.

and reality, which was a topic in her book entitled “Woman and the Islamic Jurisdiction”.

In resolving this matter some judges and officers have to work after office hours in order to occupy some of the over populated cases. Another reason is decrease number of employees³⁸; this can be proven with the number of registered cases in 1997 where from the 2529 cases there are only 14 judges to handle those cases. This thus shows the existence of imbalance of judges and the amount of court cases. These problems are not just happening in Kelantan alone but are also experience in some other states in Malaysia. This can be shown in the data reported below: -

NUMBER	STATES	NUMBER OF JUDGE	REGISTERED CASE
1	PERLIS	2	165
2	KEDAH	4	2150
3	W.PERSEKUTUAN	8	2455
4	SELANGOR	7	3331
5	PERAK	8	2150
6	KELANTAN	14	2529

Source : Mahkamah Setiap Negeri³⁹

Referring to the table above, it's obvious that the total overall cases are not balance with the number of cases. To overcome this problem some of the judges have to listen to the trials after office hour.

2. Procedure and court administration

Administration plays an important role in keeping an organization fit and running. Nevertheless all the rules and procedures that govern an organization will contribute to the lateness and unresolved trials relating to *Hibah*.

³⁸ Raihanah Abdullah, Wanita dan Perundangan Islam, Ilmiah Publishers Sdn Bhd h.40

³⁹ Mahkamah setiap negeri.

With too much procedure some trials are forced to be put on delay, for instance a trial has to be postponed because it has to follow strict protocols of lateness in distributing of files that contain the necessary information by the judge⁴⁰.

From the administration point of view, the writer finds that there are still some courts, which still haven't implemented the use of Information Technology equipment such as computers and electronic data capability. Some courts still use file and storage cabinets to store all the important court files. With the minimum number of staff, it's going to be a hustle for the court to obtain the necessary files in time and with efficiency. The only solution to solve this problem is either employing more staff or changing to a more computerized method but this costs a lot of money.

3. Lawyers attitude

Lawyer's attitude is also another factor contributing to this problem. Some lawyers are very busy handling so many cases that there are clashes with court trial dates because one lawyer may handle more than one case at the same time. This clash of trial dates has forced a trial to be put on delay to another time⁴¹.

4. Unattended Representatives.

Another issue contributing to the dilemma during the court session is the absence of the Plaintiff or the Defendant on the day of the trial. This issue usually happens not by the individual but also by the court itself; because the court doesn't take this as a serious matter, which led other community following the same footsteps. Some trials have to be halted or be delayed because of such irresponsible people⁴².

⁴⁰ Interview, Haji Zaki Zainal Abidin (Syarie Judge of Negeri Kelantan) from Tetuan Hj Zaki & Co. on 30 July 2003 at 4 p.m.

⁴¹ Op.cit Interview YAA, Dato Hj. Daud b Muhammad

⁴² Op.cit, Interview Hj Zaki b Zainal Abidin

From this problems a rise, we can draw a conclusion that some contributing elements can cause some trials to be delayed for along period. This situation will give a tremendous effect to the court trials especially matters related to *Hibah*.

3.5 CONCLUSION

From the given analysis the writer have discussed earlier, the writer find that the authority power is well demanded every passing day, and there is a rapid increase every year. This is something to be proud of, even though the authorities level are still under limit allowed by the Federal Constitutions. We hope we can see an increase in number and the Syariah Court will have a more legitimate authority balance with the same level as with Civil Court in the coming future.

CHAPTER

4

CHAPTER FOUR

THE JUDGEMENT OF *HIBAH* CASE IN SYARIAH HIGH COURT OF KELANTAN

4.1 INTRODUCTION

Hibah was practiced by Muslim early or previously until nowadays. Although, the local society it were practiced especially in dividing of property cases by parents to children in their life.

Hibah issue often spoken nowadays due to have a lot of inheritance clotted an effect from lack systematic planning by Muslims. Therefore, the society realizes and tries to claim the right through right procedures, which is, settle in court.

4.2 THE JUDGEMENT OF *HIBAH* CASE IN SYARIAH HIGH COURT OF KELANTAN

A party those who has not satisfied with *hibah* to someone can claim at court through the Administration of the Syariah Court Enactment (En. 3/1982) of section 9(2)(vi) that has been provided. Although, the enactment has no stated the procedure of claimed in court. Therefore, they may refer within the Civil Court Procedure Enactment (No.5/ 1984) of section 55. Before the judge makes any decision, claimant must through the procedure was determined as follows: -

1. Statement of claim

A party those who have not satisfied with *hibah* to someone can claim at court through provided the Administration of the Syariah Court Enactment (En. 3/1982) of section 9(2) (VI). Although, the enactment has no stated the procedure of claimed in court. Therefore, they may refer within the Civil Court Procedure Enactment (No.5/ 1984) of section 55.

The plaintiff, who makes the claimed can make the claim either personal claim or ask the service of player. If the judge made the claimed, plaintiff must sign retained by Peguam Syarie.⁴³

The claimed must be made through summons with the statement of claim⁴⁴. Within the document, it must consist of name and address both of parties completely. Besides, there must be the items of property in dispute either an immovable property or moveable property and the current market value. For the current market value it must be done by professional interpreter and were comply together. The value for the moveable property was calculated through mutual agreement⁴⁵.

For an endorsed, the particulars in any application and showed the document or evidence such as document of title, receipt, sworn document, list of witness and others⁴⁶.

Besides, plaintiff also must have the evidence an enforcement of property in which the value of subject matter in disputes to show that either the enforcement existed or not. The court committee will evaluate on it, the interpretation to the interpreter to the property in which the value of subject matters in disputes.

Through the explanation above, each of applicant must fulfill the statement of claim completely based on stated within an enactment. Although, the document shall be rejected if not comply with the requirement by the applicant.

2. Statement of defence

If the plaintiff has the intention to defend him or herself, they must be done not less than two days before the defendant, those who dispute the claim may file the

⁴³ Enakmen Acara Sivill Syariah Kelantan [No. 5 / 1984] seksyen

⁴⁴ Ibid, Section 56 (2)

⁴⁵ Ibid, Section 58 (2)

⁴⁶ Ibid, Section 57 (1)

statement of defend and the file the statement of defend⁴⁷.

The statement of defend must contain any admission or denial while facing fact of allege within statement of claim or fact on a person denial. In fact, the defendant may change contains of the document both the date of belonging of property and others⁴⁸.

Besides, the defendant can defend by him or herself or behalf their own defend to the Peguam Syarie. It must be signed by the Peguam Syarie's defendant if he has to represent a party in Syariah Court in any court proceeding .If the defendant not been accompanied by any of Peguam Syarie, he must sign the statement of claim by him or herself to be valid⁴⁹.

As a result, the procedure of statement of defend has no much different with the statement of claim which making by the claimant.

3. Counter Claim

The defendant also can make the counter claim if he has intention to do so. He has to file a counter claim together with the statement of defence. The counter claim have the same content structure with the statement of claim, that are name and address of plaintiff and defendant, list of assessment property which will be counter claimed and others⁵⁰.

As usual, the right had depended on counter claim are right which had not mentioned within statement of claim and belonging of the plaintiff. The defendant or Peguam Syarie also must sign the counter claim if the Peguam Syarie represented him⁵¹.

The counter claim cannot be done by the parties those who have not participating in the action of claim. Someone who has intention to depend on the counter claim must take an action to the party, which has made, the litigating⁵².

⁴⁷ Ibid, section 56 (1)

⁴⁸ Ibid, section 57

⁴⁹ Ibid, section 58 (1)

⁵⁰ Ibid, section 58 (1)

⁵¹ Ibid, section 58 (1)

take an action to the party, which has made, the litigating⁵². Obviously, based on the elaboration above, to anyone who want to make counter claim must abide the certain procedure which stated in the statement of claim that had been done by the applicant.

4. Form

Anyone who want to make a certain application, the defense in advance to fill forms which certain already been decided by court. For each an application which want be done have to be started by summoning which be produced by court.

For other forms like statement of defense, counter claim and statement of claim, the court do not prepare even though has be stated in an enactment. The applicant must make their own statement, which in dispute or not satisfied and then submitted to court. During submission forms to be registered in record of registration, one payment will be imposed, a total of RM 150.00 for court cost. After that officer registration will decide one date for trial or known as “case pronouncement”.

5. Testimony

In judicial process, the evidence is the most important to ensure an accusation can be judge with the justice and return the trust of those who are entitled to it. The justice cannot be achieved without their help although as well of law. Allah says:

يَا أَيُّهَا الَّذِينَ ءَامَنُوا إِن جَاءَكُمْ فَاسِقٌ بِنَبَأٍ فَتَبَيَّنُوا أَن تُصِيبُوا قَوْمًا بِجَهَالَةٍ فَتُصِبْحُوا عَلَىٰ مَا
فَعَلْتُمْ نَادِمِينَ

Which means: (And) those people) in whose hearts is a decease-Do you see how eagerly they run about among themselves, saying: “We do fear that a change of fortune will bring us ruin “Oh! Perhaps Allah will give you victory, or a decision according to His will, and then they will feel sorry for the thoughts, which they secretly kept in their hearts⁵³.

⁵² Ibid, section 59

⁵³ 1977, *al- Turuq al- Hukmiyyah Mesir: Mutbaah al-Madani*. P.14

On the basis of the above-mentioned *ayah*, it is therefore established that within to make decision in any judgment. Therefore, during the judicial process, the law of evidence most important aids the judge in the quest for the trust and the rendering of the just decision as or ordained by Allah. So, the judgment which was deciding must based on the testimony were allowed. The important of evidence is easy for the court to make decision. The decision can never be achieved without clean and convincing proof.

In Islamic law of evidence, evidence is known by the term “Al-Bayyinah”. It is comprehensive in the sense that it refers to anything which clarifies, explains or proves a position, right or interest which a court or judge may consider in rendering a justice to the rightful party or in delivering a just decision. As a result, it will give the justice decision in implemented of judgment⁵⁴.

This means that *bayyinah* encapsulates all forms of evidence in Islam including those types agreed upon by the ‘*ulama* such as *iqrar*, *yamin* and *shahadah* and the forms of evidence on which the ‘*ulama* disagrees such as *qarinah*, *rad al-yamin nukul*, *khobar* and others.

Therefore, within convincing of case relating which *hibah*. The court has to take care previously to the ways while giving the testimony. The aim of *hibah* is ensuring whether *hibah* is existed or not⁵⁵.

The testimony in Islam was uses in Syariah Court in *hibah* proceeding have subdivided to two elements⁵⁶: -

1. Oral admission
2. Written admission

1. Oral admission

⁵⁴ Ibid .P. 12

⁵⁵ Interview, YAA Dato’ Haji Daud b. Muhammad, Chief Syarie Judge, Mahkamah Syariah Kota Bharu Kelantan on 29 July 2003 at 3.30 p.m.

⁵⁶ ibid, Interview, YAA Dato’ Hj. Daud b. Muhammad

Through oral admission, the court may see the admission based on two aspects: -

1. *Iqrar* (admission/ confession)

An admission may be made by witness those who is capable of giving an orally, written and sign by any person or anybody in anywhere that has been stated before.

On basis of the above definitions, an *iqrar* is therefore of admission or recognition for proving a fact in order to establish a right or interest of another against the maker of the admission himself. Within the Syariah High Court of Kota Bharu it has more of cases relating to *hibah* through *iqrar* or admission. Some of the examples from the statement above can be convincing to the *Suzanna Abdul Syukur v Mohd Noor Idris*⁵⁸ case, which Suzanna is the adopted granddaughter that has the legal right to receive somebody property when Hassan bin Ali, the person who adopted her, was dead. Meanwhile, first defendant and second defendant therefore of granddaughter who could be their heirs as '*asabah* or residuary. Hassan bin Ali a person dead has the right or property such as a piece of land, which value of each land was RM 66,666,66 at Lot 2254 Mukim Pintu Geng Kota Bharu, a RM 49,000.00 for a double story house and a wooden house file for RM 7000.00 and the amount totaled RM 122,666.66.

During the court proceeding, the testimony of the plaintiff for *sulh* both of parties existed. She told to the court that her grandfather were mention the *hibah* of right for more time and she were receiving the donation and take over of property for farming, an improved of house and a place of residence until nowadays.

Therefore, the testimony of the plaintiff must be clear and unequivocal without any doubt. So, the Honorable of Judge can make the decision to the asset of property therefore of right of the Plaintiff.

⁵⁸ Kes Mal bil.32 tahun 2000

Although, court has to support this view to ensure that it was really existed, so the court need a witness who could give an evidence to make sure the confession was existed. Ibn ‘Abbas have reported that the Prophet s.a.w had once been asked about being a witness which means: -

The Prophet s.a.w had once been asked about being a witness and the Prophet s.a.w have replied to the person inquiring by asking the question to the effect, “Do you see that sun?” The man said, “ Yes.” The Prophet s.a.w. Then said, “ If you see it like that (as if he is seeing it as clear as the sun) then be a witness, if not you better leave it as it is⁵⁹.

Therefore, it is obviously that the witness is the most important element within convincing of decisions. The scenario can be seen in the *Rubiah bt. Ismail v. Hawa bt. Deraman and Mahat bin Yusuff*⁶⁰ case. The plaintiff is adopted son for Jaafar bin Deraman was died on 26 July 1996, and the defendant is Jaafar child. During his living, he has a piece of land valued, RM 62,000 at Lot 370 Mukim Padang Tengah Daerah Salor, Kota Bharu. She told to the court that her adopted father were mention half of land is her part and the amount totaled RM 31,000.00. An offer or a declaration of the gift was made by her adopted father and was heard by two witnesses.

The plaintiff have strengthened her testimony by bring two witnesses during *hibah*. Through the testimony is based on the testimony by witnesses were recognized or conferred by her adopter father in dispute a half of land. However, the testimony of defendant is rejected due to failed to consider in rendering witness. Therefore, the court has decided a right of plaintiff to get half of land lot 370. The reason were use in judgments testimony which clarifies and explains based on *hokum syara*’ and were corroborated by testimony of two male witness.

⁵⁹ Sayyid al-Bakri bin Sayyid Muhammad Syata al- Damiyati al-Misri (1938), *Ianah al-Talibin*, Juz 4 ,Mesir; Mustaffa Al – Halbbi, P.287

⁶⁰ kes Mal. Bil 11 tahun 1999

2. Oath

Al-yamin or as known as “oath” is an utterance accompanied by the invocation of the name of Allah for purposively stating (*tahqiq*) something over a matter, which will not be proved except by an oath. An oath is also used to strengthen or to clarify a thing to make it clear and therefore it will help towards clearing ambiguities⁶¹.

In the Draft Evidence Act of the Syariah Court Federal Territory) 1988 of sections 87 contains rules with regards to the oath. In civil cases the plaintiff and the defendant shall give evidence. The defendant who denies the claim shall be asked to the oath according to Islamic Law. When the Defendant takes the oath, the claim of the plaintiff is rejected *in toto*.

In the case of *W.Hassan b. W. Dollah v. Wan Hussin b. Wan Dollah*⁶². Both of parties are uterine siblings which was the plaintiff apply to rescind of *hibah* land no. 28 Geran Mukim 36 Mukim Gong Kulim which was the amount totaled RM 160,00,00 from the court. The defendant has mention that the land was change the right by his father at office of land in Kota Bharu during life through the form of 14A.

Within an accusation, the plaintiff has not enough of testimony except by a written document it was a document of title. Therefore, the judge who will make the decision based on Islamic law that mentions that the testimony is the responsibility of the plaintiff. The oath is demanded only when the plaintiff fails to bring conclusive and clear evidence. If the plaintiff could produce strong evidence during the judicial proceedings then the presiding judge may not validly ask the defendant to take the oath.

⁶¹ *ibid* Ibn. Qayyim P.25

⁶² Kes mal bil. 15 tahun 1997

Therefore, his father through the form 14A transferred the defendant use of the oath to deny the inheritance of land and his belongs.

Hereby, in making decision process, the judge was upholding for the defendant due to the oath has taken by the defendant .The claimant by the plaintiff was excludes and was made with firm, clear and precise words under the Draft Evidence Act of The Syariah Court No. 2/1991 of section 87.

2. Written admission

The other way to convict a person through a written admission was assumed as *qarinah* also for strengthened their argument. Under the Draft Evidence Act of the Syariah Court No. 2/1991 of section 3(1) provided *qarinah* also means a thing that explained something relating was mentioned in Islamic Law and enactment.

In Syariah High Court in Kota Bharu, *qarinah* is admissible if its authenticity can be proven. The effect of these provisions have been considered in a cases *Wan Hassan b. Wan Dollah v. Wan Hussin b. Wan Dollah*⁶³ both of parties are siblings, which the plaintiff apply to null *hibah* of land lot no. 28, Mukim Gong Kulim RM 160, 000.00 and accused his father was not very well while sign the form 14A of National Land Code.

Although, the defendant was mentioned that *hibah* was making by his father in consciously through words “I have given you my property ”, told the deceased “take it” and after that the defendant were received through words “I have accepted”. Therefore the deceased had a change the right of land in Pasir Putih office. So, the defendant was showed the document (document of title) as a *qarinah* to strengthen their argument.

Therefore, in this case the court was making decision that the court in upholding to defendant due to the testimony was proven by (document of title) and an oath was

⁶³ ibid

convict the right. Their proof for admitting *qarinah* as a type of evidence is based on the Qur'an, may be used as strong evidence in Islam. Allah says:

وَجَاءُوا عَلَى قَمِيصِهِ بِدَمٍ كَذِبٍ جَمِيلٍ وَاللَّهُ قَالَ بَلْ سَوَّلَتْ لَكُمْ أَنْفُسُكُمْ أَمْرًا فَصَبِرْ وَاللَّهُ
قَالَ بَلْ سَوَّلَتْ لَكُمْ أَنْفُسُكُمْ أَمْرًا فَصَبِرِ الْمُسْتَعَانَ عَلَى مَا تَصِفُونَ

Which means: they stained his shirt with false blood. He said: “No, only your minds have made up a story (that may sound all right) for you. (As for me) patience is most suitable: Against what you keep saying, it is Allah whose help can be prayed for....”
(Surah Yusuf: 18)⁶⁴

Based on the *ayah* above it clearly showed that the Prophet Ya'qub a.s. had resorted to *qarinah* as a means of proving that the allegations from the brother of Yusuf a.s. are false. It is usually case that a person who is mauled by wolves would have his shirt torn to pieces but this did not happen to Yusuf a.s. This fact clearly raises a doubt on the allegations coming from his brothers⁶⁵.

4.3 ANALYSIS ON THE JURISDICTION OF SYARIAH HIGH COURT IN KOTA BHARU ON *HIBAH* MATTERS

One of the grounds of jurisdiction under the Syariah High Court is *hibah* case was provided under section 9(2) (vi) of Administration of the Syariah Courts Enactment (Kelantan) No. 2 /1982.

The judicial proceedings relating *hibah* cases, the court will consider to two aspects, namely: -

1. Enforcement of the *hibah*
2. Withdrawal of the *hibah*

4.3.1 Enforcement of *hibah*

⁶⁴ ibid Ibn. Qayyim P.18

⁶⁵ ibid

Within judicial proceedings was enforced relating *hibah* case; the court must ensure that *hibah* may practice on the requirement and conditions was determined under hukum syara' and vice versa. There are conditions, which are fundamental or essential for a valid *hibah* should be obey. If one of the conditions was determined disobedience⁶⁰, is null and void. Some of the examples from the above statement can be convincing of the *Suzanna Abdul Syukur v Mohd Noor Idris*⁶⁶. In this case plaintiff is granddaughter adopted by Hassan b. Ali the deceased those who death on 15 January 1977. Then, first defendant and second defendant therefore of granddaughter who could be their heirs as '*asabah* or residuary. Hassan b. Ali the deceased has the right or property as follow: -

- I. A piece of land, which the value of each land was RM 66,666,66 at Lot 2254 Mukim Pintu Geng Kota Bharu,
- II. A RM 49,000.00 for a double story house and
- III. A wooden house file for RM 7000.00

The amount totaled RM 122,666.66.

Nevertheless, the declaration of *hibah* to the plaintiff is valid due to it is made while the declaring is healthy both physical and mental.

After accept the gift, the plaintiff hand over the possession of property that land and house such as farm, renovated house, prepare court and it also permanent residence until nowadays. After the deceased death, the defendant tries to claim that property through inheritance notice. Therefore, the plaintiff claim to court to seal that *hibah* of property and applies to court to order the Pentadbir Tanah Jajahan Kota Bharu register that land in lot 2254 her right.

Therefore, after heard the testimony from both parties, the High Court held that the asset which in amount or value of the subject matter in dispute due to *hibah* of land existed and it must have the requirement and condition enough.

⁶⁰ *ibid* Interview, YAA Dato' Hj. Daud b. Muhammad

⁶⁶ *ibid* Kes mal bil. 32 tahun 2000

Beware in spite of the requirement and condition had satisfied even it is null and void if not existed the enforcement to the right. In case *Wan Hassan bin Wan Chik V Deraman bin Sulaiman and others*⁶⁷. Fact of the case, the plaintiff as an ex-husband the deceased *Salmah @ Rahmah bt. Sulaiman* and the defendant is nephew the deceased.

During the deceased life, she was given *hibah* to the plaintiff through oral with the presence of the two witnesses that the property giving to the plaintiff: -

- I. A land and house lot 1902 in Mukim Kenali which in amount or value of the subject matter about RM105, 000
- II. Deposit in ASB RM 21, 046.48
- III. Deposit in BSN RM 3936.00

The amount totaled RM 129,982.48.

Within testimony of plaintiff after acceptance that house he were permanent resident until nowadays. Although the deposit the deceased not take over yet.

Although the defendant not agreed that claimant by the plaintiff due to that land and house was an inheritance of the previous husband the deceased. The defendant were agreed to divide that land based on *faraid* due to the plaintiff has right to the property.

Based on testimony from both parties, the High Court held as follows: -

- I. A land and house lot 1902 in Mukim Kenali and house which in amount or value of the subject matter about RM105, 000 to convict of *hibah* due to the occur in pronouncement of *ijab* and *qabul* (offer and acceptance) and were take over during the deceased life.
- II. Moveable property such as the deposit the deceased in ASB and BSN, which in amount RM 24,982.48 not convict to *hibah* due to the plaintiff not take over, while the deceased life.

⁶⁷ Kes mal bil. 14 tahun 1999

Obviously, the enforcement most important element to secure *hibah* probable occur and recognizable by *hukum syara*'.

Besides, the court should make inquiries and certify their status of the pronouncement of *ijab* and *qabul* (offer and acceptance) that are fundamental or essential for a valid *hibah*. It must be made with firm, clear and precise words to ensure that it contains no ambiguities and doubt.

Another similar scenario is in the case *Rubiah bt. Ismail v. Hawa bt. Deraman and Mahat bin Yusuff*⁶⁸. The plaintiff is adoption Jaafar bin Deraman was died on 27 July 1996. The defendant is an eldest son of the deceased. During lifetime, the deceased have a piece of land lot number 370 at mukim Padang Tengah Salor, Jajahan Kota Bharu that value RM 62,000.00. The land had change to the inheritance after his father die.

During lifetime, the deceased had given half of land by *hibah* ways to the plaintiff and had evaluation about RM 31,000.00 preceded by the words "Yah, I have given you half of land" and after that the defendant were received through words "I accept". During the giving two people has heard people saying that a piece of land belonging to someone has given for *hibah*, which had invited as a witness to plaintiff.

After hearing the evidence both of parties, the court held that half of land had giving to the plaintiff due to occurrence the giving life by Jaafar bin Deraman. The judgment based on litigating of the plaintiff clearly of the *hukum syara*' and had corroborate by two male witness as laid down by the shari'ah in *shahadah* clearly.

Another scenario is in the case *Che Hamiza bin Che Man V Ismail b. Ibrahim and Mek yam Omar*⁶⁹, the words has variety of definition and may understood in different interpretation is null and void in conveying of *hibah*.

⁶⁸ kes Mal. Bil 11 tahun 1999

⁶⁹ ibid Kes mal bil. 32 tahun 2000

Fact of the case, the defendant is adoption the deceased Che Man b. Ibrahim. During the deceased life, he has 3 piece of land, which value RM 81,000.00: -

1. Lot No. 552, Mukim Kasa Pasir Mas
2. Lot No. 1348 Mukim Kubang Gatal
3. Lot which not recognizable.

Even the defendant is a sibling the deceased denying, the *hibah* was make based on the grounds:

1. Has no testimony of plaintiff about the pronouncement of giving 2 lot of land. The words “adduce of land” or “safe keeping of land” by the deceased who death had heard a fact that it has been widely known by members of the public. The definition words known by the deceased only. In the other word, it means the deceased given for safe keeping his land only not giving that land to plaintiff. Within testimony, may she tell, “ I have accepted the document of title”.
2. Has no the pronouncement of *ijab* and *qabul* (offer and acceptance) with the formal delivery of possession. Thus, the witnesses must be existence at the time when the gift is made to strengthen *hibah* between the plaintiff and the deceased.
3. As a strong *qarinah*, the first defendant is the sole sister the deceased and close relationship each other. Besides, it is impossible if the defendant has no heard the deceased saying that a property belongs to herself has been given for *hibah* even though once more time about the claim due to they always together.

After hearing the testimony both of parties, the court held that it contains ambiguities and not near. Thus, the defendant making the oath by the Quran known as a *Yamin Nafiul* namely denying oath by the claimant. When an oath taken by the first defendant, the claimant of the plaintiff not convict and that case discharge.

It was held that in case relating the enforcement of *hibah* that court stressed its authenticity can be proven through the written document. Thus, it can render of the strengthen evidence. For example case *Amar b. Mahmood v Aminah bt Thambi & others*⁷⁰. Fact of the case, Plaintiff is Mahmood b. Salleh son who died on 24 April 1998, although all of defendant is wives of the deceased.

During the deceased lifetime, he have given his land lot No. PT 3333 Mukim Maka Jajahan Pasir Mas costing about RM 17,000.00, a house worth RM 48,000.00 and a motorcycle worth RM 2,500.00. All of these claims come to a total of RM 67,500.00.

After delivery of possession has been made the deceased and the defendant was gone to land office to mutation of names was duly affected belonging of land and house to plaintiff. Although before the plaintiff was entered as belonging of all property, Mahmood b. Salleh previous dead. Therefore, after applies were admitted, it must be delivery of possession to the second defendant who is entrusted as guardian of minor son those who under 18 year old. Thus, the plaintiff applies to court to seal *hibah* of that property.

Therefore, to strengthen of giving testimony by the plaintiff she was showed the document (document of title) as a proof that land and house belonging not right of inheritance the deceased.

After heard the testimony from the both of the parties, the court held that property belongs to the plaintiff. The held was strengthening through the *istihzar* oath.

4.3.2 Withdrawal of the *hibah*

In Islam with regards to parties who make *hibah* cannot retraction their giving. The retraction that giving is prohibited, your kin or couple exceptions a gift to minor by father is the opinion of the majority of the *ulama*'. The enforcement of retraction of

⁷⁰ *ibid* Kes Mal Bil. 19 tahun 1998

hibah can be seen in the case *Mohammad Yasin @ Sapaei b. Muhammad v. Yasman b. Mohammad*⁷¹. Issue whether the father can retract of hibah to son?

Fact of the case, the plaintiff known as fathers of the defendant. The plaintiff was transferred a land belonging, lot no. 51, Pekan Kampung Raja, Besut to the defendant on year 1993 had given based on love. At that time the defendant had promise to travel fare to Mecca if the plaintiff not hajj yet after retirement. Although the defendant breach of promise and lead to frustration on the parents. Therefore, the plaintiff have an intention to retract that given and to nullity that given to the defendant.

Therefore, after had heard the testimony from both of the parties, the court held that delivery of possession of land to the defendant nullity and void. As a result that land belongs back to the plaintiff. One of the grounds of judgment based on *hukum syara'* namely father can retract that had given according to *nas* which means father can retract any giving to son.

Although in case *Muhammad bin Awang V. Awang bin Deraman and others*⁷², it was trial in Syariah high Court in Kota Bharu.

Fact of the case, the plaintiff is son of the first defendant and the defendant is father of the plaintiff. Although before settle the trial, the first defendant was previously dead due to fever and asthma. Therefore, the plaintiff applies to nullity of giving 2 lot of land at lot 2381 Mukim Daerah Pasir Mas and lot 1691 Mukim Pasir Gender Daerah Kusiah, Tanah Merah, Kelantan by his father Awang bin Deraman (the first defendant) during lifetime to another son the second defendant and the third defendant which both of them are a siblings. They have stated that they didn't receive any inheritance. Besides that it has occurred while his father was in a very bad condition and without any information regarding to the inheritance.

⁷¹ Kes mal bil 01 tahun 2001

⁷² Kes Mal bil. 26 tahun 1996

The defendant didn't dispute the litigating of plaintiff except he denies that it was occurred without the plaintiff previously knowledge. Even both of parties have not process of adducing evidence to up holding the litigating.

Issue to withdrawal of the *hibah* in this case: -

- I. Without the deceased sons knowledge
- II. The deceased is not in a good condition which he had a fever and asthma
- III. The deceased had given the giving lifetime to the second plaintiff and third plaintiff even though in this case all of parties are his sons

Within preparing the answer of problem relating that issue it should render according to discretion of court. The deceased had followed the requirement and condition of *hibah* that determined, if had referred to *fiqh* book. The majority of *ulama* is permitted someone who qualified either heir or not delivery of possession belonging to someone who has qualified to acceptance either heir or vice versa. If it happens during lifetime, when the owner of the property gives priority to some particular heirs and waived the others but if this situation does not affect the validity of *hibah* and it is better to avoid this type of *hibah*.

In fact, it cannot be denied that the deceased had divided 2 lot of land to the defendant at Pejabat Tanah dan Jajahan Tanah Merah, he is suffering fever and asthma and both of parties were agreed that the deceased has the diseases in long period. Therefore, it is believed that the deceased not very sick and his mind is sound if not the deceased incapable follow the defendant come to land office to transfer process of belonging and logically the deceased of sound mind. As a result the transfer process of belonging not be completely due to contrary with law.

We cannot denied that the *Ulama'* views who said that should not for father as an heir make *hibah* his property to his child only. The opinion merely hold to the report from Ibn Basyir with the meaning clearly without give the other meaning of *hadis* that is Abu Bakar which gave different meaning. Thus, after all it is better for us to look for an approach, which is more proper, so that both of *hadis* applicable and Ibn Basyir

hadis is not applicable to cancel *hibah* heir. As father to the heir those who has an intention to make *hibah* which not be encouraged by Muslim law.

It is clear that there is a *hibah* by the deceased may consider in rendering injustice due to ignorance half of sons but properly have the other reasons merely the deceased and Allah only knows.

After considering the facts of case, then the court held that the claim is rejected. Although the plaintiff is not satisfied with the decision had given. Therefore, the plaintiff had to make an appeal to the Syariah Appeal Court in Kota Bharu from any decision of the judge of the High Court in this matter.

Within an appeal, the main issue had rendered namely: -

1. the *hibah* by the deceased to the first defendant and second defendant is null and void due to the requirement and condition especially the pronouncement of *ijab* and *qabul* (offer and acceptance) that hasn't been fulfill and not complete which are fundamental or essential for a valid *hibah* and,
2. in this case had injustices clearly in delivery of possessions of property and contain other evidence to contrary, the principle *ayat* within *surah* Al-Maidah:

يَا أَيُّهَا الَّذِينَ ءَامَنُوا كُونُوا قَوَّامِينَ لِلَّهِ شُهَدَاءَ بِالْقِسْطِ وَلَا يَجْرِمَنَّكُمْ شَنَاٰنُ قَوْمٍ عَلَىٰ ءَآلَا
تَعْدِلُوا اعْدِلُوا هُوَ أَقْرَبُ لِلتَّقْوَىٰ وَاتَّقُوا اللَّهَ إِنَّ اللَّهَ خَبِيرٌ بِمَا تَعْمَلُونَ

Which means: O ye who believe! Stand out firmly for Allah as witness to fair dealing, and let not hatred of others to you make you swerve to strong and depart from justice. Be just: that is next to Piety and fear Allah. For Allah is well acquainted with all that ye do.

Although to clarify any main issue within an appeal according to discretion of court, the court had explained during the trial at *Mahkamah Qadhi Besar*, there is no statement or litigating that both of land which in dispute had given to the plaintiff by the deceased. Nevertheless, it merely suggestion by the deceased that

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to give both of land to the first defendant and second defendant and had given that property. It is different if the litigating of *hibah* had rendered to court which *al-muddaei* must fulfill certain conditions and to clarify how *hibah* was occurred. In this circumstance, there has no party make an accusation about *hibah* but it just an application to nullifies of the *hibah*. The court had given the argument based on kitab *minhad al-Thullah* "Every sudakah and a gift known as a *hibah* and not vice versa and to clarify after that. Similarly the *kitab* has clarified "the gift and sudakah no need to *sighah* and it had completed with belonging only". Although, within *kitab minhaj al-talibin* has clarified that not had any condition that the *ijab* and *qabul* within the delivery of possession of gift according to the valid view

In this case, the given opposed fee without to desire to annulment and the giving is mentioned explicitly and clearly by way of *hibah* or in gift or in charity. So it had needed to the interpretation accordance to the circumstances and situation of giving the claim and any others application. What happen in this case are the application to annulment of *hibah* and not occurrence of *hibah* but the giving had occurred it needed to the determinations by *hukum* either *hibah* or *sudakah*. In this problem, the court had stressed that are gift and not have any problem relating to the pronouncement of *ijab* and *qabul* (offer and acceptance). Besides, the gift had included under *hibah* which the court have jurisdiction according to section 9 (2)(vi) of Administration of the Syariah Court Enactment (Kelantan)(En.2/1982)

In fact, in an answering the issue relating of justice or in delivering a just decision while divided an inheritance among children, the court had referred to the opinion of *ulama'* based on that grounds: -

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- I. The ordained a report by Bukhari school which means: *Be fair to your child in giving the rights*. The effect of hadith it is not compulsory but commendable.
- II. The Syafie school and majority of *ulama'* held the view, which means: *"Hence, this situation must be seen by other person and if it is null and void, for sure our prophet will not mentioned about it"*.

A report by Rasullullah s.a.w also which means: “*I will never be a witness in the age of fraud, which is the word ‘jur’ is very general, it does not show it is not prohibited and illegal, but the actual meaning is illegal or blameworthy*”.

According to the Sheikh Daud al-Fatani, in Kitab Furu’ al-Masail :” and commendable for father to delivery the possession of property justly to children or in other words equally and if injustice without reasonable grounds the legal rule is blameworthy”⁷³.

In fact, based on that ground, the Syariah Appeal Court had achieved a unanimous opinion in rejecting an appeal by the appellant to nullify the *hibah* at the Chief Qadhi Court and the decision of Chief Qadhi Court remains.

4.4 CONCLUSION

To ensure the punishment which a court or judge may consider in rendering justice to the rightful party and not have any intention to cruelty the others parties. As a result the court had calculated an issue the conditions or requirement already stated during making of *hibah*? And what the rendering of evidence may be corroborated of the fact. Clearly, during the judicial process the court had given a decision on the basis of the Islamic law, which most important before held any decision.

⁷³ Sheikh Daud Fatani. n.d. Kitab Furu’ al-Masail. Jilid 2 .p. 123.n.pb.

CHAPTER

5

CHAPTER FIVE

SUMMARIES AND SUGGESTION

5.1 SUMMARIES

The belonging of property through *hibah* is one of the method belongings of property which be recognized by Islamic law. Nevertheless to get the right belongings it must fulfill the conditions which already been decided accordance to Islamic Law. The giving of *hibah* usually had made due to love existence among these one with another either have relationship or vice versa. The attitude was helping more or less strengthen the relations which existing already.

Within the al- Quran, Al-Sunnah and Ijma' has decided the rule of *hibah* is commendable as well. As regards in *Surah Al-Nisa ayat 4*, *surah al-Baqarah ayat 177*, *surah al-Maidah ayat 12*. Although, the *ayat* not clarify detailed about with an implementation of *hibah*. Therefore the elaboration relating *hibah* had clarified deeply within a report by *Rasullullah s.a.w* as regard a report had clearly before that.

To ensure that *hibah* completely, it must fulfill the conditions and requirements which already been decided namely donor, donee, subject matter of a gift and the pronouncement of *ijab* and *qabul* (offer and acceptance).

Even though the requirement and condition already had been completed, although the process of *hibah* still not completely be consider until the donee hand over the possession of property.

Nowadays *hibah* in Syariah High Court in Kota Bharu according Administration of the Syariah Court Enactment (En. (3)/ 1982) of section 9(2)(vi) provided: -

“it is civil jurisdiction to hear, determine all actions and proceeding in which all parties are Muslims includes (hibah) or cancellation”.

The section clearly was provided within civil jurisdiction to hear, determine all actions and proceeding relating *hibah* case. It because *hibah* case only have jurisdiction committed by a Muslim, which confess of Islamic religion. Therefore, clause 1 under the list 2, Ninth Schedule, Federal Constitutions stated, the Syariah Court only have jurisdiction to Muslim which confess of Islamic religion at Malaysia, even the property in dispute are the land had delivery of possession through form 14 A which provided under section 215 (1) of National Land Code.

Other than that under Section 421 A National Land Code is also given the mandate to Syariah Court and Syarie Judge to order any Land Administrator and Registrar office (Pendaftar Pentadbir Tanah) to execute or to enforce any punishment that have been mention in any trials. Therefore, the jurisdiction of Syariah High Court were limit to hear and determine all actions and proceeding which in amount or value of the subject matter in dispute must exceed fifty thousand ringgit above.

According to the analysis which already been done in Syariah High Curt Kota Bharu a total of 15 cases had been tried form the year 1999 to 2003. Although from 15 cases only 5 cases that get be settled officially. The delay in settle this case clearly ambiguities weakness the Syariah Court that already announce in the media nowadays.

Therefore, the parties those who in dispute of *hibah* which already been done, they may make an application in the court to make conformation that *hibah* or nullifies by himself or a *peguam syari'e* service and must follow the procedures which already been decided.

Besides, to ensure the justice for all the side which claim. In this case the judge will make decision based on an explanations which already been given either by verbally, document or by witness which already had to bring. Although before the judge decided any cases in dispute, in advance he will ask that party to take an oaths which the goal to strengthen an explanation and fact which existing.

SUGGESTION

1. As already been known, the rule of *hibah* is commendable and is encouraged in Islam. An encouragement is the aim to look after good relations between the individual. Thus, the writer would like to propose that the following groups need to make *hibah* if they are in the following situations: -
 - a. A couple who do not have son
 - b. A couple who do not have child
 - c. A couple who have adopted son
 - d. Couples who have stepchild and so on
 - e. A relative or an heir who is unable to get a portion of property under the *faraid* rule.
2. To ensure certain *hibah* which the be done exactly according to Islamic law, the writer advise to those who want to make *hibah* to prepare the document for *hibah* personally or by getting an advice from the professional group like judge and *Peguam Syari'e*. The aim is to ensure the document which be done is exactly according to Islamic law. Besides, the other aim is also to avoid any problem related to that document. But the writer prefers to advise that *Peguam Syarie* prepares the document.
3. To avoid any dispute between members of the heirs who involve with donee of *hibah*, the writer had advise that the ownership of the property which is under *hibah* need to be transferred quickly, namely through the document which already been decided by law. For example changing the right or ownership of land, in this problem who involve need to fill forms 14 (A), which already provided under section 215 (1) of Code State Land. The aim are to avoid any dispute be timed will come.
4. The judge must get the *fatwa* to be issued by the National Fatwa Committee on the transfer of ownership, especially which related to land (especially which related to transfer of land through an instrument

of forms 14 A) which involve persons professing the religion of Islam to be considered as *hibah* and it must satisfy any requirement and condition of *hibah*. Besides, it has to be under the jurisdiction of Syariah Court but not to be under the jurisdiction of Civil Court. This suggestion is to avoid any confuse by public with the jurisdiction of Syariah Court in the matter which related to land especially in the event which related to “transfer of ownership.”

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APPENDICES

APPENDICES

APPENDIX A

S A M A N

Di Mahkamah di
..... Bil. 19.....

Di antara

..... Pemohon

dan

..... Defendan

Kepada nama defendan yang tersebut
di atastinggal
(atau tempat perniagaannya atau kerjanya) di

Kamu adalah dengan ini disaman untuk menghadiri samada sendiri atau bersama Peguam di hadapan Mahkamah
tersebut di atas pada pukul pagi pada haribulan 19
untuk menjawab tuntutan terhadap kamu oleh pemohon yang tersebut di atas, butir-butir dimana telah dinyatakan
di dalam pernyataan tuntutan yang diendorskan di sini.

Ambil perhatian bahawa kemungkiran untuk kehadiran itu, penghakiman akan dikenakan ke atas kamu.

Dan ambil perhatian bahawa jika kamu ingin membela diri ke atas tuntutan tersebut, kamu mestilah, tidak
kurang dari dua hari genap sebelum tarikh yang tersebut di atas, memfailkan di Mahkamah dan menyampaikan
kepada pemohon pembelaan di dalam borang ini.

Bertarikh pada haribulan 19

[Meteri]

.....
Pendaftar
Qadhi

APPENDIX B

**SOAL SELIDIK BAGI PENYEDIAAN KERTAS KERJA BERTAJUK HIBAH:
KAJIAN KES DI MAHKAMAH TINGGI SYARIAH KOTA BHARU**

**SURVEY FOR THE PREPARED OF RESEARCH PROPOSAL ABOUT
HIBAH: A STUDY CASE IN SYARIAH HIGH OF KOTA BHARU**

Pembinaan yang dilaksanakan melalui kerjasama dengan pihak lain
in form development of the property with other agencies.

Penghasilan yang diterima oleh individu atau badan
income tax is distributed among individuals and companies.

Perolehan harta hasil usaha sendiri
income tax is paid by the effort.

Perolehan harta yang diperoleh melalui pemindahan
A voluntary transfer of property.

Pihak-pihak yang terlibat dalam proses pemindahan harta
Must
the relevant parties, why not a corporation.

Mengenai jenis dan kadar pemindahan
the tax on property.

Hubungan perundangan pemindahan harta dengan perundangan lain
The relation ship between the laws on the right.

Yang terlibat dalam proses pemindahan harta
the parties involved.

Pihak-pihak yang terlibat dalam proses pemindahan harta
the parties involved.

HIBAH: A STUDY CASE IN MAHKAMAH TINGGI SYARIAH KOTA BHARU

AGE:

SEX: M F

STATUS: SINGLE

MARRIED WIDOW / WIDOWER

1. Apakah yang anda faham tentang pemberian hadiah (hibah)?
What do you know about gift (hibah)?

Pemberian yang dilakukan secara sukarela tanpa mengharapkan balasan.
Transfer of the corpus of the property without any return.

Meminta sesuatu daripada orang lain untuk kesenangan sendiri.
Ask something from someone to completely her/his life.

Pemilikan harta hasil usaha sendiri.
Belongings of property by own effort.

Pemberian kepada orang lain yang bersifat sementara.
A temporal transfer of property.

2. Pada pandangan anda, mengapa pemberian hadiah (hibah) penting dalam Islam?

In Islamic perception, why gift is important?

Mengurangkan kadar kemiskinan.
Decrease poverty.

Mengelakan berlakunya perbezaan taraf antara yang miskin dan yang kaya.
To avoid any gap between the poor and the rich.

Untuk menunjuk-nunjuk.
To show off.

Lain –lain jawapan: _____

Others: _____

3. Apakah yang penting dalam pemberian hadiah (hibah) pada pandangan kamu?
In your opinion, what is the important aspect in hibah?

- Kemampuan.
Affordable.
- Pemilikan sendiri /
Ownership.
- Keikhlasan
Honesty

Lain-lain jawapan: _____
Others: _____

4. Pada pandangan, wujudkah masyarakat menitikberatkan pemberian hadiah (hibah) dalam kehidupan seharian?
From your opinion, is there any existence in the society where *hibah* is currently practice in their daily life ?

- Ya.
Yes
- Tidak
No
- Tidak pasti
Not sure

5. Adakah masyarakat prihatin terhadap kesusahan orang lain?
Is the societies today alert about others problem ?

- Ya.
Yes
- Tidak
No
- Tidak pasti
Not sure

6. Adakah anda beranggapan pemberian hadiah (hibah) membawa kepada keamanan negara?
Do you think that gift (hibah) have any effect to national peace and harmony?

- Ya.
Yes
- Tidak
No
- Tidak pasti
Not sure

7. Adakah anda akan memilih orang-orang yang benar-benar layak atau sebaliknya?

Do you choose someone to receive the give based on his or her qualification or not?

- Ya.
Yes
- Tidak
No
- Tidak pasti
Not sure

8. Adakah barang-barang yang anda jadikan hadiah kepada orang yang menerima barang lama?
Do you give an old gift to someone who received it?

Ya.
Yes

Tidak

Tidak pasti
Not sure

9. Dalam kehidupan berumahtangga, adakah pemberian hadiah (hibah) suami kepada isteri atau sebaliknya menjamin kebahagiaan rumahtangga?
In marriage life, do you think a gift from husband to wife can warranty prosperity in married life?

Ya.
Yes

Tidak
No

Tidak pasti
Not sure

10. Adakah perceraian di kalangan umat Islam berpunca daripada ketidakadaan hadiah daripada suami semasa perkahwinan?
Divorce in Muslims community is happened because the husband did not give any present to his wife?

Ya.
Yes

Tidak.
No.

Tidak pasti.
Not sure

11. Pada pandangan anda, kadar hadiah yang bakal diberikan itu dititikberatkan atau tidak?
From your opinion, the price of gift is important or not?

Ya.
Yes.

Tidak
No

Tidak pasti.
Not sure.

12. Masyarakat pada hari ini sangat bermurah hati memberi hadiah kepada orang lain , pada pandangan kamu adakah mereka benar-benar ikhlas atau hanya untuk mendapatkan jawatan tertentu atau untuk menutup kesalahan?

Nowadays, present or gift are normally awarded to someone .In your own opinion the gift are awarded with honesty or have any other intention such as to get good perception from public and other?

Ya.
Yes.

Tidak
No

Tidak pasti
Not sure

Alasan: _____

Reason: _____

13. Berikan komen anda tentang pemberian hadiah (hibah).

Come out what your comment about gift.

1. _____
2. _____
3. _____

14. Adakah pemberian hadiah(hibah) dibolehkan terhadap orang bukan Islam?

Based on hukum syara', gift can to the non -Muslim is prohibited or not?

Ya
Yes

Tidak
No

Tidak pasti
Not

THANK YOU