

## COMMENTARY

### UNVEILING THE SIGNIFICANCE OF PROPOSING *HIBAH* AS AN ALTERNATIVE TO *NAFKAH* SECURITY FOR WIDOWS

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#### ABSTRACT

In recent years, there has been increasing interest in the study and promotion of *hibah* (gifts) as one of the alternatives in Islamic estate planning. This paper aims to shed light on the instrument of *hibah* as an alternative payment for *nafkah* (alimony) to the wife as security for maintaining the widow's claim to the husband's property after the husband's death. This study adopts a doctrinal approach as it requires an examination of the legislation relating to *hibah* and *nafkah* based on several legal provisions from the various statutes in Malaysia. This approach is important to clarify the current and existing legal provisions relating to *hibah* and *nafkah* from the various statutes as a specific *hibah* and *nafkah* law has not yet been enacted in Malaysia. Finally, this study is also based on library-based research where the data were collected from primary and secondary sources. Overall, this study provides valuable information on the existing legal provisions on *hibah* and *nafkah* in Malaysia and makes some important recommendations to safeguard the rights of women in property distribution, especially widows. It takes into account that Islam encourages the practise of systematic estate planning to ensure the rights of heirs to the deceased's assets. The findings of this study will raise awareness of the need for proper wealth planning by the *hibah* for women, which will ultimately benefit widows after the death of their husbands.

## Introduction

It is crucial to understand that proper wealth planning is recommended if it does not violate Islamic commandments. Many researchers have established the importance of proper Islamic wealth planning for all Muslims as it leads to better management of wealth in the future (Abdul Rahman & Hassan, 2020; Ahmad Irfan, 2020; Ahmad et al., 2018; Omar & Muda, 2017; Kamarudin & Abdullah, 2016). In addition, proper asset planning is important to control the growing number of frozen assets in Malaysia. In view of the above problems, several studies have proposed various distribution tools in Islamic law that could solve the problem of frozen assets in Malaysia, including *wasiat*, *wakaf* and *hibah*.

The main objective of this study is to focus on the instrument of *hibah*, since *hibah* is considered an effective method of distribution. There is no question that *hibah* could be an alternative method of distributing the wealth of Muslims as it is recognised as a tool to facilitate estate planning processes. Therefore, public awareness of the use of *hibah* as an alternative form of wealth distribution should be expanded as *hibah* has been proposed as one of the alternatives to solve Islamic estate issues (Azmi et al., 2022, Ismail et al., 2020; Hassan & Mohamad Zaizi, 2020).

Originally, the idea of introducing *hibah* was to help those who are in need, especially if they have lost their loved ones. Understandably, *hibah* is a form of gift, given by the donor to his designated beneficiaries, i.e. the donee. *Hibah* is thus seen as a solution to avoid problems between family members and to create a mutual love and affection among Muslims, especially when there is a dispute over the distribution of wealth.

Therefore, this study considers *hibah* as a solution when a person decides to distribute their wealth during their lifetime in order to avoid conflicts and help the family members in need. This study focuses on the rights and entitlements of women to their husband's assets, especially to help widows who have lost their spouse to continue surviving. Previous studies have shown that most Muslims in Malaysia are sceptical when it comes to proper planning of their assets. This shows that the majority of Malaysian Muslims do not consider Islamic estate planning as important. In response to this problem, it should be noted here that awareness of the importance of estate planning is crucial, especially for women, to avoid economic dependence on men.

It is understandable that proper Islamic estate planning helps the beneficiaries to better utilise the assets and ultimately strengthens the economy of Muslims. In this regard, this study focuses on how women, especially widows, can be protected to preserve their rights to their husband's property by way of *hibah* and prepare them to be emotionally and financially prepared for a better future.

### Definition and relevant provisions on the *Hibah* in Malaysia

According to the fourth edition of the *Kamus Dewan Bahasa dan Pustaka*, "*hibah*" means that a person assigns his right to property to another party if it is done voluntarily and in good faith and is executed during the lifetime of the donor. Similarly, Section 2(1) of the Brunei Hibah Order 2018 defines "*hibah*" as the transfer of ownership of a property from the donor to the donee during the donor's lifetime, which is done voluntarily and without any consideration. Al-Khaṭīb al-Syarbini held a similar view in his book *Mughni al-Muhtāj*, saying that *hibah* is an act in which the donor gives away his rights to a property during his lifetime without any consideration, and is based on the donor's free will.

Thus, *hibah* has been referred to some provisions in the various laws, namely the Federal Constitution, the Enactments for the Administration of Islamic Law, the Federal Territories Act, the Shariah Court Enactment, the Islamic Financial Services Act, the National Land Code and the Contracts Act. The main point of reference to which the judges of the Shariah Courts refer when deciding *hibah* matters before the Shariah Court is the enactments governing the administration of Islamic law of each state (Wan Ismail, W. A. F., et al., 2020).

Currently, the existing law in Malaysia is inadequate to address the issue of *hibah*. Another important point to consider is that these state enactments have placed *hibah* under the jurisdiction of the Syariah High Court, where *hibah* is basically mentioned in general terms in the various provisions. However, it is important to emphasise that these provisions are limited in scope. Despite the fact that *hibah* is mentioned in the aforementioned statutes, it is noted that the application of *hibah* in the said provision is limited. The

provisions on *hibah* in the administration of Islamic law in each state do not discuss *hibah* in detail, as the discussion on *hibah* has been kept brief. In other words, these provisions do not elaborate on the principles and procedures of *hibah* in the syariah court. This shows that there is a gap in the state enactments where both the substantive and procedural part of the execution of *hibah* in Malaysia is unclear and inadequate.

Although *hibah* has been proposed as an alternative method of distributing the wealth of Muslims, the biggest problem with the application of *hibah* in Malaysia is that there is no specific law governing it, except for the state of Kelantan. As such, it is important for other states in Malaysia to enact *hibah* law as the existence of a codified law on *hibah* could solve cases related to the Islamic inheritance problem in Malaysia.

### **Definition and Relevant Provisions on *Nafkah* in Malaysia**

Literally, *nafkah* refers to anything that a person spends on his family members. When a Muslim man in a marriage marries a Muslim woman, he is obliged to give *nafkah* to his wife if all conditions are met. A reference to the Islamic Family Law (Federal Territories) Act 1984 and other government enactments is necessary to clarify the issue of *nafkah*. All the enactments contain similar provisions to protect the wife's right to *nafkah*.

Interestingly, these enactments are silent on the interpretation of the term *nafkah*. Due to this limitation, reference has been made to Section 2(1) of the Islamic Family Law (Laws of Brunei, Chapter 217) for the interpretation of the term, where "*nafkah*" means the compulsory provision of food, clothing and shelter for the wife, children, divorcee and any other person dependent on a husband or former husband, including parents and stepfathers, as per *Hukum Syara*'.

*Nafkah* is obligatory and binding on a Muslim man based on the authorities of Surah At-Talaq (65:7), Surah Al-Baqarah (2:233) and Surah An-Nisa (4:34). Apart from the authorities from the Al-Quran, the *nafkah* is also mentioned in some hadiths.

Among the hadith:

Narrated from Aishah that Hindun bin 'Utbah said: "O Rasulullah, Abu Sufyan is a miser and does not give me what is sufficient for me and my children, can I take his property without his knowledge?" Rasulullah S.A.W said, "Take what is sufficient for you and your children, and the amount should be just and reasonable".

(Al-Bukhari, 1422H, Hadith 5364)

As for the *ijma' ulama*', all jurists unanimously agreed that it is an obligation of the husband to provide maintenance to his wife if the husband is an adult (*baligh*) and unless if the wife shows disobedience (*nusyuz*) to the husband (Al-Khin, 1996).

Most importantly, the necessary provision for *nafkah* is mentioned in section 59(1) & (2) of Islamic Family Law (Federal Territories) Act 1984. Section 59(1) & (2) of Islamic Family Law (Federal Territories) Act 1984 provides the followings:

59(1). The Court may, subject to *Hukum Syara*' order a man to pay maintenance to his wife or former wife.

59(2). Subject to *Hukum Syara*' and confirmation by the court a wife shall not be entitled to maintenance when she is *nusyuz*, or unreasonably refuses to obey the lawful wishes or commands of the husband, that is to say, inter alia-

When she withholds her association with her husband;

When she leaves her husband's home against his will; or

When she refuses to move with him to another home or place,

Without any valid reason according to *Hukum Syara*'.

It is important to note at this point that this study focuses on the rights of women in the *nafkah*, especially those who belong to the category of widows. In this context, Section 2 of the Islamic Family Law (Federal Territories) Act 1984 defines the term “widow” as a woman whose husband has died.

### ***Hibah* as an Alternative to *Nafkah* Security for Widows**

Understandably, inheritance law (*faraidh*) plays an important role in the administration and distribution of the deceased’s assets after death. However, there is a public misunderstanding of the concept of wealth distribution, claiming that *faraidh* is the only method of distributing the donor’s assets after death. Unfortunately, this misunderstanding has led to the majority of Muslims relying solely on the *faraidh* and ignoring proper planning for their assets. The stigma and community belief that Islamic inheritance is the distribution system that exists after death should be changed.

It should be noted that Muslim women in Malaysia are entitled to various forms of financial maintenance from their husbands. To date, most research on *nafkah* in Malaysia focuses on the rights and entitlements of women during marriage, especially when the wife is employed (Tengku Muda et al., 2017; Yelwa, 2013; Mohd & Ibrahim 2010). Not only that, but it is also a contentious issue in court if the ex-husband refuses to pay *nafkah* ‘to his ex-wife during the ‘*iddah* period. However, researchers should also investigate how to protect and preserve the widows as they should be protected in managing their wealth distribution to avoid future conflicts (Basah & Tahir, 2019).

The current scenario confirms the importance of good planning to facilitate the process of distributing the deceased’s assets. In Islamic inheritance law, the widow is entitled to a certain share of the deceased husband’s assets. In disputes between the widow of the deceased and her in-laws, the court orders that the deceased husband’s assets be distributed to the heirs in accordance with Islamic inheritance law. In the case of *RMS v RK and five others* (Civil Case 08100-017-0367- 2014), the assets of the deceased were distributed to the beneficiaries without taking into account the share of the plaintiff (widow of the deceased) in *harta sepencarian*. The plaintiff claimed part of the assets as *harta sepencarian* and the court later ruled that the assets were *harta sepencarian*, so 1/3 of the assets were awarded to the plaintiff and the remaining 2/3 were the deceased's share to be distributed to the heirs under the *faraidh* system. The court’s decision in this case was in favour of the widow, underlining her entitlement to a share of the estate and thus ensuring her financial well-being after her husband’s death.

However, recent cases show that the process of inheriting assets can be lengthy and complex, especially when a person dies without *hibah*. There is a report on the significant legal development regarding the widow's claim to the deceased husband’s assets. The legal battle over marital assets worth RM2.1 billion has been going on for about six years. In this case, the mother-in-law disputes her daughter-in-law’s claim to the joint marital assets. The mother claims that she is entitled to her own share under the Islamic *faraidh* distribution system (Khairulrijal, 2024). The division of the deceased's property can therefore lead to disputes if Muslims fail to draw up a *hibah* specifying the share of the division of assets among the heirs.

The concept of *hibah* as an alternative and more effective method of distributing assets is not very popular in the Malay community. Datuk Ikbah Salam, a lawyer who has been dealing with inheritance matters for 24 years, explained that the community in this country only resorts to the *faraidh* system as if it is the only wealth distribution in Islam. He also emphasised the need for *hibah*, which allows widows to easily withdraw their deceased husband's money if they use the instrument of *hibah* (Abdullatib, 2020).

Not only that, but the existing laws also dealing with maintenance issues are inadequate to meet the needs of Malay women, especially widows. Therefore, there is an urgent need to amend the existing legal provisions to clarify and strengthen the maintenance rights of women. Apart from that, this study proposes to develop an appropriate plan to secure the rights of widows as this initiative is deemed necessary due to the fact that widows are exposed to various risks in claiming their husbands’ property such as lack of knowledge, lack of awareness and disputes between family members.

Considering the above gaps, this study proposes to educate women to start planning for proper property division during the lifetime of both spouses to avoid misunderstandings and unexpected events in the future. Apart from this, the increasing number of frozen assets in Malaysia calls for similar initiatives as they affect economic growth and harm the country and society if not managed appropriately.

## Conclusion and recommendations

To summarise, previous literature has proven that *hibah* is considered as one of the most trustworthy and efficient methods to resolve the increasing number of frozen assets in Malaysia based on its application and services in the present time. In addition, proper asset planning is encouraged in Islam as it helps to prevent assets from being unclaimed by the beneficiaries. With this in mind, *hibah* has recently been proposed as an essential wealth distribution mechanism, as it is believed that *hibah* has the unique characteristics that it can be done during the donor's lifetime. *Hibah* differs in some ways from the characteristics of a will, in which *hibah* can be bequeathed to anyone the donor wishes to give his wealth to, including his family members. In this study, *hibah* is proposed as a planning mechanism for the distribution of the husband's wealth to his wife, which benefits the wife after the husband's death.

Based on the results of this study, the proposal of a *hibah* as a form of *nafkah* security for women can help to ensure a smooth process in the settlement of inheritance matters and solve the problems of widows. It is hoped that this study will serve as a guide and stimulus for securing the rights of women in the distribution of assets, especially widows. It should be noted that Islam encourages the practise of systematic wealth planning to ensure the rights of heirs to the deceased's property without denying the supremacy of the right of inheritance (*faraidh*). In addition, this study is also intended to benefit various parties and bodies including women, practitioners, academics, religious departments, syariah courts, takaful industries and other bodies concerned with this issue.

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