

**ORIGINAL ARTICLE****The Contract of *Hibah* (gift) From an Islamic Perspective****<sup>1</sup>Hayatullah Laluddin, <sup>2</sup>Mohd Nasran Mohamad, <sup>3</sup>Zaini Nasohah, <sup>4</sup>Shofian. Ahmad**<sup>1</sup>*Department of Shari'ah, Faculty of Islamic Studies, Universiti Kebangsaan Malaysia 43600, Bangi, Selangor, Malaysia.*<sup>2</sup>*Department of Shari'ah, Faculty of Islamic Studies, Universiti Kebangsaan Malaysia, 43600, Bangi, Selangor, Malaysia.*<sup>3</sup>*Department of Shari'ah, Faculty of Islamic Studies, Universiti Kebangsaan Malaysia 43600, Bangi, Selangor, Malaysia; Institute of West Asian studies Universiti Kebangsaan, Malaysia.*<sup>4</sup>*Department of Shari'ah, Faculty of Islamic Studies, Universiti Kebangsaan Malaysia 43600, Bangi, Selangor, Malaysia; Institute of West Asian studies Universiti Kebangsaan, Malaysia.*Hayatullah Laluddin, Mohd Nasran Mohamad, Zaini Nasohah, Shofian. Ahmad; The Contract of *Hibah* (gift) From an Islamic Perspective**ABSTRACT**

Human being is endowed with the instinct to desire and possess property. To regulate and control human urge for property Islamic law identifies two basic ways of acquisition of property; acquisition through one's own efforts and acquisition through inheritance. However, a person can dispose off his/her property in any way he likes, provided that it does not violate legal principles and his transaction is given effect during his life time. *Hibah* is one of the meritorious ways of disposal of property. Therefore, this paper attempts to present an analysis of the structural elements of *hibah*, its, legality and conditions. It also delineates the revocability or otherwise of *hibah* contract.

**Key words:** *Hibah*, gift revocation, inheritance, gift conditions, transactions, Islamic Jurisprudence.**Introduction**

In general, property can either be acquired through a person's own effort or by way of inheritance. A person, acquiring a property or obtaining its possession, can sell or dispose of it in any way he likes, provided that it does not go against the principles of the law and his transaction is given effect during his life time. (Ali, 1965:3) His power over his property is however, limited when he intends his dispositions to be operative after his death or its made at the time of suffering from a mortal disease (death-illness). In such a situation his power of disposition is restricted to a third of his property only by right of his heirs. The aim of imposing such restriction is to prevent a testator from undesired interference with the course of the devolution of property according to the law among the heirs. However, the testator may give a specific portion, as much as a third, to a stranger as *wasiyah* (will). *Hibah* is one of the meritorious ways of disposal of property. It is therefore, imperative, to highlight the meaning of *hibah* its components, legality, conditions and its revocation according to Muslim jurists.

**Definition:**

Scholars have provided different definitions for the contract of *hibah*, due to the brevity and shortage of the space a comprehensive analysis of all the definitions is avoided here. However, some of the definitions are presented here as follow:

*Hibah* literally means the giving away of such a thing from which the receiver can draw benefits. It is also defined as "The making of another person the owner of the corpus of the property without taking its consideration from him". (Tanzil-ur-Rahman, 1978:1)

Another definition of the *hibah* is "a covenant that demands the making of a person immediately owner of a property without consideration in a manner that is free from an intention of nearness to God." (Tanzil-ur-Rahman, 1978:1) This definition distinguishes *sadaqah* from *hibah* for, the former is meant for seeking the pleasure of God, while, the latter is lacking such intention.

Technically, it is defined as “the transfer of movable or immovable property with immediate effect and without consideration by one person in favour of another and the acceptance of the same by that another himself or by some one authorized on his behalf...” (Tanzil-ur-Rahman, 1978:1) Based on this definition it can be said that *hibah* is a contract by which a person during his life time transfers his property with immediate effect and without consideration to another person who accept it. It can also be conceived as a transfer of full ownership of substance without any religious motive or any other valuable consideration. The transferor of the property is called the ‘donor’ and its receiver as ‘donee’. In other words, *hibah* is a unilateral contract whereby a person offers the property to others without anything in return. In fact it is a gratuitous act *تبرع* in essence and is distinguished from other transactions such as عقود المعاوضات where consideration constitutes their principal ingredient.

#### Legality of Hibah (gift):

The legality of the *hibah* can be derived from the Qur’anic verse:

فإن طين لكم عن شيء منه نفسا فكلوه هنيئا مريئا و تعاونوا على البر والتقوى.

“But if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer” (Qur’an, 2:177)

The other verse which enjoins Muslims to give charitable gifts

...وَالْيَتَامَىٰ وَالْمَسَاكِينَ وَارْحَمِ السَّبِيلَ. ”وَأَتَى الْمَالَ عَلَىٰ حُبِّهِ ذَوِي الْقُرْبَىٰ

“...and spend of the wealth that he cherishes, to his kinfolk, orphans, the needy, the wayfarer,...”

(Qur’an, 2:177)

Besides these verses there are many *hadiths* that can be cited to substantiate the legality of contract of gift.

For instance, the prophet pbuh is narrated to have said: “تحابوا تهادوا”

“Exchange gifts so that you may love one another”

(Narrated in all major books of Hadith on the authority of Abu Hurayrah, ‘Abdullah

ibn ‘Amar, ;Abdullah ibn ‘Umar, and ‘Aishah)

The prophet has also said “do not underestimate the significance of the neighbour’s gift to her neighbor, even if it is only a sheep’s foot”

(Narrated by Al-Bukhari, Muslim, and Al-Termidhi on the authority of Abu Hurayrah)

The prophet pbuh also admonishes the revoking of gifts saying: “the one who recall his gift is like a dog, who eats his vomit”

(Narrated in all major books of Hadith on the authority of Ibn ‘Abas)

Furthermore it was the practice of the prophet to reward a gift with another one as narrated by ‘Aishah: “the prophet pbuh used to accept gifts, and reward the donor”

(Narrated by al-Bukhari on the authority of ‘Aishah)

These evidences undoubtedly prove the legality of gift. From their analysis it can be concluded that all forms of gifts are recommendable. For, almighty God command us:

“help one another in righteousness and piety” (Qur’an, 5:2)

However, it is imperative to remember that giving gifts to relatives is preferred over other. (Al-Zuhayli, 2003:540). The preferential treatment of relatives in this regard can be derived from the Qur’anic verse: “Fear Allah through whom you demand your mutual rights and reverence the womb-relationships” (Qur’an, 4:1)

It is also clear from the *hadith* of the prophet pbuh in which he has said: “whoever wishes Allah to increase his wealth and prolong his life, let him do act of kindness towards his womb-relatives” (Al-Bukhari and Muslim, n.d.)

Gift contract comprise of three main elements namely, offer, acceptance and receipt. Without these components a contract of gift is not valid. Thus, these elements are essential to the contract of gift hence, can be characterized as pillars.

#### Essential Elements of the Structure of Hibah (gift):

Hanafis jurists, analysing gift contract on the basis of its analogy with sale contract, hold the offer and acceptance as its main pillars. Some Hanafis scholars, such as al-Sarakhsi, added reception or possession as the third pillar. For, it is a necessary condition for establishing ownership in a gift contract, unlike the sale contract. (Al-Zuhayli, 2003:541) On the other hand, al-Kashani and some other Hanafis exclude acceptance from the pillars of gift contract, assuming actualization of the gift contract by the offer itself, while, acceptance is only necessary to actualise its consequences in terms of transferring ownership to the recipient. Thus, according to the Hanafis a gift becomes perfect by proposal and acceptance but the title of the donee becomes perfect only after taking over the possession of the gifted property. On the contrary, Imam Malik holds that the title of a property given as a gift is established for the donee even before transferring its possession to him. (Tanzil-ur-Rahman, 1978)

However, according to the majority of the fiqh schools *hibah* has four pillars, consisting of:  
 A-donor,  
 B-donee,  
 C-gift  
 D-expression.

*Donor:*

The donor is the owner of the object of the gift, in order for his gift to be valid, he should fulfill the conditions of discretion, puberty and that he should possess the right of property. Accordingly, the gift of minor child, insane person and a slave is not valid. (Ali, 1965:50)

Voluntary giving away of property is a mere financial loss, it requires eligibility of the owner. In the case of these persons the required eligibility is missing hence, their gift cannot be operative. Jurists do not allow the giving away of the child's property as a gift by the father. They restrict his guardianship to beneficial dealings in child's property. However, if the father gives a gift out of his child property with the condition of compensation, according to Hanafis, the contract is still impermissible. It is important to note that in the contract of gift it is not necessary to give actual physical possession, constructive possession is sufficient. For instance, if the donor vacates possession in pursuance of the gift, though the donee may not take actual possession but the gift will be held to be perfected. (Rahim, n.d: 299). The only requirement is that the donor empowers the donee to take possession of it.

*Donee:*

The donee can be any person regardless of sex, age or creed. However, when a gift is made to an individual the donee must be actually legally in existence (Rahim, n.d:299). The donee must be legally in existence in the time of the gift. Thus a gift to an unborn person, the one not in existence either actually or presumably, is invalid. (Rahim, n.d:299) A gift to a child, born within six months from the date of the gift, is valid. For, in this case the child actually exists as a distinct entity in the womb of his mother. If the property being given as a gift is available on the spot and the donee take possession of it with the permission of the donor, it becomes the property of the donee. However, if its possession is taken by donee without the permission of the donor it cannot make the donee the owner of the property. Therefore, he is required to get the permission of the donor in order to obtain ownership of the gifted property.

*Subject matter of the gift:*

Anything over which dominion or the right of ownership can be practiced, or can be reduced to possession, or anything which comes within the meaning of the word *mal*, may form the subject of gift. The subject matter of gift should fulfill the following conditions in order to be valid.

*1- Existence at gift time:*

The property should be in existence and capable of delivery. (Al-Zuhayli, 2003:546) Therefore, the gift of all valuable properties, usufruct, negotiable instrument, proprietary rights and landlord's rights are valid. A gift of a debt to a person other than a debtor is valid, although it is not *عين*, at the present; it is capable of becoming property in the future. (Ali, 1965: 5) Rights may also form the subject of gift, for example, a person may give his right to collect the rent as a gift to another person. Probable or non-existent items are not eligible for being offered as gift. For example, an unborn calf, flour in the form of wheat, butter within milk, etc. cannot be gifted due to their non-existence at the time of the contract. In all these cases the contract is invalid according to the Hanafis.

*2- Ownership by the donor:*

The subject matter should be owned by the donor. Giving another person's property as a gift according to Hanafis cannot be executed, unless the owner permission is obtained. This is because; the non-owning donor's is unable to transfer the ownership of what he does not own. However, the Hanafis allow debtor to give his debt as a gift, because of the deliverability of the liability. It is also permissible to give the debt as a gift to a third party, by authorising him to collect the debt.

### 3- *Must not be common property:*

The subject matter of the gift cannot be a common property. Thus, it is not permissible for a person to give a public property as a gift to another. Similarly, he cannot give a property that is rented or pledged or usurped as a gift to others, due to incomplete ownership and absence of possession.

### 4- *Must be possessed by donee:*

The gift should come into the actual or constructive possession of the donee. The ownership of the donee is not established unless he receives and possesses the gift. For, gift is not permissible without possession. The Hanafis and Shafi'is argue that قبض (possession) is a condition that binds the contract of *hibah* (gift). If either the donor or the donee dies before the receipt, the gift is void. Since gift is completed by the delivery of the possession, the death of either the donor or the donee before the delivery of the possession of the property renders the gift void. If the donor dies before it is collected, then it becomes part of the inheritance, unless it is made during his final illness, death illness. (Al-Zuhayli, 2003:547) Then it is paid out of the disposable third as long as it is for other than an heir. The Malikis, however do not insist on قبض (possession) assuming that it is not a condition for its validity. To them the donee becomes the owner of the gift by the contract. Other schools, however, argue that a donee becomes the owner only after obtaining its possession.

### 5- *The gift object must be separate:*

The possession to be delivered must be separate otherwise it is invalid. It is not valid to give a share in a divisible common property as a gift. Hence, gift of *musha'* (undivided share) in a thing capable of division is nullified. *Musha'* means confusion. In legal term it stands for the mixing up of proprietary rights of more than one person in a thing, where each co-owner has a right until partition in every particle of the property. (Rahim, n.d.:298). However, subsequent delivery of separate possession after partition is sufficient for the completion of the gift contract. Thus, according to Hanafis, gift of standing trees and crops apart from the land, of wool on the back of the sheep stand on the same basis as a gift of *musha'*. In contrast to Hanafis' view, Malikis, Shafi'is and Hanbalis hold that giving an unidentified share in a common property is permissible, based on its analogy to the permissibility of selling such a share. Thus, to them receipt in the case of such a share given as a gift is actualised in the same manner as its delivery in a sale. In both cases, delivery of the share is actualised through delivery of the entire property; from which donee can collect his right and the rest of property remain as a trust in his possession.

### *Expression:*

The words, through which a gift is made, are of three types. (Ali, 1965:36) First those which are specifically meant for *hibah* for example, 'I made a gift of this thing to you or I made you the owner of this thing'; or 'I made it for you'; or 'this is for you'; or 'I bestowed upon you or give you this'. Secondly, those which denote *hibah* by implication or metaphorically for example, 'I clothed you in this garment' or 'I give this house for your lifetime'. Or 'this house is for you for my age' or 'for your age' or 'for your lifetime or 'my lifetime' followed by the phrase; so that when you are dead it will revert to me. In this case the gift is valid but the condition void. Thirdly, those which may import *hibah* or *ariah* equally for example, 'this house is for you', or 'for me if I survive you', or 'a *waqf* for you' and make it over to him. The implication of the phrase according to Abu Hanifa and Muhammadis *ariah* whereas, Abu Yusuf holds it to imply *hibah*. Gift can also be made metaphorically, such as sending and receiving or when a husband buys a pair of earrings to his wife. These four elements all together constitute the cornerstones of the contract of *hibah* (gift) according to the majority of the schools excluding Hanafis who suffice on offer and acceptance as its pillars.

### *Gift Reception:*

It is the most important condition of the gift contract. Its importance lies in the fact that the ownership of the gift object is not transferred except through receipt. (Al-Zuhayli, 2003 552) Thus, a gift is in fact actualised through receipt. Jurists differed in respect of the nature of this condition, as some of them considered it a cornerstone, while others regard it as a condition for the conclusion of the contract not the condition of its validity.

The Hanafis and Shafi'is view receipt as the condition for binding of the contract, because the new ownership is established through it. They base their argument on the narration of 'Aishah in which her father gave her a gift out of his property during his lifetime. Then, when he became extremely ill, he said: "o daughter, after myself, you are my most beloved person, and you are the person whose property I am most intent on

avoiding. Now, I gave you a gift out of my property, and had you already collected the gift, then it is yours. However, this property today belongs to all my heirs, including your two brothers and two sisters. Therefore, divide the property according to the role of inheritance detailed in the book of Allah. (Al-Zayla'i, n.d.:122) From this *hadith* it is clear that a gift becomes binding only after receipt not before it. Therefore, based on the implication of the narration, the donor is entitled to revoke his gift at any time before making over its possession. (Tanzil-ur-Rahman, 1978) Therefore, in order for the *hibah* contract to be binding, the change of the possession of the gift property is required during one's lifetime. Without change of possession of the gift property during lifetime no consequence can arise out of this contract. However, in certain circumstances, formal change of possession is not required for example, when a donee is already in possession of the gift property. (Rahim, n.d.:299)

#### *Revocation of Hibah(gift):*

The prophet pbuh has extremely disliked the revocation of gift as is clear from his saying narrated by Ibn 'Abas "the man who takes back what he has gifted is like one who return to his vomit" (Al-Muslim, n.d. 790) Imam Shafi'i, commenting on this narration, says; as swallowing the vomiting is forbidden in the same manner revoking one's gift is forbidden, due to the similitude drawn between them by the prophet pbuh. Furthermore, he argues that through the contract of gift the ownership over the property is transferred. This transfer of ownership must be absolute as is the case in sale and which cannot be revoked. However, the Shafi'is and the Hanbalis make exception to their general rule in case where the donee is a child of the donor. Thus, they agree in this case with the Hanafis view. On the contrary, according to Hanafis gift can be revoked by the donor even after possession has been delivered to the donee, who however, until such revocation may lawfully exercise proprietary rights over it. They argue that this tradition implies mere impropriety and not prohibition. (Rahim, n.d.:302) However, majority of the fiqh schools, are of the view that revocation of the gift after making over possession to the donee, is unlawful. If the possession of the gift has not yet been made over to donee, the donor may revoke it. If the donor, after making gift but before, delivery of its possession, passes away, the gift should be included in his legacy and the donee has no right in it.

Hanifis make exception to their general rule of revocability of gift after its delivery in the following situations: (Al-Zuhaily, 2003: 563)

- 1- The donor is the husband and the donee is the wife or vice versa.
- 2- If either the donor or the donee has died.
- 3- If the donee has sold the gift property to another or has given it as a gift to another person and its possession is made over to him.
- 4- If the gift is with exchange.
- 5- Some other thing is mixed up with gift property in a manner that its separation is impossible.
- 6- The basic character of the gift property is changed.
- 7- His gift property is either lost or wasted.
- 8- The donee is blood relation within prohibited degree.

In these case Hanafis agree with the majority's view of non-revocability of the gift property after delivery of its possession. However, according to accepted Malikis view, revocation of a gift after its delivery is not allowed in any circumstances.

#### *Conclusion:*

The giving of gifts whether great or small is an act of benevolence, and is praised by Allah swt. Exchange of gifts has a profound bearing on creation of brotherly feeling among the people. Beside its social desirability and effect, the contract of gift also can be used as instrument of adjusting to certain extent the law of inheritance. For instance, the principle of exclusion which prevails in all the schools, and the absence of the right of representation cause much hardship. This can be adjusted through the application of the contract of *hibah*. For example, if a person has three sons and one of them dies in the lifetime of his father leaving behind children, these children are excluded from the inheritance of their grandfather by their uncles. Therefore, to solve this problem of the exclusion of the grandchildren recourse should be made to the *hibah* contract. It also can be used as an instrument by the banking system to enhance their financial activities by providing *Shra'iah* compliant incentives to the customers.

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