

APPRECIATION OF *SYARĪ'AH* PRINCIPLES IN PROPERTY MANAGEMENT IN CONTEMPORARY MALAYSIA SOCIETY*

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ABSTRACT

With improving economic status of Muslims in Malaysia, especially in term of personal property and wealth acquisitions, problems and issues relating to the devolution of properties have risen. The main argument explaining these problems is the rejection of the modern property management model based on trust and will by Islamic farā'īd rules. As the devolution of property after death based on farā'īd rules as practiced in Malaysia is often a long, complicated and costly process, there is a need to formulate an Islamic model to avoid these difficulties. This is however not to say that the Islamic rules of farā'īd should be discarded, since there are many other factors, such as legal framework, courts jurisdictions, administrative red tapes and societal attitude towards resolving disputes in estate distribution, also contributing significantly to the problem. In fact the rules of farā'īd should be considered as a part of the wider spectrum of Syarī'ah principles in property management in Islam. This article would propose hibah, in addition to waṣīyyah and waqf, as a practical model of Islamic property management.

Keywords: *Islamic property management, hibah*

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ACQUISITION OF WEALTH IN ISLAM

Prophet Muhammad s.a.w. was reported to have said:

*“A strong Muslim is better than a weak one”.*¹

The word strong or *qawī* here includes wealth as well. In another hadith the Prophet said:

*“It is better for you to leave your dependents rich than leaving them asking people for sustenance”.*²

Both of these hadith suffice to show us wealth is not only allowed but also commendable in Islam. In Islam, wealth is prerequisites to many religious obligations such as zakat and pilgrimage to Mecca. Even to perform basic religious duties such as daily prayers a Muslim must have proper clothing. Clothes have to be owned. Ownership of a property in Islam as well as in other cultures is normally through wealth acquisition.

From the above statements, no further elaboration is needed on the lawfulness of wealth acquisition in Islam. The points that need explanation is how to acquire that wealth and consequently how to spend it. Another point which stems from both questions is what kind of wealth that a Muslim is allowed to own? These are some basic legal questions which largely have been dealt with in greater details by our fuqaha or Islamic jurists. This paper will therefore only outlines some important points discussed by our fuqaha on this matter. The next interesting question, which is the concern of this paper, is how properties owned by Muslims can be better managed according to the market force and current trends of a modern society but at the same time compliant to the requirements of the *Syarī'ah* or Islamic law. Before answering this question, the paper attempts to show some problems faced by Muslims in managing their properties especially in relation to succession, bequest and gift. Other methods of property management which is *Syarī'ah* compliant such as investments, savings, insurance etc are not controversial as these products, which are now widely offered by Islamic Banks in many Muslim and non Muslim countries alike, are approved by the official *Syarī'ah* advisory bodies created by law. For this reason, products offered by Islamic Banks are not discussed in this paper.

¹ Reported by Muslim. See Sheikh Salih al-Sheikh (2000) (ed.), *Mawsū'at al-Ḥadīth al-Sharīf: al-Kutub al-Sittah*, Saudia Arabia: Dar al-Salam, 3rd Publication, p.1142.

² Reported by Bukhari and Muslim, quoted from al-Khatib al-Tibrizi (1985), *Mishkāt al-Maṣābīḥ*, Beirut: al-Maktab al-Islami, volume II, p.924.

Our attention is on the question of property management of which until now does not receive adequate attention.

Property in Islam

Islam appreciates property that is beneficial for the use of human kind. Benefit here means within the parameters approved by the *Syarī'ah*. Nevertheless, there is a great similarity between Islam and other cultures in what can be regarded as beneficial or otherwise, since what is deemed beneficial, good or bad to human kind is universal. The Muslim jurist is of the view that a thing is considered a property or *māl* when it is clean, beneficial and worthiness which they technically term as *mutaqawwim*.³ The meaning of property and its transaction are limited within these conditions. Clean and pure (*tāhir*) take in two forms: physical and abstract. In the former, things viewed by the *Syarī'ah* as impure such as swine, dog, liquor, animal's waste etc.⁴ In the latter, wealth acquired through illegal means such as theft, robbery, bribery, etc. Similarly, a thing is not considered a property if it has no direct benefit to Muslim or its purpose is contradictory to the aims of the religion: in the former, things such as wild animals and in the latter, things such as musical instruments, playing cards etc. Worthiness (*mutaqawwim*) means such a thing must have value. Hence, a pebble or a handful of sand is not a property since they are of no value. The Common Law principle in contract that states consideration need not be adequate is probably not enforceable under Islamic law. It must be reminded here that the above conditions are applicable only to Muslims. A *ḍhimmī* (non-Muslim living in a Muslim country) can still transact properties which are considered as non-property, such as liquor, swine, etc., among themselves and the law recognizes the transaction as valid.

How Property is Acquired in Islam?

How property is acquired, depends on the history of human kind itself. In ancient time, people acquired property through exploration of new lands, hunting, war, agriculture etc. These were the main ways to acquire property. Both Islam and cultures of the people acknowledge these methods as means to

³ Muhammad Abu Zahrah (1996), *al-Milkiyyah wa Nazariyyah al-'Aqd fi al-Sharī'ah al-Islāmiyyah*, Egypt, (reprint), p.48.

⁴ See Muhammad ibn al-Khatib al-Syirbini (n.d), *Mughnī al-Muhtāj*, Beirut: Dar al-Ma'rifah, volume II, p.16.

acquire property. *Iḥyā' al-mawāt* or revival of dead land (whether it is unused, left or virgin), *al-ṣayd* or hunting (whether capturing or killing of wild animals or fishing), *ghanīmah* (war's bounty), etc. were terms used by Muslim jurists in the past to indicate means of acquiring property.⁵ As time progresses and people became more civilized, trading and business have become the main ways to gain wealth and property. Islam as a religion which appreciates the demand of human needs not only endorses trading and business but also encourages Muslims to be involved in them. A hadith was reported to have said:

"Nine-tenth of the bounty or rizq originates from trading".

In another hadith, it was reported that:

*"A trustworthy and honest trader or merchant (al-tājir al-amīn al-ṣadūq) is with the Prophets (anbiyā'), the truthful ones (ṣiddīqīn) and the martyrs (syuhadā')."*⁶

History has shown us that human activities in trade and business, despite their usefulness in economy, in many instances have been manipulated by or used for the benefit of the few. The employment of interest-taking practice in money lending activities, hoarding and unjust monopoly of goods, cheating and profiteering of prices etc were some examples which resulted in the oppression of the many. Realizing these detestable elements in business and trading Islamic law imposed some controls in order to secure the interest of the majority. This is why some writers have argued Islam as anti-capitalism or pro-socialism. Neither is the case. The philosophical debate on this matter is however not within the scope of this paper.⁷ The aim is to show that in Islam there are some limitations or controls on how property is acquired.

Controls on matters relating to economics activities in general and trade and business in particular are not unique to Islam. In other cultures and societies, assortment of laws and regulations have been introduced to control these matters. Therefore, some of these limitations on trade and business between Islam and other cultures may be of universal value. Hence, transactions which contravene the law of the state or which are against morality or public interest,

⁵ Compared with 'Abd al-Razzāq al-Sanhuri (1967), *Maṣādir al-Ḥaqq fī al-Fiqh al-Islāmi*, volume I, Cairo, pp.49-50.

⁶ Maulana Muhammad Ali (1988), *A Manual of Hadith*, Curzon Press Limited, (Second Reprint of Third Edition), p.294.

⁷ Read further Farhad Nomani and Ali Rahnema (1995), *Islamic Economic Systems*, USA: Business Information Books (published in Malaysia by A Abdul Majeed & Co), pp.80-81.

are deemed illegal and unlawful. Islamic law in many respects is in agreement with other cultures and system of laws in these matters. Nevertheless, there are some values which make Islamic law distinctive from the rests. Some writers summarize these values into three elements: the prohibition of *ribā*, *gharar* and insertion of special conditions into contracts (which ultimately denies certain rights guaranteed by the law in that contract).⁸

Innovation and creativity are acceptable in Islam as long as no basic principles of the Quran and al-Sunnah are transgressed. It is almost universally accepted by the Muslim jurists that the rule in transaction is permissibility (*al-aşl fı al-mu'āmalāt al-ibāḥah*).⁹ This means Muslims can adopt whatever forms of doing business that suit their needs as long as no prohibitory elements are involved. This has been a recent position in Muslim attitude towards modern business transactions like banking, insurance and investment. The acceptance of these transactions is largely due to process of islamization from which prohibitory elements are eliminated. This process of adjusting and modifying modern business to conform with the *Syarī'ah* is indeed dynamic and synergic. At first, it seems that what has been done is that *Syarī'ah* is merely copying the modern business. Recent development appears to indicate that *Syarī'ah* is slowly but steadily creating and innovating its products. In fact, some business techniques spearheaded by the *Syarī'ah* are unprecedented and unique.

DEVOLUTION AND MANAGEMENT OF PROPERTY

How to spend one's wealth is not a serious question to be bothered with. In a free market society like ours, it is entirely left to the will of the property's owner. Limitation of the law is of course must be observed. To spend what one has gained entails surplus in the income. Surplus would mean after all necessities for the sustenance of live have been satisfied. Naturally, spending of the property is first made on the basic needs like foods, clothing and shelter. Then come other considerations depending how one culture sees it such as education, health, transportation, vocational tools, religious obligation, leisure etc. There is little disagreement between Islam and others in this respect. Nevertheless it is on the spending of the surplus of the income that Islam may probably differ from others. In modern life such as today people invest or save the surplus of their income in many ways that the market has to offer. Such

⁸ 'Abd al-Razzāq al-Sanhuri (1967), *op.cit*, volume 3, p.14.

⁹ In Suyuṭi's *al-Asbah wa al-Nazā'ir* it says: *al-Aşl fı al-Asyyā' al-Ibāḥah*, at p.133 (n.p., n.d.).

investments or savings are for all sort of reasons; future security, future spending, risk management or just simply making profit. Many of these reasons are in accordance with Islam. It is already known that the conventional investment and financial products are mostly interest based which is prohibitory in Islam because of *ribā*. In short, it is the mechanic of generating profit that makes Islam and conventional investments and savings different.

In Islam, wealth and property belongs to Allah. A Muslim is not an absolute owner of his or her property. A Muslim must only spend his or her property in the ways that Allah enjoins since wealth given to him is a trust. A trustee must administer the property as instructed by his principal. No deviation is allowed. Principally, a Muslim should spend his property for the maintaining and sustaining of oneself, family and community at large. Devolution of property for this purpose could be either obligatory or commendable. It is therefore a duty of a husband to maintain his family. The family members who are dependent on this payment have the rights to claim, if the payment is not made to them. Likewise, the better-off members of the community are obliged to pay a fixed amount of money or goods to the poor known as zakat or alms. But unlike payment of maintenance to family members, this payment is not enforceable by the poor as their rights. In certain cases, it is the government which will enforce the payment. In other, it is left to the conscience of a Muslim to observe it. Thus, devolution of property in Islam is prioritized for fulfilling the basic needs of oneself and family (known as *hawā'ij ašliyyah*) and obligation towards the poor through alms.¹⁰

Charitable donation is indeed commendable and encouraged in Islam. This is done whether the needs of a person and his family have been satisfied or not. The Prophet Muhammad s.a.w. and His Companions were said to have donated most of their properties towards the cause of Islam and barely left them with provisions. In normal circumstance, donation is taken from the surplus. It is also commendable to gift present to close relatives and friends. Gifts can also be given to orphans, travelers and others who are in need. These are deeds of piety and do not have any contractual consequence. Spending the surplus to create more property or to dispose property to achieve certain objective is permissible in Islam but this quite another thing since it involves contractual obligation as shall be discussed below.

Islam allows Muslims to invest property with a view to accrue profits. Similarly, there is no harm to transfer one's property gratuitously to another

¹⁰ Yusuf al-Qaradawi (n.d.), *Fiqh al-Zakāt*, Beirut: Mu'assasah al-Risālah, volume 1, p.151.

by means of contractual obligation. Bequest (*waṣiyyah*), gift (*hibah*) and trust property (*waqf*) are some of the common gratuitous contracts in Islam.¹¹ They are deemed as gratuitous as no consideration is needed or required. In certain instances, such as in the case of *waqf*, a mere declaration is sufficient to form the contract. Since the nature of these contracts are gratuitous, they are naturally made to close and near family members. In the past, this aspect of property management was almost negligible except for the few rich. The reason is obvious enough. But in addition to this reason, especially the Muslim community in Malaysia has held with firm conviction that distribution of property to family members is settled by the *farā'id* system and no other ways are permissible. Division of property other than *farā'id* is akin to rejecting God's law. This is certainly not the position in *Syari'ah* as Muslim is allowed to manage his property according to the terms he sees most best for the well being of his family. The *farā'id* is to cater distribution of property left intestate and it is only a part of the whole package of Islamic property management.

Problems Faced By Muslim in Devolution of Property

Property management which is personal in nature such as gift and bequest, is thought not to be important inasmuch as commercial property management. With the increasing emergence of well-off Muslims in Malaysia and for that matter the rest of Muslim world as the result of economic prosperity, family property management related to the above is becoming important. The reason for this interest besides economy is the problem relating to the administration of Muslim estates by way of *farā'id*. The process of distributing the property by way of succession or *farā'id* in many cases is time consuming, complicated and costly. Not to mention the process sometimes has disrupted relation among family members because of disputes. Admittedly, the administration of *farā'id* in Malaysia and other countries with similar tradition, which is the legacy of the British colonial government, has to a certain degree created harm to the well being of the Muslim community. Statistic from the department responsible with the administration of small estate reveals that there is a serious delay or backlog in processing the application for estate's distribution.¹² Many factors

¹¹ These contracts are known as '*aqd al-tabarru'*'. See Şubhi al-Mahmasani (1972), *al-Nazāriyyah al-Āmmah lī al-Mūjibāt wa al-'Uqūd*, Beirut: Dar al-'Ilm li al-Malāyīn, volume 2, p.272.

¹² Tuan Haji Abdullah Muhammad (2002), "Realiti dan Masalah Dalam Pelaksanaan Pembahagian Harta Pusaka Pengalaman Jabatan Ketua Pengarah Tanah dan Galian Persekutuan", (Seminar Amanah dan Harta Bumiputra-Commerce Trustee), Hilton Hotel, Seremban, 29 September 2002.

contributed to these delays have been identified by the department involved. Although several measures have been carried out to overcome these problems, the process is still cumbersome.

The nature of Malay life and realities of modern life sometimes make the fractional shares of the *farā'id* unacceptable to certain people. Some writers and women activists claim that wife's entitlement of 1/8 of her husband property is not enough to support her. Especially so when the couples have spent their life together for a long period of time working together amassing the property. In Malaysia, this would not be a problem since the concept of joint earning during marriage for Muslims or better known as *harta sepencarian* is recognized under the law. Normally before distribution of the estates is made, the wife has to apply to the Syariah court for the order of *harta sepencarian*. This rights to *harta sepencarian* is therefore not automatic upon death. As the application involves court procedures and presentation of evidence, the order so desired is not quick and cheap.

Islamic *farā'id* or *mīrāth* does not differentiate between movable and immovable properties in estate distribution. All property is considered the same as far as the distribution of the estate is concerned and all heirs are entitled to these properties according to their fractional shares. Distribution of movable properties especially money or things with monetary value according to their fractional shares is less complicated and relatively easy and can be done speedily. Immovable properties post a problem when they come for distribution according to these fractional shares. The record of the land office shows that some of the titles have not been transferred to the deceased's heirs because of difficulty in settling differences among the heirs or finding lost or unknown heirs. If the transferred was eventually made, division of land is not possible if the size of the land is too small to permit such a division. This is known as land's sub-division or fragmentation and some writers argue the practice would lead into economical lost of the land.¹³ Normally the title deeds of the land would contain several names as co-owners. What that has been done to the best ability of the land's officer is to negotiate among the heirs to avoid this situation. Negotiation as usual is not an easy process.

¹³ Dato' Sir Mahmud Mat, "Land Subdivision and Fragmentation", *Intisari*, volume 1, no.2, pp.11-17. Although some of the facts in this article are outdated, the findings are still relevant.

HOW *HIBAH* CAN BE A SOLUTION?

Indeed, there are limitations to testamentary distribution of Muslim estates as required by the Syariah law. But this does not forbid Muslims to arrange the distribution of their property among family members while he is still alive. Thus, *hibah* and to certain extent bequest can be the tools as how the management of Muslims' property in Malaysia can be done. The ability of bequest to provide adequate service to current property management is limited. This is due to the nature of bequest in Islam which only allows the maximum one-third of the property to be distributed upon death. Moreover no bequest can be made to legal heirs of the donor. In this respect, *hibah* is seen as the best solution to the above proposal since property can be transferred to family members with terms chose and decided by the donor. Nevertheless, *hibah* is transfer of property *inter vivos* dan takes immediate effect after the contract. In addition, Muslims jurists also insist the property must be delivered to and possessed by the donee. *Hibah* to non-family members is furthermore irrevocable once all the necessary requirements of the contract are fulfilled. Using *hibah* in the above fashion would make the donor impoverishing himself and be dependent on his donee. Thus, the type of *hibah* that would be used to solve the above problems needs to be accommodative between the requirements of the *Shari'ah* law and the needs of the donor to utilize the property.

The problems that have been mentioned above are largely related to devolution of property after death. As not to compromise or contravene with the rules or at least the spirit of the Islamic law of succession and bequest, many Muslims are reluctant to use *hibah* as an alternative. Having said that, the writer is of the opinion that Muslims do have the choice how their property should be divided to their family members provided that the choice they make must be in the interest of the family and must not in any way impose injustice. The Islamic rules of succession and bequest are made to ensure the rights and interest of the inner family members protected and guaranteed. But the law allows them to waive these rights (under a technique known as *Takhāruj* which literally means to opt out). Thus the rule of inheritance as prescribed in the Quran as far as the heirs are concerned are not binding upon them. They have the rights not to accept distribution prescribed by the *farā'id* rules by releasing their claims either unilaterally or by agreement. If a person dies intestate then his property is subject to the rules of successions. But if a person decides to arrange the distribution of his property before his death but at the same time retaining the rights to transact the property, there is no harm in respect of the *Syarī'ah* law provided he uses the right technique of the *Syarī'ah* to achieve this. In this respect, *hibah* can provide the solution.

Looking at the experience from other Muslim communities especially that of Indian Sub-Continent, *hibah* was used to achieve several aims which testamentary distribution of the property could not do.¹⁴ Thus, the concept of *inter vivos* transfer of corpus with reservation of usufruct was used in Pakistan to avoid the property goes to distant relatives under the rule of faraid. Thus in *Mir Zaman Khan v. Ajaib Sultan* (1994) Civil Law Cases 991 (Lahore) the gift with condition reserving to the donor the major share of the usufructuary benefits was valid and effective.¹⁵ In this case the court declare the condition limiting the donee to sell the property donated is void. In Malaysia, several modified concepts of *hibah* have been introduced. It involves appointment of agent to hold the property on behalf of the beneficiary and at the same time giving donor rights to use the property. Appointment of agent to receive property donated in *hibah* contract is probably controversial as some Muslim jurist may argue against it.¹⁶ But at least there are some writers who view it as permissible.¹⁷ Nonetheless it is normal to be reprehensible for the things we are not used to. Some of the Islamic banking products received criticism in the early days of their operation. But through course of time, those products are now acceptable to many. I believe the same will happen to *hibah* as its potential as a financial tool is not fully developed. Acceptance to *hibah* will grow according to viability and cost-effective of the product as time progresses. This is indeed the nature of Islamic law: dynamics and progressive as history has shown us.

¹⁴ For the experience of Muslim society living in non-Muslim countries namely The United States of America see Jerry E. Ellison Jr. (2001), "Islamic Estate Planning", *California Lawyer*, pp.59-61.

¹⁵ Quoted from Lucy Carol (2001), "Life Interest and Inter-Generational Transfer of Property Avoiding the Law of Succession", *Islamic Law and Society*, 8:2, p.269. For detailed discussion on this concept see Kamila Tyabji (1949), *Limited Interest in Muhammadan Law*, London: Stevens and Sons Limited, p.157-163.

¹⁶ For example in Kasani's manual of *Badā'i' al-Şanā'i'* at p.126, volume 6, the author classifies possession of the donation (*al-qabḍ*) is either through donee himself (*al-Işalah*) or representation (*al-niyābah*). Representation in *Hibah* according to Kasani only occurs in case of a child where the guardian shall represent the child to receive the donation.

¹⁷ Abdur Rahim (n.d), *The Principles of Muhammad Jurisprudence*, Lahore: PLD, p.301. "A gift *inter vivos* may be made to some definite individual who can take possession of the thing either himself or through his agent or guardian..."

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