

# FIQH HIBAH WORK ON THE GROUNDS OF JUDGES IN THE SELANGOR SHARIAH COURT OF APPEAL

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## Abstract

Grounds of Judgment (GoJ) is something that needs to be done by the Honorable Judge (HJ) based on the facts of the court proceedings after making a decision. This is also implemented in the Shariah Court of Appeal (MRyS) of all states in Malaysia, including in Selangor which covers all cases, including hibah cases. However, is the GoJ based on contradictory and authoritative sources of sharia arguments, especially based on the texts of fiqh works by great classical scholars? If so, what are the works and what are the main issues raised in the judgment. Therefore, this study selects hibah -related cases, namely nine cases as a sample whose primary data was obtained from the Selangor MRyS office. The GoJ data were analyzed descriptively using content analysis methods with inductive, deductive and comparative processing. The results of the study showed that there were seven cases of the HJ based on judgments on 12 texts from eight works of great scholars of the past covering the four major sects of Islam. There are two main issues mentioned, namely (i) general issues related to the pillars and conditions of hibah and (ii) specific issues related to al-Qabd and ownership of hibah items. This study shows that the reasons given when making the decision are contradictory, authoritative and based on sharia facts. The results of this study can be used to improve the governance performance of Shariah Courts and the reference of other researchers.

**Keywords:** fiqh work, grounds of judgment, hibah, judge, sharia court.

## Introduction

The Malaysian Shariah Judiciary Department (JKSM) revealed that the number of cases tried in the Shariah Court showed a consistent increase, exceeding 100,000 cases every five years. A total of 616,707 cases were recorded to have been filed in Shariah Courts nationwide for the years 2014 to 2018 (Maisarah, 2020). These statistics challenge JKSM in providing the best service to customers, including in the preparation of GoJ for each trial case.

GoJ is a written document that must be prepared by the Honorable Judge (HJ) of the Shariah Court based on Practice Direction No. 6 of 2001 not later than one month from the date the judgment is made (JKSM, 2001a). This document is implemented at all levels of the Shariah Courts of the states, including the Shariah Subordinate

Courts (MRS), the Shariah High Courts (MTS) and the Shariah Courts of Appeal (MRyS). This is also in line with the Civil Procedure Enactment of the Shariah Courts of the states, including in Section 130 (1) 2003 in Selangor that ‘Every trial Judge shall deliver a written judgment.’

The content of the GoJ should touch on the issues raised, the application of the law, Islamic law, interpretation and commentary on the arguments of the relevant parties. In addition, GoJ writing is done by using correct punctuation such as paragraphs, commas, periods, conjunctions, exclamation and so on (JKSM, 2001a).

The GoJ writing format was then streamlined with coordination in all Shariah Courts in Malaysia through the JKSM Judgment Text Writing Guidelines in 2011. Through this guide, all GoJs were standardized in paper form, type and font size, numbering, abbreviations to the procedure for writing Quranic quotations, hadith, legal articles, other case decisions including references to scriptural material (JKSM, 2011). From the aspect of Islamic law, the GoJ can use the opinion of the schools of fiqh muktabar based on the policy set by the king or sultan in the relevant state (JKSM, 2001b).

However, the question arises as to whether the GoJ in the Shariah Court was written based on contradictory and authoritative sources of shariah arguments based on the text of the fiqh works of Islamic scholars in various sects? If so, what are the main issues decided in Shariah Court cases that cause the HJ to base fiqh on such works? Thus, this study will highlight the matter for the benefit of all.

## Literature Review

There has been a lot of scholarly research done on Shariah Court as well as issues related to it including governance, case studies and comparisons with Civil Courts, especially in the last five years. However, the latest research on GoJ in the Shariah Court is relatively few compared to other issues. A rather early article on GoJ was made by Prof. Ahmad Ibrahim entitled ‘Nota Perbicaraan dan Penghakiman (Trial and Judgment Notes)’ which was later published by the Institute of Islamic Understanding Malaysia (Ahmad, 1997).

In 2008, a study on GoJ writing was collected in a book edited by Ruzman Md. Noor, among them a study by Ahmad Hidayat (2008) on GoJ in Islamic jurisprudence; a study by Daud (2008) GoJ writing methods and approaches; a study by Suwaid (2008) GoJ of mal cases; and a study by Faiza (2008) comparing GoJ writing methods.

According to Ahmad (1997), although the GoJ is not part of the trial record, it is nevertheless part of the appeal record. This is acknowledged in all the above studies on the importance of the GoJ to give justice to the relevant parties if they wish to make an appeal (Ahmad Hidayat, 2008) because the appellant can only dispute a judgment through the existence of such writing (Daud, 2008). In addition, the writing of the GoJ can also assist in the execution of orders and sentences, especially if the parties concerned are not represented or are not present during the judgment (Ahmad Hidayat, 2008).

In fact, the GoJ could be a guide to the court itself or be a follower of a lower court hierarchical system in the future (Ahmad Hidayat, 2008; Ahmad, 1997; Daud, 2008; Suwaid, 2008). However, Suwaid (2008) explains that Shariah Court is not bound to implement the principle of binding precedent because it has two basic references, the Quran and hadith. According to Faiza (2008), higher courts also refer to the GoJ content of previous cases at the trial stage.

Suhairimi and Sardi (2011) also produced a book entitled ‘Alasan Penghakiman Mahkamah Syariah (Reasons for Syariah Court Judgments)’, but only discusses GoJ in the Federal Territory Syariah Court. This book proves that the fines and imprisonment imposed on offenders are taking into account the provisions of shariah offenses in the relevant acts. However, this study also revealed that there are cases that do not record the trial record properly such as the conviction argument of an accused.

The study by Mazni (2016) focuses on the Practice Instructions issued by JKSM related to procedures or policies that need to be followed even if they do not have legal status. However, the Practice Direction that touches on GoJ, namely No. 6 of 2001 and No. 11 of 2011 is not directly mentioned. He only highlights the literature on three

writings, namely (i) The Islamic judicial system and the jurisdiction of the shariah courts; (ii) Practice directions in the Civil Court; and (iii) Practice Direction in Shariah Courts. This highlight found that the writing and research on Practice Directions, including those related to GoJ, is still declining because it has just been implemented in the Shariah Court.

Similarly, the study of Zulzaidi and Ahmad Hidayat (2016) who identified the literature on three things, (i) The discussion of fiqh with respect to the judiciary in Islam; (ii) Past studies on Islamic judiciary and Shariah Courts in Malaysia; and (iii) Past studies on Shariah Court judgments in Malaysia. On this third item, the researchers reviewed 10 studies that touched on GoJ, namely in 2005 (1 study), 2008 (2), 2009 (3), 2011 (1), 2012 (2) and 2014 (1). This highlight found that the study of the judiciary in the Shariah Court is active, but still lacks in terms of references and trial records.

The study of Mastura and Jasni (2016) emphasizes on GoJ, but more focused on the history of GoJ writing implemented during the time of the prophet SAW, his Companions, Tabi'in, Tabi' al-Tabi'in which also covers the reign of the Umayyad Caliphs and' Abbasids. Apart from that, this study also highlights the history of GoJ writing in Malaysia Shariah Court which began before independence until 2001 when JKSM issued a Practice Direction on the coordination of GoJ by shariah judges throughout the country (JKSM, 2001b). The writing of the GoJ was then streamlined with the existence of guidelines for the writing of judgment texts to be standardized and adopted in the Shariah Court in 2011 (JKSM, 2011).

In general, studies on GoJ in the Shariah Courts of Malaysia are relatively few, especially focusing on the works of fiqh. Similarly, specific studies on hibah-related court cases are not given attention compared to polygamy, divorce and hadhanah cases. Therefore, this study was produced to fill the research gap for the benefit of improving the performance of Shariah Court governance as well as the reference of various academies.

## Methodology

The framework of this study is qualitative in nature. Data was collected through documentation methods such as books, journals and official court documents. The latest GoJ records for some cases in the Federal Court, Appeal, High Court, Section, Magistrate and Industrial Court can be accessed through the website of the Office of the Chief Registrar of the Federal Court of Malaysia (eJudgment, 2021). For shariah cases, the State Shariah Court or the State Shariah Judicial Department also share the GoJ of certain cases to the public on their respective websites such as in Malacca (MSNM, 2021), Terengganu (JKSTR, 2021), N.Sembilan (JKSNS, 2021) and Selangor (JAKESS, 2021).

Thus, the main data related to the GoJ of this study was obtained through authoritative sources, namely from the office of the Selangor Shariah Judiciary Department (JAKESS) and the JAKESS website reference. Data from the office were obtained on nine hibah cases and seven of them had GoJs based on the text of fiqh works. On the website, there are 250 cases tried in MRS, MTS and MRyS with most of them being civil cases rather than criminal (JAKESS, 2021).

Of the 250 cases, 90 cases were tried in MRS, 49 cases in MTS and 111 in MRyS. Of all the cases, there were only seven hibah -related cases, two of them in MTS while five cases in MRyS (JAKESS, 2021). However, all the cases in the MRyS were also contained in nine cases obtained from the JAKESS office, seven of which contain fiqh works. Thus, this paper selects seven or 100 percent (%) of the case population to be the study sample.

The data obtained were analyzed descriptively using content analysis methods. The inductive method was used to draw conclusions from evidence of a specific nature to find conclusions of a general nature, while the deductive method was used to draw conclusions from evidence of a general nature to find conclusions of a specific nature (Ghazali & Sufean, 2015).

## Findings and Discussion

The discussion in this paper is made through three aspects, namely (i) Case study in the Shariah Court of Appeal; (ii) Fiqh works and backing issues in judgment; and (iii) Grounds for the Judgment of the Shariah Court of Appeal.

### Case study in the Shariah Court of Appeal

The trial of hibah is a civil case handled based on Practice Direction No. 1 of 2000. There are two case registration codes related to hibah, namely 044 - Application for Confirmation of Hibah and 045 - Application for Confirmation of Hibah During Maradul Maut (JKSM, 2000). However, usually only code 044 was used, including all MRyS cases discussed in this paper.

Seven hibah-related cases studied were decided at MRyS, Selangor between 9 December 2020 to 10 June 2014. Meanwhile, there were two other cases posted on the JAKESS website, but both were decided at MTS which is not the scope of this study (JAKESS, 2021). Table 1 shows the details of hibah-related cases in the Shariah Court in Selangor.

Table 1 Cases on Hibah in Shariah Courts in Selangor

No.	Code Case	Date of Decision	Court	Source
1	10000-044-0004-2014	3 November 2014	MRyS	Shariah Court Office
2	10000-044-0019-2015	8 April 2016	MRyS	Shariah Court Office
3	10000-044-0001-2016	14 April 2017	MRyS	Shariah Court Office Shariah Court Website
4	10000-044-0058-2016	9 December 2020	MRyS	Shariah Court Office Shariah Court Website
5	10000-044-0077-2016	12 December 2018	MRyS	Shariah Court Office
6	10200-044-0908-2017	9 December 2019	MTS Shah Alam	Shariah Court Website
7	10000-044-0050-2018	9 October 2019	MRyS	Shariah Court Office Shariah Court Website
8	10000-044-0066-2018	3 September 2019	MRyS	Shariah Court Office Shariah Court Website
9	10207-044-0074-2019	23 July 2020	MTS Gombak	Shariah Court Website

Thus, only seven of these nine cases were analyzed in this study, while case No. 6 and 9 were rejected.

### Works of fiqh and issues of backing in judgment

The HJ has backed up the issue decided with a work of classical fiqh in the GoJ. Of the nine cases examined, a total of seven cases recorded texts from eight Islamic works with a total of 12 texts as shown in Table 2.

Table 2 Fiqh Works and Background Issues in Grounds of Judgment

Case No.	Case Code / Date	Fiqh Works	Issues
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01-A1	10000-044-0058-2016 (9 December 2020)	<i>Mughni al-Muhtaj</i> al-Sharbini (1994) v.2, p.512	Terms of hibah
02-A2	10000-044-0058-2016 (9 December 2020)	<i>Al-Fiqh al-Islami wa Adillatuhu</i> al-Zuhayli (1996), v.5	The meaning belongs to perfect
03-B1	10000-044-0050-2018 (9 October 2019)	<i>Al-Turuq al-Hukmiyyah</i> Ibn al-Qayyim (1442H) p.30	Dominance does not mean ownership
04-C1	10000-044-0066-2018 (3 September 2019)	<i>Al-Mughni</i> Ibn Qudamah (1997) v.6	Sighah Ruqba
05-C2	10000-044-0066-2018 (3 September 2019)	<i>Rawdah al-Talibin</i> al-Nawawi (1991) v.4, p.438	The method of determining al-Qabd
06-D1	10000-044-0077-2016 (12 December 2018)	<i>Al-Iqna'</i> al-Sharbini (1431H) v.2, p.123	Tasarruf right
06-D2	10000-044-0077-2016 (12 December 2018)	<i>Al-Muhadhdhab</i> al-Shirazi (1431H) p.332	Terms of Accept orally
07-E1	10000-044-0001-2016 (14 April 2017)	<i>Bidayah al-Mujtahid</i> Ibn Rushd (2004) v.2, p.333	Withdrawal of hibah
08-E2	10000-044-0001-2016 (14 April 2017)	<i>Mughni al-Muhtaj</i> al-Sharbini (1994) v.2, p.512	Terms of hibah
09-E3	10000-044-0001-2016 (14 April 2017)	<i>Al-Turuq al-Hukmiyyah</i> Ibn al-Qayyim (1442H) p.30	Dominance does not mean ownership
10-E4	10000-044-0001-2016 (14 April 2017)	<i>Al-Fiqh al-Islami wa Adillatuhu</i> al-Zuhayli (1996), v.5	Sighah hibah
11-F1	10000-044-0019-2015 (8 April 2016)	<i>Mughni al-Muhtaj</i> al-Sharbini (1994) v.3, p.565	Al-Qabd hibah conditions
12-G1	10000-044-0004-2014 (3 November 2014)	<i>Mughni al-Muhtaj</i> al-Sharbini (1994) v.2, p.512	Terms of hibah

Table 2 shows a total of eight works of fiqh from the seven great scholars of the past as backup in GoJ HJ MRyS Selangor. The case that has many references to the work is 10000-044-0001-2016 which is four works, followed by the case 10000-044-0058-2016, 10000-044-0066-2018 and 10000-044-0077-2016 which is two works, while the rest is a work, respectively.

The HJ brought the translated text in the GoJ and also accompanied the original text in Arabic in all cases except two cases, namely case 10000-044-0019-2015 and 10000-044-0050-2018. Of these classic works, the work of *Mughni al-Muhtaj* by al-Sharbini (1994) is the most popular with reference four times in the judgment, followed

by *al-Fiqh al-Islami wa Adillatuhu* by al-Zuhayli (1996) and *al-Turuq al-Hukmiyyah* by Ibn al-Qayyim (1442H) twice, respectively. Meanwhile, the rest is only once.

From the aspect of the issue, most of them touch on the conditions of hibah mentioned in three separate cases and all based on the work of *Mughni al-Muhtaj* by al-Sharbini (1994). Sighah hibah is also mentioned covering sighah orally, sighah ruqba and withdrawal of hibah. In addition, the HJ also included the concept of ownership in the GoJ. Among them is the meaning of perfect ownership as well as the conditions of al-Qabd related to the method of determination and the right of tasarruf.

Interestingly, the HJ by referring to works in all sects, not just the al-Shafi'i sect. Although the works of al-Shafi'i schools such as *Mughni al-Muhtaj* by al-Sharbini (1994) and *al-Muhadhdhab* by al-Shirazi (1431H) are preferred, but works in other schools are also used as references such as *al-Mughni* by Ibn Qudamah (1997) al-Hanbali, *al-Turuq al-Hukmiyyah* by Ibn al-Qayyim (1442H) al-Hanbali, *Bidayah al-Mujtahid* Ibn Rushd (2004) al-Maliki and the works of various schools of jurisprudence *al-Fiqh al-Islami wa Adillatuhu* by al-Zuhayli (1996). However, this coincides with Practice Direction No. 9 of 2001 on the Application of the Opinion of the School of Fiqh (JKSM, 2001b).

### **Grounds for the Judgment of the Shariah Court of Appeal**

There are two main issues in the GoJ by the HJ MRyS Selangor based on 12 texts of fiqh works in those cases. The issues are (i) general issues related to the pillars and conditions of hibah; and (ii) specific issues related to al-Qabd and ownership of hibah items.

#### ***The issue of pillars and conditions of grants***

The HJ recorded the GoJ on the pillars and conditions of the hibah including the giver and receiver of the hibah, the items donated and the sighah used. Text for case No. 01-A1, 08-E2 and 12-G1 explain the grantor is required to own the donated property, while case No. 06-D2 and 10-E4 contain an explanation of the concept of sighah hibah.

Case Bil. 06-D2 explains the need for hibah to be done with the words *ijab* (giving) and *qabul* (acceptance) because this contract gives ownership of rights to a person, therefore it requires the words *ijab* and *qabul* such as sale and purchase and marriage. The conditions and principles of oral acceptance (*qabul*) must be said immediately or immediately after the utterance of consent, without delay. Both of these things are based on the text of al-Shirazi (1431H) according to the authentic view. Case 10-E4, on the other hand, describes that sighah can occur in words (words), writing, deeds and other ways that are understood to give the meaning of hibah as a reference to the text of al-Zuhayli (1996).

Specifically, the HJ also gave an example of Sighah Ruqaba to show that the hibah transaction that took place in the trial of case 04-C1 was in accordance with the hibah. This happens when one of the givers or recipients dies after sighah, the goods bestowed (*al-mawhub*) will become the property of the living person. This argument is based on the statement of Ibn Qudamah (1997) in *al-Mughni* about the validity of this hibah is valid on the side of the majority of Muslim jurists with the following examples:

“(This house) is for you for the rest of your life, if you die before me it returns to me, (but) if I die before you then it becomes yours.” (Ibn Qudamah, 1997).

This court also heard the appeal case for the withdrawal of hibah under section 61 (3) (b) (vi) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003. In the case of No. 07-E1, the judge ruled the father had the right to withdraw any property that had been gifted to his children. This is based on Islamic law by basing its argument on the text of Ibn Rushd (2004) in the work *Bidayah al-Mujtahid wa Nihayah al-Muqtasid*.

### *The issue of al-Qabd and ownership*

Case Bil. 11-F1 deals with the question of al-Qabd, i.e. qabul (acceptance) which allows dealing or exchanging with property received is also given attention in the GoJ. This is because the hibah contract is not perfect and does not have effect with ijab and qabul, except after al-Qabd (holding or mastery) as in the text of al-Sharbini (1994). In fact, the giver of the hibah has the right to withdraw the hibah as long as the property is in his possession and al-Qabd does not occur. Case text No. 01-A1, 08-E2 and 12-G1 explain that the giver is required to be able to perform tasarruf absolutely on his property (al-Sharbini, 1994). This matter is used to explain that the deceased (giver of hibah) must fully own the goods donated (al-Mawhub), for example a piece of land and have full authority over the land.

This is also the case in the case of Bil. 06-D1 refers to the text of al-Sharbini (1431H) which also requires that the giver of hibah owns the property perfectly and has the power to perform absolute tasarruf or freehold on his property. In this case, the HJ dismissed the plaintiff's hibah confirmation appeal because the hibah giver did not have perfect ownership of the property. This is because the property is still under the management of Federal Land Development Authority (FELDA) and depends on the party to provide permission to transfer or vice versa if there is an application. Thus, the HJ viewed that the restriction of interest set by the government at the time the grant is made does not cause the right of the deceased to exchange absolutely.

This argument is reinforced in the case of Nos. 02-A1 with a description of the conditions of perfect ownership in Islam as explained by al-Zuhayli (1996) which means ownership that contains the power of control and use of a property. Similarly, ownership means that the owner has all the rights allowed by law. In fact, the case of No. 11-F1 clarifies that hibah goods are not said to be owned by contract alone, but necessary to the holding or control over them made with the permission of the hibah giver based on the text of the work of al-Sharbini (1994).

However, naming or possession alone does not mean ownership of an item. This is stated in the case of No. 03-B1 and 09-E3 based on the text of Ibn al-Qayyim (1442H) that the ownership of a property is not calculated solely on the basis of the name listed in the property. In fact, the name on a property does not necessarily prove ownership. He gives the following example:

“The statement is because if the ownership of something is taken into account based on the name listed, then surely the turban worn on a hijacker who confiscates a turban belonging to another person will be counted as a turban belonging to the hijacker. While such recognition is a cruelty and is not taken into account.” (Ibn al-Qayyim, 1442H).

In the Case Bil. 09-E3, the HJ used the text of Ibn al-Qayyim (1442H) to show that mastery (*al-yad al-hissiyyah* or that which can be equated with the registered owner in the grant) is not the owner who cannot be denied according to Islamic law.

GoJ for Case Bil. 05-C2 explains the method of determining how al-Qabd can occur in the hibah of immovable property, that is, as the method of qabd in sale and purchase. This is based on the text of al-Nawawi (1991) which states ‘if the property is jointly owned, al-Qabd is by way of *al-takhliyah* if the property is immovable property’.

## Conclusion

This study is based on seven cases of hibah decided and having GoJ in MryS Selangor. All the cases recorded 12 texts from eight works of classical Islamic scholars. This answers the research question that the GoJ written in the shariah appeal case is based on contradictory and authoritative shariah arguments, and even refers to the fiqh facts of the four major Islamic sects. The main issues referred to in these works are related to the pillars and conditions of hibah as well as related to al-Qabd and the ownership of hibah items.

This study is beneficial to the governance at all levels of Shariah Court in all states to improve the performance of GoJ preparation. His writing can be refined by adding reference sources in each issue decided. The presentation aspect of the GoJ can also be enhanced by placing the source according to the academic citation as well as consistently placing the Arabic text from all the sources taken. In addition, this study can be extended by other

researchers by focusing on al-Qabd or ownership of hibah items or an extension study to GoJ in other cases in court.

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