

**AL HIBAH: THE PRINCIPLES AND OPERATIONAL MECHANISM
IN THE
CONTEMPORARY MALAYSIAN REALITY**

MOHD KAMIL BIN MOKHTAR

**The submission of this dissertation is part of the fulfillment to award the degree
of
Masters of Science (Land Development and Administration)**

**FAKULTI KEJURUTERAAN DAN SAINS GEOINFORMASI
UNIVERSITI TEKNOLOGI MALAYSIA**

APRIL 2007

UNIVERSITI TEKNOLOGI MALAYSIA

BORANG PENGESAHAN STATUS TESIS ♦

JUDUL: **AL HIBAH: THE PRINCIPLES AND OPERATIONAL MECHANISM IN THE
CONTEMPORARY MALAYSIAN REALITY**

SESI PENGAJIAN : 2005/2006

Saya MOHD KAMIL BIN MOKHTAR

(HURUF BESAR)

mengaku membenarkan tesis (PSM/Sarjana/Doktor Falsafah*)* ini disimpan di Perpustakaan Universiti Teknologi Malaysia dengan syarat-syarat kegunaan seperti berikut :

1. Hakmilik tesis adalah di bawah nama penulis melainkan penulisan sebagai projek bersama dan dibiayai oleh UTM, hakmiliknya adalah kepunyaan UTM.
2. Perpustakaan Universiti Teknologi Malaysia dibenarkan membuat salinan untuk tujuan pengajian sahaja.
3. Perpustakaan dibenarkan membuat salinan tesis ini sebagai bahan pertukaran di antara institusi pengajian tinggi.
4. ** Sila tandakan (✓)

SULIT

(Mengandungi maklumat yang berdarjah keselamatan atau kepentingan Malaysia seperti yang termaktub didalam AKTA RAHSIA RASMI 1972.)

TERHAD

(Mengandungi maklumat TERHAD yang telah ditentukan oleh organisasi/badan di mana penyelidikan dijalankan.)

TIDAK
TERHAD

Disahkan oleh,

(TANDATANGAN PENULIS)

(TANDATANGAN PENYELIA)

Alamat Tetap : NO.21-2A, PUTRI APT.
TAMAN SETIAWANGSA.
54200 KUALA LUMPUR

Nama Penyelia

Tarikh: 15 MEI 2007

Tarikh :

Catatan * Potong yang tidak berkenaan.

** Jika tesis ini SULIT atau TERHAD, sila lampirkan surat daripada pihak berkuasa/ organisasi berkenaan dengan menyatakan sekali tempoh tesis ini perlu dikelaskan sebagai SULIT atau TERHAD.

♦ Tesis dimaksudkan sebagai tesis bagi Ijazah Doktor Falsafah dan Sarjana secara penyelidikan, atas disertasi bagi pengajian secara kerja kursus dan penyelidikan, atau Laporan Projek Sarjana Muda (PSM).

TESTIMONY

“I hereby certify that I have read this dissertation and in my opinion this
Dissertation fulfills in term of scope and quality for the purpose of the award of
Masters of Science (Land Development and Administration)

Signature :.....

Name of Supervisor :

Dated :

DECLARATION

“I hereby certify that this dissertation is my own piece of work except notes and
Summary which I have explained each of them of its source”

Signature :.....

Name of Writer :MOHD KAMIL BIN MOKHTAR

Date : 26 April 2007

DEDICATION

To my family, Zareha, Mazran, Filzah, Fadzilah, Farhanah, Firdaus

ABSTRACT

This thesis deals with the solution of problems of property disposition, without ruling out the commonly used land transfer under *faraid* and *wassiah*, through a method called *hibah*. The suitability of *wassiah* order to provide adequate method to current property management is limited. This is due to the nature of *wassiah* in Islam that only allows the maximum of one third of the property to be distributed to the beneficiaries upon the death of the proprietor. No such limitation exist in *hibah*, because in this case the owner divests himself of all rights in the property immediately, *Faraid* and *wassiah* are largely related to the distribution of property after death of the owner. As not to compromise or contravene with the rules of Islamic law of succession and bequest, many Muslims are reluctant to use *hibah* as an alternative. This is due to the fact that *wassiah* and *faraid* are seen to be the only tool available to them and also due to the lack of knowledge and the very fact of the existence of *hibah* does not cross the mind of many Muslims in the country. In this respect, *hibah* is seen as the best solution of the above proposal since the property can be transferred to family members with terms and conditions merely decided by the donor himself, and, of course with the agreement of the other heirs or would be beneficiaries. This thesis also emphasizes that this method of property disposition should be made understood by all in the first place. Without that, heirs and would be beneficiaries would consider this method of disposition as unfair and injustice to them. Materials contained in this thesis were obtained from books, such as religious books, books on Islamic land law, papers from the internet, seminars and lectures. The findings obtained from this research indicates that the use of this instrument of property disposal is not yet popular among the Muslims of this country, as many still opted for other traditional methods

ABSTRAK

Tesis ini membicarakan penyelesaian kepada masalah yang berkaitan dengan perlupusan harta dikalangan orang Islam tanpa mengeneipkan cara perlupusan melalui faraid dan wasiat. Kesesuaian cara wasiat adalah terhad, kerana hanya maksima sepertiga sahaja dari bahagian harta itu mampu dipindahmilik melalui cara ini. Tiada had perlupusan dalam hibah kerana pemberi hibah memutuskan terus haknya dari harta itu setelah melakukan hibah itu, maka dengan itu hibah didapati sebagai instrumen yang sangat sesuai. Wasiat dan faraid hanya boleh berlaku apabila tuan punya harta sudah meninggal dunia, manakala hibah dilakukan semasa hayat. Pada masa sekarang orang Islam menyangkakan bahawa cara wasiat dan faraid sahaja cara terbaik. Oleh yang demikian cara hibah kurang mendapat perhatian. Selain itu didalam hal pelupusan harta, hibah didapati cara yang sangat baik kerana pemberi harta mampu memindahmilik harta dengan terma and syarat yang diputuskannya sendiri, setelah dipersetujui oleh waris waris dan bakal penerima hak yang lain. Walau bagaimana pun tesis ini mencadangkan bahawa segala tata cara perlupusan harta melalui hibah ini harus difahami terlebih dahulu, tanpanya ianya mungkin akan dilihat sebagai tidak adil. Maklumat yang terkandung dalam tesis ini diambil dari buku, termasuk buku berkaitan undang undang tanah Islam, buku agama dan dari kertas internet, seminar dan kuliah. Penemuan yang diperolehi menandakan penggunaan kaedah hibah ini dalam pembahagian harta adalah sangat kurang berbanding dengan cara perlupusan yang lain.

CONTENTS

CHAPTER	ITEMS	PAGE
	Title page	i
	Testimony	ii
	Declaration	iii
	Dedication	iv
	Abstract	v
	Abstrak	vi
	Content	vii
 CHAPTER I	 INTRODUCTION	 1
	1.1 Background	1
	1.2 Statement of problems	3
	1.3 Aim	4
	1.4 Research Objectives	5
	1.5 Research Scope	5
	1.6 Research importance	5
	1.7 Research methodology	6
	1.8 Chapter flow	6
 CHAPTER II	 PROPERTY DEALING IN THE ISLAMIC WORLD	 8
	2.1 Introduction to Property Dealings in Islamic Law	8
	2.2 The rights of public in private property	9
	2.3 Sources of Islamic Law governing land and property	10
	2.4 Property and its methods of acquisition in Islam	12

2.4.1	Definition of property	12
2.4.2	Methods of acquisitions	13
2.4.2.1	Alienation (iqta’)	13
2.4.2.2	Purchase	13
2.4.2.3	Lease and charges	14
2.4.2.4	Gifts and hibah	14
2.4.2.5	Will	14
2.4.2.6	Waqf and trust	17
2.5	Property disposition	17
2.5.1	Voluntary disposition	18
2.5.2	Involuntary disposition	20
2.6	Conclusion	21
CHAPTER 111	THE CONCEPT OF HIBAH	22
3.1.	The permissibility of hibah	22
3.2.	Definition of hibah	23
3.3	Ingredient of hibah	24
3.3.1	Ijab by donor	24
3.3.2	Acceptance (qabul) by donee	24
3.3.3	Taking possession of property	25
3.3.3.1	Hibah to minor son from parents	27
3.3.3.2	Hibah to major son	28
3.3.3.3	Hibah to son while at mother’s custody	29
3.3.3.4	Hibah to son at uncle’s custody	29
3.4	Evidence of hibah	30
3.5	Prerequisites of valid hibah	30
3.5.1	The donor	31
3.5.1.1	Donor capable of hibah	31
3.5.1.2	Hibah at Mard al maut (death bed illness)	32
3.5.1.3	Conditions valid at Mard al maut	32
3.5.2	The donee	34
3.5.3	The objects of hibah	34

3.5.3.1	Property of Donor	34
3.5.3.2	Property Has Syarak Value	35
3.5.3.3	Property Property Physically In Existence	36
3.5.3.4	Property not in Continuation of Another Property	36
3.5.3.5	Property must be Known	36
3.6	Types of hibah	38
3.6.1	Hibah ruqba and hibah umra	38
3.6.2	Hibah al iwad (gift for consideration)	40
3.6.3	Conditional hibah	40
3.6.4	Preferential hibah	41
3.7	Revocation of hibah	45
3.7.1	Revocation before delivery of possession	46
3.7.2	Revocation after delivery of possession	47
3.7.3	Donor prohibits donee from taking over possession	47
3.7.4	Revocation of hibah to parents, brothers and sisters	48
3.7.5	Hibah to one's spouse	49
3.7.6	Revocation of hibah if property is not in its original form	49
3.7.7	Revocation after death of donor	50
3.7.8	Revocation after death of donee	51
3.7.9	Donee's ownership lost	51
3.7.10	Revocation after compensation	52
3.7.11	Conclusion	52
CHAPTER IV	APPLICATION OF HIBAH IN MALAYSIA	53
4	The application of hibah	53
4.1	Introduction	53

4.2	The integration of hibah in various products of Islamic Banks	53
4.2.1	Wadiah saving account	53
4.2.2	Car financing by Hong Leong Finance	54
4.3	Takaful (Islamic Insurance)	54
4.3.1	The donation by the policy holder	55
4.3.2	The donee	56
4.4	Hibah as instruments of estate management	58
4.4.1	Hibah as alternative to law of succession	60
4.4.2	The advantage of hibah	61
4.4.2.1	Strengthening love and concern	61
4.4.2.2	Harmonization on family	62
4.4.2.3	The freedom of the donor	63
4.4.2.4	The conclusiveness of transactions	64
4.4.3	The permissibility of hibah as alternative	64
4.5	Hibah as practiced by some financial institutions	65
4.5.1	Hibah harta defined	65
4.5.2	Hibah harta as practiced by Bumiputra Commerce Trust Berhad	66
4.5.3	Hibah as practiced by Amanah Raya Berhad	67
4.5.3.1	Benefits of hibah at Amanah Raya Berhad	69
4.6	Conclusion	69
4.6.1	Possible gray areas	69
CHAPTER V	ANALYSIS: PROBLEMS AND SOLUTIONS	71
5.1	Problems	71
5.1.1	Lack of understanding of the concept	71
5.1.2	Restrictions in land dealings	72
5.1.3	Controversy among Muslim Jurists	72
5.1.4	Possible confusions	73
5.2	Solutions	74
5.2.1	Spreading the concept Nationwide	74

5.2.2	The administration of hibah	75
5.2.3	Task of the National Fatwa Board	76
5.2.4	The involvement of the Syariah Court	77
5.2.5	Problems and limitation of property disposal by way of faraid	77
5.2.6	Hibah as solution	78
CHAPTER VI	GENERAL CONCLUSIONS	79
6.1	Introduction	79
6.2	Achievement of Research Objectives	79
6.3	Limitations of Research	80
6.4	Further Research	80
6.5	Recommendations	81
6.6	Conclusions	81
GLOSORY OF ARABIC WORDS		82
REFERENCES		86

CHAPTER I

INTRODUCTION

1.1 Background

Management of property disposition in Malaysia is different from other countries due to different religious background, custom and the way of life of the people. Because of that there exist numerous government and non government agencies which have jurisdiction in the disposal of properties in the country. Among them are the High Court, Jabatan Ketua Pengarah Tanah dan Galian Malaysia, Amanah Raya Berhad, and heads of departments who are equipped with the powers of disposal of land under different Acts, government orders and government administrative circulars.

Property management, which is personal in nature such as *hibah* and bequest, is thought not being as important as commercial property management in the real meaning of business. An average Muslim may own some properties such as a house, several pieces of land, shares, savings and goods such as vehicles or machinery. Even with that little properties they have, Muslims are not so particular or do not take seriously the management of their properties while they are alive. Knowing that after their death, their heirs and beneficiaries will be taken care of, as there is existing system of law such as *faraid* that will take care with the property disposition of the deceased. With the increasing emergence of well-off and rich Muslims in Malaysia as the result of economic prosperity, family property management related to the

above is becoming important and should be taken seriously by the Muslims in Malaysia.

Under Islamic law an owner of a property has extensive powers of disposition of his properties. He can choose to dispose the ownership of his property by whatever methods allowable by the authorities while he is alive or to leave to the authorities to dispose whatever properties to his heirs and beneficiaries after his death. He has the right of choosing whatever option available for the sake of his family. All these options can be executed by himself or through the then available organizations or corporations in a State, which deals with property disposition of the Muslims.

Hibah can be in the form of goods, services or any valuable property. It may be movable property such as machinery, gold and vehicle or immovable property such as land, houses and buildings. Other than the above, other properties such as crops, animals, miscellaneous wealth such as life insurance policy, company shares, unit trust, and employees' provident fund are capable of being *hibah*.

Immovable properties such as houses, buildings and land, while movable properties such as machineries, vehicles, business shares etc all fall in the category of valuable properties. While properties such as fruits, trees, animals etc all fall into the category of goods that are also capable of being an item for *hibah*. This includes negotiable instruments, proprietary rights, land under attachment and the right of redemption.

One of the commonest problems in this concept is the lack of understanding of *hibah* itself among the Muslim community in the country. Muslims in the street generally had not heard of the term *hibah*, even though many had heard the word gift but they do not know the concept had a far wider meaning than the word gift itself. It had only concentrated among the Muslim scholars and academicians. Most *ulamaks* and religious personnel who know this concept do not look at the importance and the impact that this concept has towards the Muslims.

This narrow interpretation was caused by lack of awareness, lack of guidelines by the relevant authorities and also lack of suitable and useable

instruments of doing it. The relevant authorities share some of the weakness by their lack of support and cooperation in the practice of *hibah*. There had been no enactment or provisions in the existing laws of property distribution about *hibah*, as though this concept had not been in existence at all.

The concept and meaning of *hibah* is very wide. Most of us had in the past practiced *hibah* in one way or another without even knowing it. The understanding of the concept through the reinterpretation of the Holy Quran and the Sunnah and employing *ijtihad* in the application of *hibah* must be fully understood. Muslim in Malaysia should be broad based and the provision of the accepted school of *fiqh* be taken into consideration for the purpose of the reinstatement and codification of the Muslim Law. *Hibah* is not yet well rooted in the property disposition system in the country, but it has some potential to be one. Little efforts are being made for *hibah* to become a truly viable alternative property disposition system. But, with the support of the government and the relevant authorities, it is being hoped that it shall one day be an important tool in the field of property disposition.

Initial skepticism about this system and its inherent ability to meet the demands of the modern day property industry is hoped to be lessened and finally disappeared. It is also hoped that there is growing understanding and appreciation about *hibah*. With the passage of time and the experience over the years in seeing the practical implementation and the working of the system, the way forward shall become more clearly defined. The areas where new laws have to be enacted, existing laws revised and consequently amendments made to other applicable laws and procedures have come into focus.

What need to be done is the refinement and putting into place the necessary legal infrastructure, both the substantive laws and procedures. The urgency for this to be done is keenly felt by the Islamic property industry and the Muslims at large together with the practitioners (*hibah* consultants), bankers, lawyers, land administrators, academicians, the Islamic theologies and the people alike. It is again hoped that the relevant authorities will take the necessary actions urgently.

1.2 Statement of Problems

Muslims in the country own properties in the form of land scattered in all corners of the country. Problems of disposition of properties occur when an owner dies as there are numerous heirs and beneficiaries who claim the property of the deceased. This problem would lead to neglect of the property and as a result failure to develop these properties can cause the heirs and beneficiaries any benefits from the properties themselves. The nation would lose in term of agricultural products that could be cultivated in these fertile lands due to failure of proper property disposition among the heirs. Whereas in other cases where disposition had been successfully settled among the heirs, the fractional division had caused more serious problem due to the size of each division as being too small to be economically developed.

So there is a need to find the most suitable solution for this problem of property disposition among Muslims. Innovation and creativity are acceptable in Islam as long the basic principle of the Quran and *Sunnah* are being maintained. This means that Muslim can adopt whatever form of doing business transaction while maintaining the rules of the Quran and the *Sunnah*.. In this context, whatever conventional instruments of dealing were not against the views of Islam and the principles of the *syariah* were adopted, while those, which were against, were left out or being modified and adjusted so as to agree with the *syariah* principles.

1.3 Aim

The aim of the thesis is to investigate the principles of *hibah* and the way it can be implemented in Malaysia. At the same time it is also for the purpose of identifying

The present practice by the private and public sector in the country focusing on the problems and solutions in its implementations, and comparing its practice with other types of property disposals, searching for the most effective method for the benefits of property owners.

1.4 Research Objectives

The main objective of this thesis is to introduce this uncommonly used method of *hibah* in the property disposition of the Muslim in this country. With this, the writer hopes that future property disposals do not only utilize the commonly used method of *faraid* and *wassiah* only. There would be various types of *hibah* being introduced in this paper, thus property owners can choose the method most suitable to them, and let themselves witness the transaction of their properties to their children or whoever they wish to while they are alive.

The application of *hibah* in Malaysia especially in the banking and financial sector and also the Islamic insurance of *takaful* are also covered in this thesis. The mechanism of how these instruments of property disposition in these institutions are carried out becomes one of the objectives of this thesis.

1.5 Research Scope

Scope of research is based on secondary information obtained from Muslim Religious books, journals and other written materials compiled from seminars and lectures. This thesis also investigates the materials from earlier writers and how their views and recommendations could be applied to our present situations in the country.

1.6 Research Importance

The research is hoped to contribute to the State Religious Department, The Land Office, Financial Institutions and institutions that deal with property businesses. This will also create awareness among the Muslims in the country that their properties could be distributed to any parties they want while they are alive. This will create a more dynamic method of property disposal which could be more profitable to the owners and at the same time reducing the presently huge arrears in

property transactions at the various governmental or private institutions which takes many years to clear as is happening at the moment.

1.7 Research Methodology

Research was done through readings of various books, not only those connected directly with the subject matter but also those that deals with banking, finances, land rules and various Islamic Religious books. Any article that deals with “gifts” was felt to have connections with this subject. It was later found out that there were numerous act of giving in the field of Islamic banking and Islamic insurance, and these being the core subject of this research.

1.8 Chapter Flow

Writing started with the concept of property in Islam, that how Muslims are allowed ton properties and at the same time be able to disposed off their properties to others by whatever method of disposition they choose. Later on the subject moved to *hibah*, that is the various types of *hibah* and their conditions. Realizing that *hibah* had been practiced in Malaysia by banks and financial institutions, the writing covers some aspects of this institutions and their role in applying this concept.

Realizing that any new concept has its problems and restrictions, the research moved to find out these and how to solve them and give some recommendations.

Chapter 1 deals with the various methods of property disposal among the Muslim property owners in the country. They are free to dispose off their properties by which ever methods they wished, whether while they are alive or after their demised. This chapter also explains how the writing of this thesis is done, starting with the general objectives, the problems and the solution of the subject matter.

Chapter 2 deals with the general discussions about property acquisition as well as the sources of Islamic laws governing of land and property. Beginning with the supreme source of the Holy Quran and goes further to the *sunnah* and finally the subsidiary sources of Islamic laws such as *al-ijma*, *al-qiyas*, *istihsan* and so on.

Chapter 3 deals with the concept of *hibah*, which is the core subject that is being discussed in this thesis. It explains the meaning of *hibah*, its various ingredients which include all the types of *hibah* and also how such *hibah* can be revoked.

Chapter 4 deals with the application of *hibah* in Malaysia especially by the financial institutions and insurance companies which apply *hibah* instruments in their business dealings

Chapter 5 deals with the problems and solutions of applying *hibah* instruments in the country especially focusing the willingness of the individual property owners and the authorities in applying this method of property disposal, not putting aside the traditional methods of disposal by sale and purchase as well as the traditional and commonly methods of the *faraid*.

Chapter 6 deals with the general conclusions and the findings of this thesis

CHAPTER II

PROPERTY DEALINGS IN ISLAMIC LAW

Introduction

In Islam everything that exists in this world belongs to Allah SWT, the creator of the heavenly bodies and everything in between them. It is mentioned in the Quran, Surah An-Nissa 132 says:

“To Him belongs whatever is in the heaven and whatever is in the earth and whatever is in between them, and whatever is beneath the soil.”

Men being the vicegerent (*Khalifah*) of Allah SWT are commanded to take care of the properties in this world and to benefit from them either as a source of food, clothing, shelter, territorial borders or security, in order for them to achieve a higher standard of living. There are opinions which support that land is national property, but there is no verse in the Quran which support that. Nevertheless, there is also no verse in the Quran which directly established private ownership of land. A number of verses accept in equality of wealth disposal and distribution of property and the payment of *zakat*, which is levied on private property. Surah Al Baqarah:267 says, *“O you who believe, spend (benevolently) of the good things that you earn and of that which We bring forth for you out of the earth, and aim not at the bad to spend thereof.”* Another verse says, *“Eat of its fruits when it bears fruit and pay the due of it on the day of its reaping...”*

The Holy Quran however recognizes the *de facto* and *de jure* ownership of a person over economic resources. For example the Holy Quran uses references such

as ‘his wealth’, ‘their wealth’, ‘your wealth’ and ‘the property of others’. All these verses suggest private ownership of individual over property, capital and livestock for instance.

When properties are said to belong to Allah SWT and that men are the servants of Allah SWT, therefore, men who work are actually working for Allah SWT. Even though properties are connected to individual ownership, but as they are all servants of Allah SWT who, together would care and maintain it for the benefit of all. Allah SWT had always-correlate property with the public, therefore ownership of properties had been acknowledged by Allah SWT as public property.

“Then We made you rulers (vicegerent) in the land after them, so that We might see you how you act.” 14 Surah Yunus

Therefore men should at all time be aware of their responsibilities as trustees of God to keep and care for the said properties and should be aware on when how these properties are to be utilized and not being untoward of these responsibilities.¹ That means the right to use and benefit from land is limited and conditional. State has the power to acquire individual property for public interest.

2.1 The Right of Public in Private Property

The concept of absolute ownership in Allah SWT as sole proprietor and man as His trustee allow owners of properties to take part and to contribute in order to fulfill the needs of those who are in need, parallel with the responsibilities already fixed by Allah SWT for the rich to share their wealth with the poor. The contributions can be in the form of creating employment, creating living spaces and development of the property as a whole. The State, at the same time introduces laws and regulations in dealing with the management and the distribution of properties to the people.

¹ Surah al Hadiid:7, *and spend of that there of He has made you heirs (vicegerents on earth)*

Islamic State reserves the right to take over individual property whenever it finds that such rights had been abused or there exists a better use of the property. Normally, when land is taken by the State, reasonable compensation is to be paid. During the time of the Prophet, the Holy Prophet bought the land of the Jews of Medina when they were asked to leave because of their continued hostility towards the Muslim. So was Omar who paid handsome prices to the Jews for their lands in Khaibar, Fidak and Wadi ala Qura.

For an Islamic state to acquire private property, it has to follow the rules and principles established in the principal sources of Islamic law which are mentioned below.

2.2 Sources of Islamic Law Governing Land and Property

The two main sources of Islamic Land Law governing property are:

- (i) The Holy Quran, the book of Allah
- (ii) *Sunnah*, as the tradition of the Prophet SAW
- (iii) Additional but subsidiary sources of Islamic law such as *al-ijma*, *al-qiyas*, *istihsan*, *istihlah*, *maslaha mursala*, *urf* and custom (*adat*).

It should be considered that the Holy Quran, which is God's word, as the first and supreme source of Islamic *Syariah*. *Hadith* stands second as it is the 'hidden revelation'. A *hadith* says, "Undoubtedly, I am given the Quran and the like of it (ie *Sunnah*) with it." ²

Other sources are the:

- (i) *Al-ijma*, it can be defined as the consensus of opinion of the companions of the Prophet and the agreement reached on the decision

² Hadith Al Bukhari

taken by the learned *Muftis* or the jurists on various Islamic matters after the death of the Prophet SAW.³

- (ii) *Al-qiyas*, reasoning by analogy, or analogical deduction. It is the legal principle introduced in order to derive at a logical conclusion of a certain law on a certain issue. It also must be based on the Quran and Sunnah.
- (iii) *Istihsan*, *Istihlah*, and *Maslaha mursala* are referred to public interest. *Istihsan* means equitable preference to find a just solution, while *istihlah* means seeking the best solution for general interest.⁴
- (iv) Custom, *urf* and *adat*⁵ are also recognized as a subsidiary source of all school of Jurisprudence. These rules are normally used when there are no provisions on the matter in the Quran and the Sunnah. If any of the customs contradicts any other rules of the *Syariah*, they will be considered outside the pale of Islamic Law.

All the above rational sources of Islamic law should not contradict with the Holy Quran and *Sunnah* of the Prophet. This is, because, the final sanction for the intellectual activities in respect of the development of the *Syariah* comes from nowhere else but the Holy Quran.

The above sources of *Syariah*, consists various rules and principles guiding human life particularly the parts dealing with acquisition, holding, and disposal of property. These together with system of taxation and state revenue constitute a fairly well defined system of property ownership. According to this system property holding are basically of three types:

- (i) Holding of private property in full ownership,
- (ii) Holding of *waqf* property, i.e. land held in perpetuity with the income devoted for the upkeep of charity or the family of the constituter of the *waqf*,

³ Being juristic reference in the Quranic verse Al Nisa 4:115

⁴ Being juristic reference in the Quran verse Al Baqarah 2:185

⁵ Being custom of the local inhabitants

(iii) State owned property⁶.

Among the above three types, the holding of private property is relevant to this study which is discussed further.

2.3 Property and its Methods of Acquisition in Islam

2.4.1 Definition of Property

Property is defined as an exclusive association of the owned item with its owner which gives the owner the right to deal in what he owns in any way that is not legally forbidden. This includes the exclusive control over a specified property, usufruct, and legal rights in it⁷. Examples of property in Islam are gold, silver, agricultural produce, livestock and lands.

Islam does not just recognize individual ownership of these properties and the enjoyment of their owners to use these properties but also recognizes the rights of the proprietors to manage their properties while they are alive and after their demise. Before elaborating the management of these properties, the methods of acquisition are discussed. Another point is that how properties owned by Muslims are better managed following the market force and current trend of modern society while at the same time keep compliance with the requirement of the Islamic and *syariah laws*.

⁶ Property Law in the Arab World

⁷ Wahbah al-Zuhaili, *al-FIqh al-Islami wa Adillatuh*, as translated by Mahmud A. al-Gamal, vol. 2, p. 417

2.4.2 Methods of Acquisition

Islam encourages its followers to acquire wealth and properties lawfully and in accordance with the principle of *syariah*. A Muslims can acquire property through labor, alienation (*iqta'*), purchase, lease and charge, gifts, will, trusts, and inheritance. All of these are discussed briefly in the following sections.

2.4.2.1 Alienation (*iqta'*)

Iqta' is the alienation of state land (God's land) by government to any deserving applicant. It is a process of alienating government land under the law and given away to an applicant after fulfilling certain conditions and payment of various fees to the government. There are two types of lamination in Islamic law: express alienation through issue of title and implied alienation by way of reclamation of dead land. The former can be divided into freehold (*iqta' tamlik*) and leasehold (*iqta' istighlal*).⁸

2.4.2.2 Purchase

Sale and purchase is recognized as a system of property dealings in Islamic law, whereby one acquires the object and the other disposes it. It is a system of business already accepted all over the world where buying and selling of properties is common. A Muslim may acquire his full ownership right through purchase. The acquiring of rights in land by sale are well established in Islam. The Prophet SAW Himself bought land to build his house in Medina. Normally the purchase of property is subject to various laws and regulations in Islamic law.

⁸ Awing, p 202

2.4.2.3 Lease and Charges

Under this type of dealings one may acquire proprietary rights in government or private land for a maximum of 99 years, after which time the said land may be reverted back to the government or the original owner after expiry of the lease. Under the system of Islamic land law he could transfer his lesser rights by means of pledge or charges (by *rahn*) or sale by the owner with an option to repurchase (*bai' bi alwafajual janji*), lease or loan by the method of *ijarah* or gratuitous lease (*a'riyat*). This control over property is temporary in nature as duly agreed by both parties and be returned back to the original owner after the expiry of the charge or lease.

2.4.2.4 Gift and Hibah

Gift and hibah are acquisition of property from another living person without any return and executed by way of *ijab* and *qabul* by the donor and the donee. The donee would then become the proprietor of the said property. This is the subject of this study which will be discussed in detail later.

2.4.2.5 Will

A will is a clear expression of one's intention of transference of the corpus of property or its usufructs (profits from a property) with reference after death. A Muslim can make a will subjected to the Islamic principles. It is a method of property transfer by signing a document distributing his estate to his designated heirs and beneficiaries according to the law on testamentary disposition. It is permitted by Qur'an and Sunnah:

*“It is prescribed for you, when death approaches any of you, if he leaves wealth, that he makes a bequest to parents and next of kin, according to reasonable manners. (This is) duty upon Al-Muttaqoon (the pious)”*⁹

*(The distribution in all cases is) after the payment of legacies he may have bequeathed or debts’*¹⁰

*“Allah was being generous to you when He allowed you to give one third of your wealth (in charity) when you die, to increase your good deeds”*¹¹

*“It is the duty of every Muslims who has something to be given as bequest not to spend two nights without making a will.”*¹²

For a *wassiah* to be valid the following conditions must be fulfilled:

- (i) The gift shall not consist more than 1/3 property of the donor
- (ii) The property may be given to any heirs unless all other heirs disagree
- (iii) The transfer of property shall only take place after the death of the donee.

In Islam, the distribution of personal belonging by the owner after his death is not permitted. Hence one does not have the right to state how his property should be distributed after his death, because the share of each heir had been defined by Allah. So it is not permitted for anyone to state how the distribution of his property after his death in his *wassiah*, as this is would be exceeding the limit set by Allah. In the Holy Quran *Surah Al-Nisa* 4:11-14, Allah said,

“Allah commands you as regards your children’s (inheritance): to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share are only two third of the inheritance; if only one, her share is a half. For parents, a sixth share of inheritance to each if the deceased left children: if no children and the parents are the (only) heirs, the mother has a third; if the deceased

⁹ Surah Al Baqarah :180

¹⁰ Surah Al Nisa :11

¹¹ Narrated by Ibn Maajah

¹² Narrated by al-Muwatta of Imam Malik

left brothers or (sisters), the mother has a sixth. (The distribution in all cases is) after the payment of legacies he may have bequeathed or debts. You know not which of them, whether your parents or your children, are nearest to you in benefit; (these fixed shared) are ordained by Allah. And Allah is Ever All-Knower, All Wise.

In that which your wives leave ,your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts. In that which you leave, their (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts. If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sisters, each one of the two gets a sixth; but if more than two, they share in a third, after payment of legacies he (or she) may have bequeathed or debts, so that no loss is caused (to anyone). This is a Commandment from Allah; and Allah is Ever All-Knowing, Most-Forbearing

These are the limits (set by) Allah (or ordainments as regards laws of inheritance), and whosoever obeys Allah and His Messenger (Muhammad) will be admitted to Gardens under which rivers flow (in Paradise), to abide therein, and that will be the great success.

And whosoever disobeys Allah and His Messenger (Muhammad), and transgresses His limits, He will cast him into the Fire, to abide therein; and he shall have a disgraceful torment.

Contrary to the concept of ‘will’ Islam permits gift *intervivos* or *hibah*. Property that is willingly given away and possessed whilst one is alive is considered as a *hibah* or gift, which does not come under the same ruling as a ‘will’.

2.4.2.6 Wakaf and Trust

Another method of property acquisition is through *wakaf* (trust) by conveying it to another person or corporations as trustee to manage it for the benefit of named beneficiaries (under private trust *waqf al ahli*) or for a charitable purposes (public and charitable trust/ *waqf al khairi*).

The trustee is duty bound to look after that particular property just as he would after his own. He must be person of integrity, honest, sincere and have faith in Allah. The trustee is charged with great responsibility in Islam. His duty is to guard the interest of the person on whose behalf he holds the trust and to render back the property when required according to the terms of the trust.

Relatives of the donee and any member of the public named in the document can acquire rights in the returns and revenues of the waqf property as can be seen from the *hadith* mentioned in the next section. Whether it is *waqf al ahli* or *waqf al khairi*, both have the same function, being created for the welfare of near relatives as in the case of *waqf al ahli* or for the needs of orphans, destitute or the poor in the case of *waqf al khairi*.

2.5 Property Disposition

Property disposition in Islam is divided into voluntary and involuntary. Involuntary disposition refers to inheritance and compensations paid by the owner to another party as required by law. Voluntary disposition means the transfer of property to another by the owner on his own free will. The basic difference between the voluntary and involuntary transfer of property is that, in the voluntary mode of transfer of property between the transferor and the transferee, proposal and acceptance and in some cases as in *waqf* merely a proposal is a necessary condition, whereas the involuntary mode of passing ownership of property i.e. inheritance is independent of either of proposal or acceptance.

2.5.1 Voluntary Dispositions

Transfer of property that takes place voluntarily may be either with consideration or without consideration. Voluntary disposition with consideration includes the contract of sale, lease and charge. Disposition without consideration refers to the contracts of gift (loan for use, *hibah*, will, trust and *waqf*). Under Islamic law the owner can transfer his lesser rights by means of pledge or charges (by *rahn*) and sale by the owner with an option to repurchase (*jual janji*), lease or loan by the method of *ijarah* or gratuitous lease (*a'riyat*). These transfers of property are temporary in nature as duly agreed by both parties and be returned back to the original owner after the expiry of the contract.

The contract of sale is with consideration, i.e. the purchaser makes payment for the transfer of the property to the vendor, and the vendor transfers the property to the purchaser in perpetuity. For this, proposal and acceptance are the main requirements. The contract of sale is the most common mode of transfer now practiced widely in the country and is commonly said as sale and purchase. Sale and purchase of properties are going on everyday and this constitutes to the business of land development, property acquisition by individuals and corporations and the development of the country as a whole.

The government or a registered land owner may lease a piece of land for a maximum of 99 years, after which time the said land may be reverted back to the government or the original owner after expiry of the lease.

A land owner may charge his whole land or the whole of his undivided share to others for a stipulated amount of time for the purpose of a loan or annuity.

Voluntary transfer of properties without consideration may take place during the lifetime of the owner or after his death. They comprise of *wassiah*, *hibah* and sometimes *waqf*. The contract of *hibah* and *wasayyah* are comparable to the contract of sale, as they transfer full ownership rights. The contract of sale requires a return consideration, while the *hibah* and *wasiyyah* do not.

Voluntary transfer of property without consideration in normal health is ‘*hibah*’ (gift) which is the most ideal method of disposing one’s property to his/her family member, as explained later in this paper. The transfer of property after death or sickness of the owner is executed through *wasiyyah* (will). But this is not the same as wakaf for will or *wassiyyah* transfers the title to the beneficiary while *wakaf* is not.

The legal meaning of *waqf* is the dedication of a property or giving it away in charity for the benefit of others. *Waqf*, according to the majority of Muslim jurists transfers the title from the owner to Allah and henceforth freezes it as such in perpetuity. It is a disposition of a specific thing by the proprietor, and devoting or appropriating its profits for charity on the poor, or for other good objectives, from the start of the disposal to the end of the world. The property, generally immovable, is not allowed to be sold or otherwise disposed off, only the profits accruing from it are dedicated to charitable purposes.

The validity of this type of disposal is mentioned in the following *hadith*. Ibn Umar reported, that ‘Umar ibn al-Khattab got land in Khaibar (name of place) : so he came to the Prophet SAW, to consult him about it . he said,” O Messenger of Allah, I have got land in Khaibar, than which I had never obtained more valuable property, what does you advise me about it?’ . He said, “if you like, make the property itself to remain inalienable, and give (the profit from) it in charity.

So Umar made it a charity on a condition that it may not be sold, nor given away as a gif, nor inherited, and made it a charity among the needy and the relatives and set free slaves and in the way of Allah and for the travelers and to entertain guests, there being no blame on him who managed it if he ate it out and made (others) eat, not accumulating wealth thereby.

Every Muslim who is neither a minor nor an insane has the right to create *waqf* willingly, provided he is the legal owner of the property.

2.5.2 Involuntary Disposition

Involuntary disposition is the automatic transfer of property from a deceased person to his or her heirs without any 'will', intention or authority of the deceased. This involuntary transfer of property is called 'inheritance' or the devolution of one's property on death in favor of another as a successor. Transfer of property through inheritance is obligatory and therefore it is automatic, contrary to transfer of property through a will, which is a voluntary act of a person, that is to say, a person who makes another person a proprietor through a will does so at his own discretion. As against this, in inheritance the property compulsorily devolves upon the heir without the volition on the part of the heir or of the person from whom the inheritance is received.

The Islamic Law of succession comprises a separate and complex law governing the devolution of estates. It is obvious that owners of private properties are subject to laws of succession, and in this sense they have the rights to transmit their properties according to those laws, and it appears that the succession laws are primarily intended to govern private owned properties only, and it thus applies absolutely to heirs only. *Syariah* gives rules which guide us as to who inherits and what is to be inherited, and what shares go to the heirs. This is clear from the following *hadith* and verses (as mentioned early).

Narrated Jabir : *The Prophet SAW and Abu Bakar came on foot to pay me a visit (during my illness) at Banu Salma's (dwelling). The Prophet SAW found me unconscious, so He asked for water and performed the ablution from it and sprinkled some water over me. I came to my senses and said, "Allah's Apostle, what do you order me to do as regards my health?" So this was revealed, "Allah commands you to do as regards your children's inheritance."*

There are numerous verses in the Quran which refer to inheritance (about 35 verses) or its derivatives in the form of one or the other. Thus the property of the deceased is divided among his sons, daughters, father, mother and all other near relatives as determined by the Quran: "*Men shall inherit what their parents and other*

relations of kinship leave at their death, and so shall women received from them; whether the portion is great or small, all shall get their prescribed share”¹³)

The death of a person brings about transfer of most of his rights and obligations to persons who survived him and are called *wuratha* that is heirs and representatives. The transmissible rights includes all rights to property as well as rights connected with the property as well as other dependent rights such as debts, rights of compensation etc. The rules regulating distribution of the estate are based on the principle that property should devolve on those who by reason of consanguinity or marital relationship has the strongest claim. The deceased may, however, leave more than one person so related to or connected with him that it would be difficult to say with regards to any one of them that his claim should altogether supersede that of the others.

2.6 Conclusion

Under Islamic law there are several methods whereby one can acquire and dispose property which are almost similar. This study however concentrates on the methods of disposal of property especially after the death of the owner in order to find an alternative to the current problem of management of Muslim estate. Relevant to this are disposition through testimonial gift (will), inheritance, and gift inter vivos (by *hibah*). While the discussion on will, inheritance (*faraid*) will be undertaken in due course, the concept of *hibah* is considered a solution and therefore important and a priority. Hence the next chapter is will explain the basic concept of *hibah*, its permissibility and constituents.

¹³ Surah An Nisa:7

CHAPTER III

THE CONCEPT OF HIBAH

3.1 The Permissibility of Hibah

The General Concept of *Hibah* (Gift) in *syarak* is an undertaking by one (*aqad*) to donate his property to another person during his life without a consideration (*iwad*). The principle of *hibah* is derived from the Quran, and *hadith* as explained by standard books of all recognized schools of *fiqh*. The Quranic injunction of spending in the path of Allah encouraged Muslims to offer gifts. The giving and accepting of gift is recommended by the Prophet SAW .

Narrated Abu Huraira:

Whenever a meal was brought to Allah's Apostle, he would ask whether it was a gift or Sadaqa (something given in charity). If he was told that it was Sadaqa, he would tell his companions to eat it, but if it was a gift, he would hurry to share it with them.

¹⁴

¹⁴ Hadith Al Bukhari

3.2 Definition of Hibah

Hibah means gift from one living person to another person or organization whether or not being family members, stranger, Muslim and non Muslim (without neglecting the rights of his descendants and near relatives) which must be an immediate and qualified transfer of the corpus of a determined property without any consideration (*iwad*). In other words, it is a transfer of a determinate property without exchange, with a definite proposal on the part of the person to whom the gift is given. *Hibah* can even be made in favor of a child in the womb of his mother, a mosque building, a school or any charitable institutions

Najmud Din Abu Jafar Al Hilli in his noted work, *Shariai'al-Islam* had defined *hibah* as a covenant that demands the making of a person immediately the owner of a property without consideration in a manner that is free from an intention of nearness to God, thereby a distinction is maintained between *hibah* and *sadaqqa*.

The above definitions show the differences between *hibah* and other forms of donations, such as *sadaqah* (charity), *waqf*, bequest and the others:

Hibah is not *sadaqah* (charity) for the purpose of *hibah* is to show love to the donee, whereas the purpose of charity is to gain God's pleasure. *Waqf* is the transfer of the corpus of a valuable property to the ownership of Allah SWT with a declaration of dedicating its usufructs perpetually for religious, charitable or pious purposes as recognized by *syariah*. Therefore, similar to charity, *waqf* the purpose is religious, charitable or pious as recognized by *Syariah*, though *waqf* is different from charity as in the case of charity the corpus of the gift may be consumed, but that cannot be done in *waqf*.

Bequest (will or *wassiah*) and *hibah* are similar in a sense as bequest is an unequivocal expression of will by a person for the transfer of his property or its profits without considerations, in favor of any persons or any institutions, to take effect after his death, permanently or for a fixed period. Nevertheless, *hibah* is different from *wassiah*, for in *wassiah* alienation of property occurs after the death of the donor, and in *hibah* it occurs immediately. It is not allowed for a person to revoke

a *hibah* after the beneficiary has accepted it. In *wassiah* (will) however revocation of the gift is allowed. In addition, one only can donate up to 1/3 of the property, but no such limitation is imposed on *hibah*. The reason for this is that in the case of *hibah* the donor divest himself of all rights in the property immediately, while in the case of a *wassiah* not the owner but the heirs are deprived.

Hibah differs from loan (*ariyah*) even though both are gifts without consideration, because through *hibah* one transfers the physical form (*tamlik al ayan*) as well as its usufruct (*manfa'ah*), and in loan (*ariyah*) one only transfers interests in the given property.

3.3 Ingredients of Hibah

A gift is undoubtedly an agreement between two consenting parties and therefore an agreement is only completed by proposal by the donor and acceptance by the donee. Valid *hibah* under Muslim law must have three main ingredients: offer (*ijab*), acceptance (*qabul*), and delivery of possession to the beneficiary.

3.3.1 Ijab by the Donor

There must be a proposal or declaration (*ijab*) of the gift by the person (donor) who wants to give it away. *Ijab* can be in the form of oral declaration, such as, "I give you this..." or may be in written form. In giving, the proposal, words used must have the meaning of giving the ownership of a property gratuitously. Thus statement such as "I have given gratis" or "I have made a gift" is sufficient to convey the meaning of giving property gratuitously. Expressions, which are evidence of conveying ownership gratuitously, can also be considered as a proposal of making a gift. Words constituting *hibah* should be clear and unequivocal, that means the intention of the person who makes the *hibah* depends upon his renouncing

completely the property gifted in favor of the donee. Oral expression, which are evidence of conveying ownership gratuitously also convey the implication of gift, like a husband who buys a pair of earring for his wife and tells her, “Take and wear them”.

3.3.2 Acceptance (Qabul) by the Donee

The person, donee or beneficiary to whom the gift is given, must accept it (*qabul*) either by himself or by an agent (trustee). The property being given in *hibah* should be available at the place where the *hibah* is being made or the document pertaining to the property available to the donee or the trustee, and the donee takes possession of the property with the permission of the donor, it shall become the property of the donee. Where the donor merely informs the recipient of giving something to him, but the recipient does not answer it but later on he accepted its delivery, this will be an indication of his accepting the gift. In order to repudiate a gift, the denial or refusal of the recipient is necessary in words or action.

3.3.3 Taking Possession of Property

A *hibah*, by an offer of the donor of a property or an article and the acceptance by the benefactor, becomes a concluded transaction, and by receipt of the property or article it becomes complete. Taking possession in the case of *hibah* is like acceptance in the case of sale. This argument is based on the narrative related by the Prophet, “*hibah* is not valid without the possession”. It means the validity of *hibah* does not get established without taking over possession of the property. That is the validity of ownership of the property. So in *hibah* it is the delivery of possession by the donor to the donee which negates the donor’s rights and establishes the donee’s ownership.

However, there is an exception in the case of property, the possession of which cannot be made over the completion of *hibah*. Example of this is where there is a proof from acts of the donee that makes it patently clear that he has renounced his rights and title in the said property. Aishah related that “my father made an *hibah* of 20 *wasaq* of unplucked dates from his property which was in Aliah (name of place). When his last moment approached him, he praised to God and said, ‘I made *hibah* of 20 *wasaq* of unplucked dates from my property in Aliah, you have not taken possession of them, neither have you separated them. Hence, the whole (property) belongs to the heirs.’”

Possession is essential for the proof of title, not for the constitution of the *hibah*. Consequently, if the donor makes his offer by stating that he had given the property away by way of *hibah* or by using some similar expression, and the donee without signifying his acceptance, merely takes delivery of the things given, at the time it was offered, the *hibah* is considered as complete.

The donor, by his offer, can expressly or by implication authorize the donee to take delivery of the gift. There is an express authority when the donor makes use of formal words, as when he states that he has given something to someone and invites that person to take it, in the event of the gift being present when the parties meet. Where he has given something to someone and invites him to go and get it, should the gift itself not be there when the parties meet, the permission to take possession of the property is implied.

When the donor has given his express authority, the donee may take delivery of the property bestowed by way of *hibah* at the meeting place or after they had separated. If the authority is merely implied, however, it is only valid so long as the parties are present together. After they had separated the donee may not validly take delivery of such property.

If its possession is taken without the permission of the donor such taking possession shall not on the basis of *qiyas*, make the donee owner of the property. But on the basis of *istihsan* (public interest) he shall become its owner.

The argument on *qiyas* is that the property given in *hibah* is the property of the donor and no one has the right to take possession of the property belonging to another without his permission, because such a possession shall be usurpation and not a possession.

The argument on the basis of *istihsan* is that gifted property in a transmission of *hibah* is like an acceptance in a contract of sale. So a proposal in sale amounts to permission for taking possession too in case it is accepted. Likewise, proposal in *hibah* carries with it permission to deliver possession for completing the ‘act’ of *hibah*, and this is only confirmed by taking possession.

Whereas if the property is not present at the place of making the *hibah* and the donee has taken possession after the donor and the donee have separated, the donee does not become the owner without permission of the donor. But, if the donee takes possession with the permission of the donor it has two aspects. On the basis of *qiyas*, it does not make the donee owner, whereas on the basis of *istihsan* such possession makes the donee owner of the property given in *hibah*, as a contract is constituted by proposal and acceptance.

The gift should be delivered by the donor to the person receiving it. In the case where a trustee had been appointed, the transfer of property shall be done towards the trustee who looks after the property. For this reason in the following cases the possession of trustee is viewed to have amounted to delivery of possession to the beneficiaries or otherwise.

3.3.3.1 Hibah to Minor Child from Parents:

When the parent or guardian of a child gives something to the child, by merely saying, ‘I have given’, the *hibah* is complete. There is no need for the child or infant to take immediate possession of the article. Mere declaration of *hibah* by the parents is sufficient to provide for a valid *hibah*. The father is legally presumed to

have taken possession of the article on behalf of the child. In such a *hibah* the right of taking possession of the property on behalf of the minor belongs to the father.

If the one who makes the *hibah* is himself in possession (of what he has *hibah*), the *hibah* is completed by such possession and what is then absolutely necessary is that *hibah* be declared because the child cannot lay exclusive claim to it unless he knows what had been given to him by way of *hibah*. In other words, the thing that validates *hibah* made by father in favor of his minor child is evidence in *hibah*, meaning thereby the declaration of *hibah*.

The declaration of *hibah* is for the sake of giving strength to *hibah*, so that it may be within the power of the son to prove his title against all other heirs. If either the father or the son dies before the delivery of possession of the property, the *hibah* made shall be void, as *hibah* is completed by delivery of possession of the article.

Delivery of possession in *hibah* is like the acceptance in sale, because it proves the title. As death of either the seller or the purchaser after the proposal, but before its acceptance makes the proposal void. Similarly the death of the father or the child before the delivery of possession makes the *hibah* void. However, a *hibah* by a stranger to a child, if not possessed by the child's parent or guardian is incomplete.

3.3.3.2 Hibah to Major Son:

If a father makes a *hibah* to his major son and he does not deliver possession of the gift to his major son or the son does not take possession of the *hibah*, the *hibah* is not valid. To some jurists such a *hibah* to a major son from his father is valid, because the *hibah* to the major son who is still under the care of the father is just like a *hibah* to a minor child still under the care of the father.

3.3.3.3 Hibah to Son While at Mother's Custody:

This is the case of an orphan whose father is the proprietor of a property and gives it away to the unborn son as *hibah*. He later dies leaving the child in the care of the mother. The mother who is taking care of the infant as guardian over him and giving maintenance and at the same time protects the child and the property of the child, she can take over possession of the property gifted to the child. This is due to the fact that her guardianship is sufficient to qualify her to take possession of the said property.

In another case where the mother who makes a *hibah* of a property to her child, an orphan under her care, and creates evidence for it, and if there is no executor appointed by the late father for the minor child, the *hibah* created by the mother shall be valid and the possession of the said property by the mother shall be considered to be equivalent to taking possession of the same property by the father had he been alive.

Possession means acquirement of control which is in the nature of protection and the mother's guardianship includes 'the taking over of the property of the orphan'. Hence the mother in the matter of taking possession of the property given in *hibah* (to the orphan), is like the father, in case there is no other guardian or executor.

3.3.3.4 Hibah to Son at Uncle's Custody:

If a minor child is under the control and guardianship of his uncle after the death of the child's father, the taking over possession of the child's property by the uncle, earlier given in *hibah* by his late father is valid, even though the child still has his brother and mother who are still alive. This taking over possession of the property must be to the advantage of the child because of the close relationship of the child and his uncle, just like his close relationship to his brother. The relationship of the uncle is also strengthened by the fact that the orphan child is under his maintenance.

Hence the taking over possession of the property by the uncle shall complete the *hibah* made in favor of the infant child under his charge. This condition cannot be applied if the child's father is still alive, even if the child is under the care and maintenance of his uncle, his brother or even his grandfather.

3.4 Evidence of Hibah

According to Muslim Law an oral *hibah* is complete as soon as declaration of the *hibah* by the donor, acceptance by the donee and delivery of possession by the donor to the donee had been affected. When these essential events had been completed and complied with, *hibah* becomes perfectly valid, and if a written deed is executed afterwards, the deed may not be admissible in evidence though the oral *hibah* would be valid. This means that *hibah* is concluded even without evidence and without the presence of any witness. Creating evidence or documentation of it, by itself is not a condition for the validity of the *hibah*. Creation of evidence is a precautionary measure so that after the death of the donor it may remain undeniable by the heirs or the father when his minor child attains the age of majority, who has made a gift to his minor child.

Prerequisites of a Valid Hibah

Apart from the necessity of offer, acceptance, and delivery of possession, there are certain conditions imposed by *syariah* on the donor, the donee, and the subject matter of the *hibah* or the property being donated. All these are discussed below.

3.4.1 The Donor

Every Muslim who has reached the age of maturity and is mentally sane is capable of making *hibah*. The *hibah* should be made voluntarily without any force or duress. It is also essential for the donor to know the consequent of his act.

A person who is dying on his deathbed during the last minutes of his life (*mard al maut*) cannot make a valid *hibah*, because it is neither *hibah* nor *wassiah*. Any *hibah* made during *mard al maut*, will be considered valid, at the time of distribution of the estate of a deceased, if does not exceed one third of the estate after paying all funeral expenses, the debts of the decease, and all heirs have no objections to such a *hibah*. This and some other related issues will be discussed further.

3.4.1.1 Donor Capable of Hibah

The donor should be capable of making *hibah* that is he must be sane and adult person and free to transfer his property by way of *hibah* to another person. The impediment to such freedom are death-illness, and insolvency of the donor which otherwise would frustrate the rights of his heirs and creditors. It is only necessary for the donor to be sane and being adult, while it is not necessary for the donee to be such. If a father makes a *hibah* in favor of his minor child, the proprietary right of the minor child shall get established merely by the fathers declaration of *hibah*.

It is a condition that the donor must be of sound mind and of age (not an infant). Therefore *hibah* from an infant, madman, or imbecile is void. But a *hibah* to them is valid. (majelee)

If someone gives an amount of money which he is to receive from his debtor, or discharges his debtor from it, and the debtor accepts it, the *hibah* is valid. Similarly, where a person to whom money is due makes a *hibah* of the said sum to a third party other than the person who owes him such money, and expressly

authorizing the recipient to take payment from the latter, the *hibah* is complete as soon as the recipient has received payment.

Contrary to the above, where a person who is indebted donates his property to his heirs and is accepted by them, the *hibah* is void. Claims of the creditors in the property prevail over the claims of the heirs, to the extent of being fully satisfied.

3.4.1.2 Hibah at Mard al Maut (death-bed illness)

Mard al maut means death sickness, which means that the would-be donor had become too ill from which he eventually dies. Under the laws as stated in the *Majallah al-Akam al Adliyah* the word *mard al maut* means a disease which generally may cause death, where the disease itself may discourage the sufferer (man) from viewing whatever problems he has outside his house, and for women sufferers whatever is in her home. The sufferer may eventually die after being bedridden or otherwise within one year. For a sickness to be regarded as *mard al maut* the following conditions should be fulfilled:

- (i) death of the donor looks inevitable
- (ii) the disease is likely to cause death
- (iii) the disease would bring the fear of death
- (iv) there is outside fear that the disease is serious
- (v) Death that is being expected due to the disease could happen in one year or after one year, if the disease becomes more serious.

3.4.1.3 Condition for Valid Hibah at Mard al Maut

The power of the owner to dispose his property, during *marad al-maut*, is limited under Islamic law. The wishes of the owner especially if he dies immediately

after his *ijab*, and before being accepted by the donee is considered as a *wassiah* and is categorized under the principles of *wassiyyah*; therefore the following conditions shall apply:

- (i) The donated property shall be not more than 1/3 of the property of the donor
- (ii) the offer is not given to any heir unless other heirs agree

Under the Majallah, there are a few provisions about *hibah at mard al amut*:

- (i) When a man who does not have any heir to his property, gives *hibah* of his entire property during *mard al maut* and later accepted by the donee, the *hibah* is considered as valid. After his death the ruler of the country cannot include his property under the rule of inheritance or a legacy;
- (ii) When a husband *hibah* his entire property to his wife at *mard al maut* and at the same time he has no other heirs except being husband and wife, they only had each other to inherit their property, the *hibah* is valid.
- (iii) When a man *hibah* his entire property to one of his heirs while he was at *mard al maut* and after his death other heirs do not agree to it, then the *hibah* is only valid to the extent of one third of the property. If he recovers from the disease then the *hibah* is valid. This is due to the fact that the *hibah* he made though expressed to take effect during his lifetime is really intended to be a testamentary disposition and can only take effect as such.
- (iv) When a man is indebted and *hibah* his property while he was at *mard al maut* and later accepted, therefore the *hibah* becomes invalid, because the property should be used to pay his debtors.

Following the above authority when a person wishes to *hibah* a property to another person during *mard al maut*, while at that time he has no heir to his property, if the offer is accepted then the *hibah* is legal. The *baitul-mal*, as entrusted with his estate, after the death of the donor cannot interfere as having charge of the deceased estate. Similarly if a man who has no heirs except his wife, on his death bed, donate all his property to his wife, the *hibah* is valid, and the *baitul-mal* cannot interfere. In case the deceased is succeeded by heirs, his *hibah of* a property to one of his heirs,

during *mard al maut*, if contested other heirs later, is invalid. But, if he has made a *hibah* and has delivered it to a person who is not his heir, the *hibah* is valid if it comprised one third of his property, but if it is more than a third of his property, the donee is liable to return the remaining.

3.4.2 The Donee

Hibah can be made in favor of any living person capable of holding property including non Muslims, a child in the womb of the mother, or any organization such as mosque building, school, college or university or a charitable organization. If being a minor, a guardian is to be appointed to manage the said property.

3.4.3 The Object of Hibah

Hibah can be in the form of goods, services or any valuable property such as land, building, life insurance policy, company shares, unit trust, and employees' provident fund. Immovable properties such as houses, buildings and land, while movable properties such as machineries, vehicles, business shares etc all fall in the category of valuable properties. While properties such as fruits, trees, animals etc all fall into the category of goods they are also capable of being an object of *hibah*. This includes negotiable instruments, proprietary rights, land under attachment and the right of redemption.

Even properties at the time of auction by the auction purchaser in execution of a decree is also valid, though the purchase of the property till then is not certified by the court and its possession has not yet been obtained by the donor, provided the donee is authorized by the donor to take its possession. If it is preferred by the deed of *hibah* itself the donee is authorized to take its possession.

Irrespective of the nature of the object, the following conditions on the subject matter of a valid *hibah* are imposed which must be fulfilled.

3.5.3.1 Property of the Donor:

The property bestowed by way of *hibah* must be the property of the donor. Consequently, if a person makes a *hibah* to some other person, of a property, which is not his own, such *hibah* is not valid. If the owner, however, thereafter ratifies the *hibah*, such *hibah* is valid. A *hibah* made out of a third person's property is only valid if he agrees to it, as though he is the donor himself. Hence, the saying, 'I will give you the house if I can afford to buy it' does not constitute *hibah*, because the house is still owned by another person.

This condition applies to all properties. Movable properties such as machinery, vehicles and even investment shares, or immovable properties such as land and houses could be determined by their physical existence together with their proof of ownership such as land titles, share certification, receipt of purchase or even other document of dealings of the said property proving beyond any reasonable doubt as to solely belong to the donor.

3.5.3.2 Properties Has Syarak Value:

The donated object should be recognized by Islamic law as valuable property, and must be acquired through legal means that is it should not contravene the principle of the *syariah*. Thus, wine, pork and the property of a gambler, robber, illegal merchants or even property acquired through corruption cannot be given as *hibah*. When giving the approval of the donor is necessary. Property *hibah* under duress or compulsion, it is not valid.

3.5.3.3 Property Physically in Existence:

At the time of giving, ie at the time of *ijab* the property should be in existence and owned by the person who wants to *hibah* it away. The fact of declaring a property as an item of *hibah* and finally the act of receiving and acquiring it by the donor either in its physical form or other types of dealing is an evidence of the existence of the object. *Hibah* of a property not yet in existence at the time of the *hibah* is not valid. If one says, ‘I make gift of all the fruit that this tree may bear’ or ‘I will give you grapes when the vineyard starts producing fruits’ shall not be valid, because the fruit or the grapes do not exist yet, at the time of the *aqad*.

3.5.3.4 Properties not in Continuation of Another Property:

Hibah or generally understood as gifts do not always be associated with landed property, but can also be associated with crops, fruits or even monetary in nature. Properties of the donor cannot be separated such as trees, crops and building without giving the land. It is very unlikely to *hibah* trees or crops or even buildings, while at the same time keeping the land by the donor.

3.5.3.5 Property Must be Known:

Words like ‘I will give you something from my property’ or ‘I will give you one of these two cars’ without stipulating which one of the cars or the amount, do not constitute valid *hibah*. But if the donor asked the donee to choose one of the cars, and the donee chooses it in front of the donor, then the *hibah* is valid. This means that the property must be clearly ascertained and defined. If a donee makes a *hibah* of a certain portion of his property without specifying which and the donee during the session of offer and acceptance states which portion he selects, then the *hibah* is valid. If the donee selects the portion he chooses after the meeting, at which the *hibah* is made, then such *hibah* is not valid.

In the case when the *hibah* is made to two or more persons jointly or if the *hibah* is made by two people jointly to one person, it is valid. Therefore it is essential in the case of *hibah* that its quantity should be known properly. If the specification is not given, it is bound to give rise to confusion. Both of these cases are discussed further.

Hibah of a divisible property, belonging to the donor, made to two or more people without division is irregular. The term irregular used here is merely because there had been different views by Islamic jurists over the years. According to the views of early jurists, such *hibah* is invalid because at the time of making the *hibah* the property is not divided in spite of being divisible. Therefore in such a case the share of each donee is not being fixed.

According to views of later jurists, such a *hibah* is not void. It shall rather become valid after the division of the property between the persons in whose favor the gift has been made. But if one of the donee takes possession of a part of the given property after division, the *hibah* shall be valid. Property division can be in the form of area calculations, or land separated by separate titles even though not physically surveyed on the ground and boundary marks planted on the ground. *Hibah* of money in the bank or company shares to two or more persons is possible as this type of property is readily divisible provided the term of the *hibah* clearly states the amount.

Hibah of joint shares in a property that are indivisible (e.g. house) is valid but irregular too. Joint ownership consists of a thing itself belonging absolutely to more than one person; that a property is jointly owned by two or more persons or organizations, be it at shares in a company or deed and title to a landed property. Joint ownership can be obtained through operation of law as in the case of inherence, or contract of sale and purchase, *hibah* and the like. Joint property can be divisible as in the case of a piece of land or indivisible as in the case of a house.

Hibah of joint shares of a property without division (e.g. land) can eventually be considered valid under the following circumstances;

When *hibah* made by one heir to another heir

When *hibah* made of a parcel of landed property

When *hibah* is made of heritable property situated in a large commercial city

Hibah of a part of a property, which is divisible, is not valid until that part after division is not separated from the property of the donor, but the *hibah* of a part of the property that is indivisible (eg machinery) is valid.

Gift of divisible property made without division in favor of two or more persons shall be irregular. But, if each of the donee takes possession of the part of the property *hibah* to him, the *hibah* shall be valid. The reason for being irregular is that at the time of making the *hibah* the property is not divided; therefore the property is yet to be fixed, as though it still non existence. The only way to make the *hibah* as valid is that the *hibah* and the division should be done simultaneously.

Hibah of *musha* property (which means joint or undivided property) should not be encouraged simply because without proper division disputes and complications would arise in the enjoyment of such *hibah*. Another point is that when several persons owned a property jointly no one is in a position to predict that his interest is attached to any specific portion of the property. Therefore an *hibah* by one of the co owners in such a property is likely to cause some confusion in its enjoyment by all the other co-owners.

Types of Hibah

3.4.4 Hibah Ruqba and Hibah Umra

Hibah ruqba is a contingent gift on the life of the donor and donee. It carries the meaning that a property will go to the donor or donee in case either of them dies first.

There are two opinions concerning this case. One says that *hibah ruqba* is invalid because it falls into the category of ‘license’ which could be revocable at any moment. Bukhari did not approve *ruqba*, which, according to him was not allowed in Islam. Another opinion is that this *hibah* is valid, but all the conditions stipulated by the donee are void. The particular property given away in *hibah* shall be considered the property of the donee and the same will be included in the heritable estate of the donee.

Umra is that kind of *hibah* in which a person makes a gift of a property with a condition that the donee shall remain the owner until his lifetime. After his death it shall return back to the donor. Such a *hibah* under the *Syariah* is valid. After the death of the donee, however the ownership of the property shall not return back to the donor and the heirs of the donee shall be entitled to it. But, when an expressed condition was laid down, that on the death of the donee it shall revert back to the donor or his heirs, there are two opinions, firstly, that the transaction shall take effect in accordance with the conditions laid down, as it were a loan. Secondly, it shall be looked upon as a *hibah*, while the conditions already lay down as illegal or as unenforceable.

Several *hadith* had been found to be associated with this:

*Jabir bin Abdullah stated that the Prophet had said, “ If a property is given in gift to a man for his lifetime it shall become his property and it shall not return back to the donor (after his death)”*¹⁵

Jabir bin Abdullah also said,

*The Prophet SAW decided in the matter of umra that is for him to whom it had been gifted.*¹⁶

¹⁵ Hadith Al Muslim

¹⁶ Hadith Al Bukhari

3.4.5 Hibah al iwad (Gift for a Consideration)

Hibah al-iwad is means a gift for a consideration, which is in reality a sale and has all the ingredient of a sale contract. There are two types of *hibah* for a consideration: first, where the exchange is by way of condition and is called as ‘hibah with condition of exchange’. Second, the exchange is not by way of condition, as the donee does it by his own will, this is called as “*hibah* with exchange” For the validity of *hibah* with condition of consideration two conditions must be met, that is payment (of consideration or *iwad*) be made by the donee and the donor should divest himself of the property at once and declaring it upon the donee

The value of consideration, i.e. any property, specific or *musha* (undivided) paid in exchange, is not important, however, the possession and payment be actually bona fide between the two parties. But, if the donee gives something to the donor and does not specify it that it is in exchange for *hibah* made by the donor, it shall be considered as *hibah bil iwad*. In such a case, *hibah bil iwad* shall be valid and operative on the receipt of consideration (*iwad*).

This type of *hibah* is similar to sale contract when the donee takes possession of the property and the donor takes the exchange. The basic difference between *hibah bil iwad* and *hibah* with condition of exchange is that in *hibah bil iwad* the exchange the donee gives is at his own volition, but *hibah* with condition of exchange is a contract with details of exchange as agreed between the two parties.

3.4.6 Conditional Hibah

Conditional *hibah* means contingent *hibah* as when a gift is made dependent on the happening of some event. Conditional *hibah* also means a gift with a condition. In the former the gift can be operative only if the event occurs. In the second the gift is made if the donee accepts the accompanied condition.

Hibah cannot be made contingent upon the occurrence of a future event. A *hibah* that is limited in time is treated as *ariyat* (loan creating a license), which is revocable at any moment. Therefore, such a *hibah* has to be re-transacted or re-considered in order to transfer title to the donee permanently.

A *hibah*, accompanied by a condition, is valid. For example, one says, “I am giving you this house as long as you support me for the rest of my life”. This condition is valid and the donor can only revoke or cancel his *hibah*. Nevertheless, the condition must not be contrary to the nature of ownership and should not restrict such rights of the donee in the subject matter of the gift. Thus, if the person making the *hibah* imposes a condition whereby he continues exercising the rights of ownership in respect of the property given in *hibah*, the *hibah* is considered as null and void.

3.4.7 Preferential *Hibah*

Preferential *hibah* means a donor making *hibah* of his property in favor of one of his children and thereby depriving other children of their shares in the property of the donor, or so much preference is given to a particular child over the other children of the donor that no equitable proportion is maintained among them with respect to his properties.

The Prophet said, “Every owner of a property is better entitled to the use of his property,” that proves that a person’s absolute rights to deal with his property. Hence, one might utilize his property in the manner he likes, provided that all those utilizations have not been specifically held as forbidden under the *syariah*.

Discriminating among children without any good reason is a sin, especially, when the intention is to harm them. Even then, if someone does so, his decision should be given effect and whosoever is given more property will be the owner of it. Those who have been given less are not entitled to ask those who have been given

more for giving them some portion back to equalize the share in *hibah*. However if the father discriminates due to any good reasons, for example to whom he gives a bit more is a pious and to whom he gives less is a sacrilegious or of bad character, then the father would not be a sinner.

Further, if someone believes that his heirs would spend the property against the will of Allah swt and had confirmed it from any Islamic scholar, it is better for him to spend his wealth in the way of charity and should not leave anything for his bad heirs.

If the father gives his wealth to some of his children and deprives others, though it is not unlawful according to the opinion of Imam Shafie, Imam Malik, and Imam Abu Haneefah yet it is *makroh* (undesirable). This applies, even if he gives his whole wealth to only one of his sons, he is still considered to be a sinner but his decision would be implemented and that son would be the only owner of the property.

Several verses of the *Quran* gave certain direction for dealing with property of Muslims in this provision of preferential *hibah*, even though there is no definite provision in the Holy Quran about the legality or illegality of a preferential *hibah*. Among them:

*It is righteousness to believe in God and The Last Day, and the Angels, and the Book, and the messenger of Allah; (and) to spend of your substance out of love for Him, for your kin, for orphan, for the needy, for the wayfarers, for those who ask for and for the ransom of slaves,*¹⁷

From the above verse it is clear that the *Quran* lays great emphasis on spending wealth in a manner, though the same is spent upon oneself. It urges to spend on others, though prescribed therein first place to *dhawi al Qurba* (the related ones). It is evidence that when God forbids an owner from spending lavishly upon himself, how can He approve of doing it upon others. Now, if we look at the

¹⁷ Surah Al Baqarah 177

aforesaid directives of the Quran one may agree to the conclusion that God approves of the *hibah* made, at the first instance in favor of the related ones. As God Himself is just, He looks with favor to those who do justice.

In one tradition: from Al Bukhari Sahih,

Muhammad bin Ahmad bin Al-juhaym reported from Mu'awiyah bin Hiday that his father, Abu Hiday had a minor son. Abu Hiday was a rich man. Abu Hiday gave away all his property to one of his sons. Consequently, his other son, Muawiyah went in the presence of the Caliph Uthman and narrated to him the entire story. Uthman gave his father the option of either taking back all his property to himself or distribute it justly among all his children. He therefore took back his property and on his death left them as heritable. By that time the brothers of Muawiyah had attained the age of maturity.

In another tradition;

'Amir says that he heard Nu'man bin Bashir saying from the pulpit that his father, Bashir, made a *hibah* to him. 'Umrah bt. Rawaha, thereupon, told him that she would not consent to it unless he gets it witnessed by the Prophet. Hence, he presented himself before the Prophet and said, "I have made a gift to my son born of Umrah bt Rawala. She desires me to get it witnessed, O Prophet, by you. The Prophet asked, "Have you made a similar gift in favor of all your other children". Bashir said, "No". The Prophet said, Fear God and maintains justice among your children." Nu'man said, Hence he (Bashir) rescinded the gift"¹⁸.

Preferential *hibah* according to most of the classical jurists is quite valid. But this is also correct that such *hibah* is undesirable to the degree of prohibition. If a person in full health makes a *hibah* preferring some over others of his children, the same may be in contrast of his morality (between man and God), even though legally valid. That is in the view of the law, the said *hibah* shall be held to be valid and operative. Accordingly, the words of the traditions are not commandments or judicial pronouncements, but are the words of general advice. Likewise, there is no harm in

¹⁸ Al Bukhari Sahih O M Fath al Basr, Cairo 1978 AH Kitab Al Hiba, chapter on Ishad vol V
page 1340

depriving the corrupt and immoral children of the donor and making *hibah* in favor of those who are virtuous and learned.

Indeed there is only a single opinion of Abu Yusuf among the Hanafis, for it being invalidated if it is made with the intention of causing harm to the donor's other issues. According to the schools of Hanafi, Shafi and Shiah and some of the Malikis, a Muslim man or woman, in his lifetime or in good health is entitled to make *hibah* of his entire property to whomsoever he likes. This is different from a will where a Muslim is not allowed to dispose off his property up to more than a third of his property. However, for a person to make a *hibah* in a manner that one of his issues get preference over others is not commendable. In other words, a Muslim in his lifetime and during good health may deprive all his heirs by making a *hibah* of his entire property in favor of a stranger, but his action may not be virtuous though legally valid.

The Hanafi maintained that equality between the issues shall be the cause of winning the hearts while giving preference to one over the other shall cause dissension between all of those concerned. Hence maintaining equality is the best course. If a person deprives some of his children by giving preference only to some of them, whether those deprived be learned or virtuous or ignorant or *fasiq*, his act shall be legally valid because he has full control of his own personal property in which others have no right. But, morally there shall be no justice done among his children.

The person who holds this *hibah* to be void advanced the argument on the basis of *qiyas* as well, that utter disregard of relationship and disowning of children are forbidden. It is incumbent to avoid both. Hence not maintaining justice and equality is the cause of doing what is forbidden, and the act which is the cause of doing what is forbidden is in itself unlawful. Thus, doing justice implies the performance of that which is incumbent and that which initiates the thing which is incumbent is itself incumbent. The maintaining of justice and equality is thus incumbent and its abandonment is forbidden.

Courtesy demands that no preferential treatment ought to be accorded to one over the other, so that in the heart of one who is neglected there may not arise a feeling that may lead him astray from the path of virtue because relationship is cooperation of one with the others and not enmity or cruelty. The other rule upholds validity of the *hibah* in favor of some of the issues. Had it not been so the Prophet would not have directed the donor to retract from what would be void. Other rule is the validity of the father retracting from *hibah* in favor of his issues.

According to these opinions, such *hibah* is not valid morally even legally because it is comprised of injustice and cruelty. Hence such *hibah* are invalid and liable to be reversed.

As a conclusion, the *hibah* executed during lifetime and completed by delivery of possession is distinct and different from the gift made through the making of a will.

3.7 Revocation of Hibah

The Prophet had said, ‘if anyone seeks to take back a gift he is like a dog who returns to its vomit’. This gives the impression that the Prophet disliked the revocation of *hibah*. Even though the word dislike can be considered as scrupulousness but not prohibitory. Some *ulamaks* went to the extent of concluding that revocation of *hibah* after delivery of possession is unlawful. This is to say, when a donee takes over possession of the *hibah* property, the donor cannot cancel the *hibah*. Some say that revocation of such is valid provided that the donor is a stranger and not related to the donee by blood within the prohibited degree.

Hadith narrated by Ata and Mujahid stating Omar as saying, *Omar had said that a person who makes a gift in favor of a relative within the prohibited degree and that relative takes over possession of that gifted property, it is not valid for that person to revoke his hibah and the person who makes the hibah in*

favor of a relative not within the prohibited degree, it is not valid for him to revoke the hibah unless he has received an exchange for that gift.

As a general rule, nevertheless, the stipulation of hibah is binding except in some specific cases where revocation is allowed. The reason is that *hibah* is a covenant for proprietorship, that is to say, it is a covenant that makes one the proprietor. The covenant for ownership being absolute does not admit revocation as in the case of sale. Further, the purpose being to make one proprietor, the revocation is opposed to the said purpose.

In Islamic law, a *hibah* created by the donor cannot be withdrawn. To withdraw *hibah* even though given to one's family members or towards a husband and wife is *haram*, except *hibah* that is held by the donor's father, where a *hibah* from a father to a son can be revoked, if the son is still a minor at the time of the execution of the *hibah*, provided that the son does not use the property to finance his marriage, provide a loan or to exchange the object of *hibah* in any other form. A wife can withdraw a *hibah* when the husband is still alive. But if the husband passed away, she could not recover any property that had been given away in *hibah* earlier. For *hibah* executed to a grown up son, the father could not repossess the property already given away.

3.7.1 Revocation before delivering possession

The donor, while alive, can revoke his *hibah* at any time before delivery of possession of the property. So in a case where the donor, after making the *hibah*, and before delivery of its possession, dies, the property shall be included in his legacy. In another case, if the donor prohibits the donee from taking possession of the donated object, the *hibah* is not valid. The recipient, by accepting the *hibah* becomes the immediate owner. He can do whatever he wishes to do with it thereafter. But before the recipient receives the gift the donor can revoke the *hibah* but not after.

3.7.2 Revocation After Delivery of Possession

The donor is entitled to revoke his *hibah* after delivery of possession by consent of the donee, and if the donee refuses he could go through a decree of a court where the judge can annul the *hibah*, if there do not exist the impediment to the revocation which will set out the articles hereafter. Such revocation of the *hibah* is possible, except for the following circumstances:

- (a) The donor is the husband and the donee is the wife, or vice versa. As long as the marriage still stands.
- (b) The donee is the blood relation within the prohibited degree, such as ascending or descending relations in a family.
- (c) The donee is dead
- (d) The donated property has gone out of possession and proprietorship of the donee either by sale, *hibah* or other mode of transfer
- (e) The *hibah* property is lost or gone waste.
- (f) The basic character of the property had changed, for example a piece of land had changed into a township due to development by the donee in his own capacity as a land developer.
- (g) Some other things are so mixed up with the *hibah* property and their separation is not possible.
- (h) The gift is with exchange that is when something had been given to the donor as consideration for the gift, either by the donee or some other persons on behalf of the donee, and if the donor had received it.

3.7.3 Donor Prohibits Donee From Taking Over Possession

In the case where the donor *hibah* the item, but before the recipient could take possession of the said item or property, then the donor prohibits the recipient from doing so, then the revocation shall be valid. After the recipient takes valid possession of the item or property, on his own accord, he can return the item or property back to the donor. If, however the donor unlawfully takes it back the possession of his *hibah*,

and it perished in his hand, he is to be held responsible and liable to pay compensation to the recipient.

3.7.4 Revocation of *Hibah* to Parents, Brothers and Sisters

A person giving *hibah* to his parents, brothers and sisters, or children of his brothers or sisters cannot revoke the *hibah*. This is due to the fact that *hibah* made between them was made on the account of love and affection. The same reason goes to *hibah* between relatives which are also favored because they are made on account of affection.

The Prophet SAW had said that;

‘The best alms dedicated to pious uses is that which is given to relatives deserving compassion.’

Another *hadith* narrated by Ibrahim Nakh’I stating of Umar as saying;

‘The person who makes a gift in favor of a relative within the prohibited degree and that relative takes over possession of that gifted property, it is not valid for that person to revoke that gift.’

Another *hadith* narrated by Ata and Mujahid stating of Umar as saying;

‘The person who makes a gift in favor of a relative within the prohibited degree and that relative takes over possession of that gifted property, it is not valid for that person to revoke his gift and the person who makes gift in favor of the relatives not within the prohibited degree it is not valid for to revoke unless he has received any exchange for that gift.’

The traditions stated above supports the principle that *hibah* without delivery of possession is not complete. Possession is given importance on the ground that it serves as a block against revocation. The directive prohibiting revocation is with special reference to the affection between the said relatives. In revocation there is an element of dissatisfaction and hostility, which extinguishes affection. It is contrary to

gift to a stranger where the donor has the right of revoking such gift till he has not received anything in its exchange.

3.7.5 Hibah to one's Spouse

Gifts serve the purpose of promoting matrimonial amicability, where as revocation of a *hibah* creates disaffection and dislikes between them. Marriage relation means love and affection. It is therefore forbidden for any one of them to take a step that negates love and affection between them. That is why revocation between intimate ones and between relatives is forbidden

If a husband gives a *hibah* in favor of his wife, but later on the marriage dissolves, the husband cannot revoke the *hibah* made by him as it was made during the continuance of marriage. Apparently at that time the husband's intention could not be that of making the *hibah* for an exchange.

According to Islamic jurists revoking *hibah* made by a husband to a wife or vice versa is hateful. They maintained that the husband and wife in this respect are governed by the rule of 'close relationship'. That is why inheritance originates from both sides without any exception and because of this marriage relationship evidence of the one in favor of the other is not acceptable.

3.7.6 Revocation of *Hibah* if Property is not in its Original Form

When a lawful revocation of *hibah* takes place, it is only valid if the *hibah* is still in its original form. For example if anyone *hibah* paper and the recipient writes on it, it cannot be returned. Or, If someone *hibah* a barren piece of land and the

recipient build a house on it, it cannot be revoked. The fact is that any increase attached with the hibah property becomes an impediment to the right of retraction

In short, the increase accrued with the original property, whether it is because of the act of the donee or in natural way, shall be an impediment to the right of retractions. The reason is the original becomes impossible to be returned without the accretion and that the accretion is not the original property that retractions may be affected, as it is not possible to separate the original property from its accretion. This does not apply to increase in price of a property, as property prices changes with demands and supply, the corpus remains the same state as the old. . But if the change in it does not effect the original position of the *hibah*, eg when a *hibah* ewe gives birth to a lamb, then the ewe is to be returned but not the lamb.

A *hibah* cannot be revoked when there is a change in the physical appearances of the property, e.g. the name of the property had changed or the property was a building site where a building is constructed or trees planted by the donee. But, if the increase is a separate thing it does not prevent revocation.(majelee)

If the donee had put the property given in *hibah* to sale or to *hibah* by the donee to another donee, the rights to revoke the *hibah* does not continue (majelee)

3.7.7 Revocation After the Death of the Donor

The death of the donor does not allow his heirs to revoke the *hibah*, because after the covenant of *hibah* is made the property does not remain heritable, for the heirs cannot succeed to the property which does not belong to the deceased at the time of his death. Whereas if the donor after making the covenant of *hibah* dies before making over possession to the donee, the property shall be included in his legacy.

There are two opinions reported in respect to the question whether the donor has or not the right to revoke his *hibah* during the death illness of the donee. One is to the effect that he may revoke his entire *hibah*. The other is to the effect that it may be revoked with respect to one third only; because the donee is being stricken with death illness involves the rights of his heirs in the property.

3.7.8 Revocation After the Death of the Donee

When a donee dies, his property devolves upon his heirs. If the donee, during his lifetime, transfers his property to someone else the donor has no right to revoke the *hibah*. Likewise, the donor, after the death of the donee, has no right to revoke the *hibah* because with the death of the donee, the rights of his heirs are simultaneously created in that property.

3.7.9 Donee's Ownership Lost

If a *hibah* property passed out of the ownership of the donee, the donor has no right of revoking it, because the *hibah* property has passed to the ownership of another person. The *hibah* property has thus become the property of another person by transfer of its ownership. Besides this, when the donee makes actual use of the *hibah* property, the *hibah* attains its final purpose. Giving the right of revoking such a *hibah* would mean the extinguishment of the rights of the donee in the property, which is not possible as the property now belongs to another.

If the *hibah* property is destroyed or lost or the donee himself utilizes it, or the *hibah* property goes out of the possession of the donee, or the donee gives the property to his minor son or to a stranger by way of *hibah* or otherwise, or the property in possession of the donee increases in utility (but not in price), it then shall not be valid for the donor to revoke the *hibah*.

If a *hibah* is made of a building and the building is destroyed completely, it shall be valid for the donor to reclaim the land (by way of revocation) because the diminution in the corpus of the property will not act as an impediment to revocation.

When a *hibah* property is perishable or has perished or passes out of the ownership of the donee through *hibah* or otherwise to his minor son or to a stranger or the *hibah* property is spent on welfare by the donee himself, it shall not be valid for the donor to revoke his *hibah*.

3.7.10 Revocation After Compensation

Receiving compensation for a *hibah* is an impediment to revocation of the *hibah* because the exchange which is the purpose of the *hibah* had been completed. When the donee gives the exchange of the *hibah* to the donor and the donor takes possession of the same, the donor shall not be entitled to revoke his *hibah* nor shall the donee be entitled to claim compensation already given.

3.4.11 Conclusion

Since *hibah* a alternative method of property disposal, we can choose anyone of the methods available depending on the situations. Whether it is an ordinary *hibah* of transferring the ownership of a property between a father and a child or a conditional *hibah*, preferential *hibah* or even *hibah ruqba* and *hibah umra*.

Even though *hibah* cannot be revoked freely, there are certain conditions where revocation is allowed. This condition only applies only when taking over possession of the property is not yet finalized or if is already completed only with the consent of the donee.

CHAPTER IV

THE APPLICATION OF HIBAH IN MALAYSIA

4.1 Introduction

The concept of *hibah* in the recent history of Malaysia has been revived in many ways. Some forms of *hibah* play nominal role while others are quite instrumental in the formation of new financial products. Yet there are few institutions who utilize *hibah* as an instrument of estate management for their clients. All of these are discussed respectively in the following sections.

4.2 The Integration of Hibah in Various Products of Islamic Banks

Islamic banks use *hibah* to substitute interest in attraction of depositors and also as an incentive to make the borrower pay their dues in due time. So far there are only two such products in the market:

4.2.1 Wadiah Saving Account:

It is a saving account based on the Islamic contract of *al-wadiah* which refers to a concluded contract between the owner (depositor) of the goods (money) and the

custodian (bank) for safekeeping. The depositor grants the bank their permission to utilize the money for whatever purposes permitted by *syariah*. The bank in return guarantees the value of the deposit, thus creating a *wadiah yad-dhamanah* contract. The bank will provide *hibah* (gift) should there be any profit from the utilization of the deposit. An example of this is the practice of Public Bank Malaysia Berhad which gives a *hibah* rate of 1.72% per annum on its *wadiah* saving amount (effective from 16.7.2003).

4.2.2 Car Financing by Hong Leong Bank:

Hong Leong Bank has integrated *hibah* in its car financing scheme based on the *syariah* principle of *al-ijarah thumma al-bai*. Basically it is similar to the ordinary hire purchase scheme. However, there are certain features that differentiate these two schemes. Customers will receive cash incentive of 0.5% of their financing amount when they pay their installments promptly, i.e. payment must be made on or before the due date for continuous period of 12 months starting from the first installment due date. This cash incentive can be understood as *hibah*, i.e. a gift from the bank to the customers.

Takaful (Islamic Insurance)

One of the important applications of *hibah* is in the contract of insurance which in fact makes the contract dependent on it. This is so, because under normal circumstances, a commercial contract that involves indeterminate and doubtful results is not acceptable in Islam. Since insurance is considered as a commercial contract, the same applies to it. To be acceptable in Islam, insurance contracts should be transformed to 'donation contract', i.e. *hibah*. This necessitates a clear declaration by the policyholder of his intention to donate the whole sum of the premium or part of it to the beneficiaries. In this contract the policyholder donates the premium and eventually he or his nominee will be the recipient of the donated amount.

4.2.3 The Donation by the Policy Holder

When a policyholder subscribes to an insurance policy he consents to giving a portion of the premium as a donation termed as *tabaru'*. *Tabarru* means giving gift or executing social undertaking with good intention of helping others. In this context *tabarru* can be considered as an *akad takaful*. The insurance company invests the accumulated amounts of premium wholly based on the principle *mudharabah*. The insurance company pays all technical and management expenses out of the accumulated fund, and then the balance which is called surplus, not profit, belongs to the policy holder and not to the shareholders of the insurance company.

In fact, in any kind of policy, the contribution made by the policyholder to the *Takaful* insurance company may be divided into two portions:

- (i) One portion can be regarded as partial capital to the *mudharabah* financing arrangement,
- (ii) The remaining portion would be given away as a *tabarru* (donation) which is kept in the charitable account of the insurance company. The requirement of making donations applies to all policyholder which means that every participant agrees that part of their *takaful* subscription be considered *tabarru*. Accordingly all funds in the *tabaru'* fund shall be used by the *takaful* insurance company when the need for payment under the policy arises. This amount is almost equal to the amount needed for any claims by other subscribers in the event that they make claim for any loss or even death of the subscribers.

The account credited into the charitable account of the company as *tabarru* (donation) would be utilized by the company to provide a material security for the benefit of the deceased (participants) after the unexpected risk occurs over the subject matter of the policy. The reason why the portion of the contribution is allocated as *tabarru* is that under Islamic Law *tabarru* is like *sadaqah* (charity) or *hibah*. The nature of *tabarru* is that once the donor gives it as a *tabarru* the

ownership from him is transferred immediately to the donee without any consideration. In other words the portion of the premium specified for the *tabarru'* account is released from the ownership of the donor, and as needed would be distributed to the participating beneficiaries (policyholders including the donor himself) or their donees.

This kind of undertaking and care for each other among the participants to those who are unfortunate can be understood as approving a sum of money for this purpose. In other words whatever fund accumulated by *tabarru'* or any profit obtained from the investment of the fund can be assumed as monetary aid among the participants.

4.2.4 The Donee

Both common law and Islamic Law share the same views that it is necessary in an insurance policy that the policyholder should nominate one or more persons as their nominee.

A nominee is considered the recipient of the policy upon the demise of the insurer. In Islamic Law a nominee may be subjected to the principles of *wisayah* which requires the nominee to be a trustee. The principles of nominees under principles of *wisayah* in turn are governed by the doctrine of *al amanah*. The word *amanah* means reliability, trustworthiness, good faith, faithfulness, honesty and fidelity, containing the concept of *al-amin* implying trustee, guardian, agent, authorized representative and safe keeper. Therefore, a nominee is a person who is empowered by another to undertake the responsibility of his property as a trustee.

The nominee therefore is a trustee to receive the benefits accordingly from the insurer and later distribute them to the beneficiaries¹⁹ and not the beneficiary who

¹⁹ Based on the Quranic injunction “*Verily Allah SWT doth command you to render back your trust to those whom they are due.*”

can enjoy the benefits of the policy absolutely as a gift (*hibah*) from the policyholder. Under Islamic Law, there are a number of authorities, which justify the nomination of persons as nominees to hold the subject property in trust both in commercial and personal transactions.

According to the National Council for Muslim Religious Affairs of Malaysia, in 1773, it was summed up that in an insurance policy, a nominee is nothing more than a trustee whose obligation is to receive the benefits over the policy and distribute them among the beneficiaries of the policyholder according to the principle of *mirath* and *wassiah*.

Therefore it was not wrong for the policy holder to name a nominee for the security and fair distribution of the benefits over the policy. The nomination was not considered as a *hibah* nor an ownership over the benefits of the policy but only a mere trust in which the nominee is under the obligation to receive the benefit from the policy and distribute them among the beneficiaries of the policy holder according to the principle of *mirath* and *wassiah*.

If however, the nominee is among the heirs of the policy holder, then he is entitled only to the portion according to the principle of *mirath*. But if the policy holder made a will for the nominee, he may get up to one third of the benefit. If the nominee is among heirs of the policy holder and the policy holder made a will for him (the nominee), he may still be entitled up to one third of the benefit, subjected to the consent of the other heirs of the policy holder.

Contrary to the above it is claimed that an insurance policy should be regarded as *hibah* and the nominee in it should be enjoying the benefit of the policy absolutely as a gift for him from the policyholder. This might be valid argument based on the principle that each and everybody have the freedom of making *hibah*. Nevertheless, one has such power over his property if he has an absolute and perpetual proprietorship over the *hibah* property. In this case, the power of *hibah* can be exercised in relation to the insurance policy, where the gift can made conditional on the death of the policy holder. This is because the nomination is made by the policy holder based on the understanding that if the policy holder dies before the

maturity of the policy, the nominee will be an absolute beneficiary of the *hibah* (the policy). Since the possession of the property can be passed only upon the death of the policyholder, the donated property therefore can distribute only in accordance to the law of wills or *wasiyah* that is ultimate subjected to rule of *faraid* and not of *hibah*.

Hibah as an Instrument of Estate Management

In Malaysia *hibah* had not been widely used as an instrument of property management by the Muslim community as this concept had not been widely understood. Instead, distribution of assets of a deceased among his heirs had always been done by two common methods, i.e. by a making a will or through operation of law namely *faraid*. Both methods of estate distribution have serious shortcomings as they need to be executed through lawyers and following various procedures.

The suitability to bequest in order to provide adequate method to current property management is limited. This is due to the nature of bequest in Islam that only allows the maximum of one third of the property to be distributed to the beneficiaries upon the death of the proprietor. Moreover, no bequest can be made to legal heirs of the donor as they are totally subjected to the *faraid* laws of property disposition.

In case where the heirs disagree on the distribution, they have to settle it through court battles. These would require large sum of money and sometime need a long time. Take for example the distribution through a will the survivor need to appoint an executor or a lawyer to be heard in a civil court for distribution of the asset of which 1/3 goes to the beneficiaries and the other 2/3 goes to the heirs through *faraid*. The executor should in the first place be applying to the court for the grant of probates, after which he would then be able to transfer the properties to the beneficiaries of the will, whereas at the same time he would have to apply for *faraid* certificate specifying the shares of the legal heirs. All these need to be paid out of the estate.

To distribute the property among the rightful beneficiaries and heirs takes a very long time and becomes very costly as it involves a longer court time and with huge lawyers' fees, as they need to comply with the provisions of the Probate and the Administration Act, Will Act and the *faraid* laws. Statistics from the department responsible with the administration of small estates reveal that there is a serious delay or backlog in processing the application of estates distributions. The department involved had identified many factors which contributed to the delay. Although several measures had been carried out to overcome these problems, the process is still cumbersome. Not to mention the process had sometimes disrupted relations among family members because of disputes.

The disposition of movable properties through *faraid* is less a problematic than that of the immovable properties such as land and building. Supposing the distribution is agreed to by the heirs, yet the division of the property may, sometimes not be possible as there are limitations in dealing if the property is small and to be divided into many parcels, as there exist laws limiting the subdivision of land into smaller portions. For example agricultural land of an area of less than one acre cannot be subdivided into smaller parcels. The only solution commonly used is the insertion of names of the beneficiaries as co owners of the property. With the introduction of new clause in the Group Settlement Act 1960, the ownership of a property in Felda schemes should be transferred to the surviving widow of the original settler, and not among his children. This provision is not however generally applicable to all properties.

The laws of succession (*faraid*) has its main disadvantage of distributing properties among heirs and beneficiaries without considering the size of the fractional division of the property which sometimes becomes so small and tended to result in a decimation of the original estate into increasingly smaller parcels in the hands of succeeding generation of heirs. The rigorous requirements of the law of inheritance could be mitigated only in parts by the use of will.

The Islamic rules of succession are made to ensure the rights and interest of family members are protected and guaranteed. Under current circumstances and the

drastic individualism among Muslims, it is often thought that the implementation of the law of succession and wills is unfair to some members of family.

The above discussion clearly indicates that an alternative method of distribution of estate is needed in order to rectify the injustices that are occasioned to some members of family in some exceptional cases. This alternative is seen to be the utilization of *hibah*.

4.2.5 Hibah as Alternative to the Law of Succession

Faraid and *wassiah* are largely related to the distribution of property after death of the owner. As not to compromise or contravene the rules of Islamic law of succession and bequest, many Muslims are reluctant to use *hibah* as an alternative. This is due to the fact that *wassiah* and *faraid* are seen to be the only tool available to them and also due to the lack of knowledge and the very fact of the existence of *hibah* does not cross the mind of many Muslims in the country, even though Muslims have the choice of how their properties should be divided to their family members while they are alive or after their death, provided the choice they make be in the interest of the family and not in any way imposed injustice to them.

Nevertheless, certain portion of Muslims being critical of the law has desired to avoid the application of succession laws where they could have more freedom of disposition than was available to them under those laws. Such a mechanism is available under the law of *hibah* which allows them to waive their rights during their lifetime in whatever way they choose.

For this group of Muslims who could manage and plan for their properties while they are alive, the passing of the rights of ownership of properties to successors or heirs by the methods of *hibah*, now generally known as gift has additional advantages. This will be discussed in the next.

4.2.6 The Advantages of Hibah

As consequent to the process of reinterpretation of the provisions of the Holy Quran and the Sunnah by employing *ijtihad*²⁰ in the application of the *syariah* in this modern world, the Muslim Law should be broad based and the provisions of the accepted school of *fiqh* be taken into consideration for the purpose of restatement and codification of any particular provision of Muslim Law.

Viewing the accept *hibah* in the above perspective, it is an alternative method of property disposal by Muslims in Malaysia. There are several advantages of this method which need to be appreciated. They are as follow.

4.2.6.1 Strengthening Love and Concern

A clear advantage of *hibah* can be seen in the way the gift is given, that is while the donor is alive. Unlike *wassiah* where the disposition of the property is done after the death of the owner whereby is is done in conjunction with the present laws and regulations. *Hibah* is capable of strengthening family love and concern. *Hibah* from parents to their children especially those children who are less fortunate than others or from brothers and sisters to less fortunate ones among themselves cause love and strengthens family bond.

Narrated Aisha:

*I said, "O Allah's Apostle! I have two neighbors; which of them should I give a gift to?" The Prophet said, "(Give) to the one whose door is nearer to you."*²¹

²⁰ Ijtihad is an effort or an exercise to arrive at one's own judgment by the use of human reasons in the elaboration and explanation of the Syariah Law

²¹ Hadith Al Bukhari

Before any disposal of property, it would be proper for the donor, the donee and all the heirs to discuss the transaction and the reasons for doing so, if need be and to be understood by all the parties concerned, and finally the agreement for the final transaction. This is to ensure the consent of everyone and to avoid conflict in the family or among the heirs.

The holy Prophet SAW said,

“Exchange gift among yourselves and thus strengthened mutual love on each other”

4.2.6.2 Harmonization in Family

If the ones making the *hibah* continue exercising his rights of ownership in respect of the property given in *hibah*, then the *hibah* shall be considered to be null and void. After all these have been taken into account, then the disposal of the property be done accordingly and all the formalities, i.e. the transfer of property or the appointment of the trustee and the documentation thereafter.

The law governing *hibah* does not specify that it must be given to a destitute or poor person; a gift can also be made to a rich person, to an organization, an institution such as schools and universities or for charitable organizations. However, it is essentially encouraged that the poor person or a charitable organization should be made recipient of the gift, as they are more deserving. However the giving and receiving of *hibah* is always recommended by the Prophet even between Muslim and non-Muslim. *Hibah* between family members is the most ideal, e.g. from father to wife or to children.

The Prophet also emphasizes on making a habit of exchanging gifts, as it was beneficial in generating mutual relationship and strengthening love and infirmity and takes away rancor.

*If anyone seeks to take back a gift he is like a dog that returns to its vomit, an evil example does not apply to us. It is forbidden to take back what has once been given as a gift.*²²

In another *hadith*, the prophet has said:

*Give present to one another, because present removes grudges*²³

Yet there another saying of the prophet to the effect that,

*“... To spend out of love for Him for your kin, for orphan, for the needy, for the wayfarers, for those who asked and for the ransom of slaves; to be steadfast in prayer and practice regular charity to fulfill the contract which you have made; and to firm and patient, in pain (or suffering) and advisory”*²⁴

4.2.6.3 The Freedom of the Donor

Considering the difficulties involved in the distribution of estate of a deceased through inheritance and will, *hibah* is seen as the best solution, since the property can be transferred to family members with terms and conditions merely decided by the donor himself, and, of course with the agreement of the other heirs or would be beneficiaries. But, this method of property disposition should adopted when principles of justice demands it and is made understood by all in the first place. Without that, heirs and would be beneficiaries would consider this method of disposition as unfair and injustice to them.

²² Al Bukhari and Muslim, Mishkatul Masabah, Chapter on Hibah, (Tran) Karim Al-Haj

Maulana Fazlul. Op.cit. book II No 18, pg 316

²³ Al Bukhari and Muslim

²⁴ Al Baqarah 177

4.2.6.4 The Conclusiveness of the Transaction

Unlike inheritance and will which are subjected to various conditions and procedures to be followed, such limitation do not exist in the case of *hibah*, because in this case the owner divests himself of all rights in the property immediately, while in the case of *wassiah*, not the owner but the heirs are deprived. Therefore, once the owner of the property make a gift to his heir it becomes conclusive and indisputable provided the normal condition of *hibah* are satisfied.

4.2.7 The Permissibility of Hibah as an Alternative

It was discussed early that making hibbah which is not fair to some of heirs is valid but sinful. Additionally it was also mentioned that wasiyyah was invalid if the rights of the heirs of the deceased were infringed therewith. Would this be true in case of hibbah where the intention of the donor is to distribute his property through the law of succession?

The answer to the above question is that the rules in the Quran concerning inheritance are not always binding. It is clear that Muslims are allowed to have the right not to abide by the rules of the *faraid* by releasing their property through will either unilaterally or by agreement. Where the portion under will is more than 1/3 the agreement of the heir thereto is needed. Similarly, a Muslim can decide to arrange the distribution of his property before his death through a right technique of the *syariah*. For this *hibah* is the ideal mechanism. It is however should be noted that this solution to the problem of property disposition in no way rules out the commonly used transfer under *faraid* and *wassiah*.

Hibbah as Practiced by Some Financial Institutions

A Muslim is free to donate his property irrespective of being in the form of goods or real estate. The latter is called *harta* and the donation thereof is termed as *hibah harta* which will be mentioned below.

4.2.8 Hibah Harta Defined

Hibah harta is a gift of landed property for the loved ones during ones lifetime. For a lawyer *hibah harta*, is a trustee product requiring a private contractual arrangement whereby a person (the donor) allocates his property during his lifetime to his loved ones (the donee). In doing so, the property thus will be held in trust and managed by an organization. The property can be in the form of both movable and immovable properties that can be bought and sold. Just like normal form of *hibah*, mentioned early, *hibah harta* involves three parties; the donor, donee, and trustee.

The Majlis Fatwa Wilayah Persekutuan had approved this. Upon the donor's demise; the trustee will then transfer the gifted property to the donee. As *hibah* is a private contract during the lifetime of both the donor and the donee, the property will not form part of the donor's estate, and not subjected to the Probate and Administration Act 1959 and *faraid*. The transfer of property shall be free of complications.

Under the procedure *hibah harta* given by parents to their children may be unconditionally withdrawn or terminated at any time. However, *hibah harta* by the children for their parents cannot be withdrawn. The procedure also allows that the property be transferred back to the donor if the donee dies before the donor.

Hibah harta is not subjected to laws relating to estate (deceased estate). The asset of the gifted will be preserved and managed by the trustee, hence preserving the security and well being of the donor. The gifted property will be wholly owned by the donee only after the demise of the donor.

The administration of estates would normally take between 6 months to 10 years under normal circumstances. There are unforeseen problems and many rules and regulations under the various regulatory authorities, which may prolong the transfer even longer. The processing time for a will is a little bit shorter than *faraid*, that is between 3 to 6 years, as the terms of a will to be read in a civil court. This is even made worst as the procedure is subjected to the various Act and Regulations such as Probate and Administration Act, 1959, Rules of the High Court 1980, *Faraid / Will Act* 1959. For the administration of an estate under *hibah* is believed to be very much shorter. The time taken to perfect the assignment of subject property under *Hibah Harta* from the trustee to the beneficiaries will take only between 14 days to 3 months.

4.2.9 Hibah Harta as Practice by Bumiputra Commerce Trust Berhad

One of the products of Bumiputra Commerce Trust Berhad is *hibah harta*. It had been incorporated in the Assets Planning Schemes of the BCTB. The advantage of this is that the customers have the option of using the gifted property for investment purposes, where the bank's Assets Planning Consultants and Fund Managers are giving professional advice. The gifts provided under *hibah harta* are not subjected to any bankruptcy or liability claims from creditors because it is being a trust product.

The most visible advantage of *hibah harta* is that it would lessen the immediate financial constrains faced by beneficiaries, while at the same time maintaining harmony among family members, by the way properties are being disposed after agreement among family members.

Additionally, beneficiaries are not burdened by enormous task involved in administration and distribution of assets, as all administration work is done by the bank's personnel.

4.2.10 Hibah Harta as Practiced by Amanah Raya Berhad

Amanah Raya Berhad was established and registered under The Companies Act 1965 and the Public Trust Corporations in 1st August 1995. It is wholly owned by the Government of Malaysia. It was formally the Public Trustee and Official Administrator Malaysia since 1921. Amanah Raya Berhad is under the Ministry of Finance Malaysia (Incorporated) as the shareholder, headed by the Minister in the Prime Ministers Department.

The main function of Amanah Raya Berhad is as being a trustee company that provides professional services in trust and administration of estates. Under the planning function, Amanah Raya Berhad provides three products: (i) Muslim will writing, (ii) Trust and *waqf* and (iii) *Hibah harta*.

Under the concept of hibah *harta* the following components should be present: that there must be a donor, the beneficiary, the property and the transaction with Amanah Raya Berhad being the trustee.

The donor must be a Muslim and capable of owning property, and should be the owner of the said property. As the case may be, the donor may still benefit from the property provided there is consent after *aqad*.

The beneficiary should be capable to own property. If being a minor, a guardian is to be appointed to manage the said property. In the event the beneficiary predeceased the donor, the property becomes the beneficiary's estate

The property could be in the form of movable property such as cars, lorries or other valuable goods or immovable properties such as houses, buildings or land. All of which must be something valuable. They must have been acquired by *halal* means and already existed during the *aqad*.

The transaction should be concluded through an *aqad* whereby the donor declares the hibah through *ijab* (offer); the beneficiary accepts '*qabul*', and a trust deed is signed between donor and trustee.

Hibah at Amanah Raya Berhad may incorporate '*aqad umra*' and '*aqad ruqba*'. These two conditions can be accommodated into the *aqad* by the donor and should be accepted by the donee. *Aqad umra* means that the *hibah* is only during the lifetime of the beneficiary provided that the gift reverted back to the donor after the death of the beneficiary. While *aqad ruqba* means conditional gift where death of the donor or the beneficiary would result in the survivor (the donor or the beneficiary) owning the property.

Amanah Raya Berhad is being the trustee of the property, to whom the property is to be delivered to and to be vested upon. The trustee takes possession of the property and becomes the registered owner and may invest the trust property in whatever manner the company thinks suitable at that moment. If the property is in the form of commercial shares Amanah Raya Berhad Investment arm would look after the investment.

The Trustee (Amanah Raya) maintains the property and would pay all dues imposed on the property as required by the relevant authorities such as payment of annual quit rent to the Land Office of the District, payment of annual assessment to the town or city council and other miscellaneous bills. If the property is in the form of landed property such as houses or shops and at the same time the property is under rental to third party, then it would be the duty of Amanah Raya Berhad to collect monthly or annual rental from the tenant. Whatever income derived from the investment as mentioned above, Amanah Raya Berhad would utilize the income to pay maintenance to the beneficiary. At the same time it becomes the duty of Amanah Raya Berhad to execute any other terms stipulated in the trust deeds.

4.2.10.1 The Benefits of Hibah at Amanah Raya Berhad

Hibah harta through Amanah Raya Berhad provides many benefits to property owners in their quest for the disposition of their properties to their love ones while they are alive. Assets distribution can be done expediently with low cost and they be rest assured of minimum hardship to their beneficiaries compared to distribution through faraid which sometimes may take a very long time due to various problems as described earlier. The trustee (Amanah Raya Berhad) being owned by the government of Malaysia had more than 80 years of experience is capable of executing the transfer of property efficiently. The process of transfer of assets is professionally done with privacy and confidentiality.

Conclusion

4.6.1 Possible Grey Areas

Some Islamic scholars request that *hibah harta* be studied further and need further interpretation. It had been known that in Islam the act of direct giving during one's lifetime has an immediate effect. In gift, once the legal transfer is completed, the gift must be given to the donee that takes possession and should not be held by a trustee. The idea of the gift is given back to the donor by the trustee after the death of the donee does not go with the spirits of giving, that once given it is not meant to be taken back.

Another question is that full ownership of the property is actually happening after the donor's death, which, in this case would only comply with the rule of the

faraid and asset distribution should follow the spirit and proportions as already fixed in *faraid* distributions.

Other arguments focused on the creation of trust and agreement between the donor and the donee. If someone gives something in *hibah* to another and creates a trust and an agreement and still hoping to gain from the asset, then there exist some questions on the validity of the *hibah*. Some says that this is not *hibah*, but some kind of convenient arrangement between two parties. There should not be any residual rights on the part of the donee.

CHAPTER V

ANALYSIS: PROBLEMS AND SOLUTIONS

5.1 Problems

5.1.1 Lack of the Understanding of the Concept

One of the commonest problems in this concept is the lack of understanding of *hibah* itself among the Muslim community in the country. Muslims in the street generally had not heard of the term *hibah*, even though many had heard the word gift but they do not know the concept had a far wider meaning than the word gift itself. It had only concentrated among the Muslim scholars and academicians. Most *ulamaks* and religious personnel who know this concept sometimes do not look at the importance and the impact that this concept has towards the Muslims.

This narrow interpretation was caused by lack of awareness, lack of guidelines by the relevant authorities and also lack of suitable and useable instruments of doing it. The relevant authorities share some of the weakness by their lack of support and cooperation in the practice of *hibah*.

5.1.2 Restriction in Land Dealing

As mentioned in the National Land Code sec 205(3), any agricultural land of an area of less than one acre, no other dealings could be done on it, such as subdivisions and multiple ownership. It also applies to other agricultural land of other sizes where the final undivided share of each owner is less than one acre.

Another restriction is on charge, where the charge holder would refuse to surrender the land title for transfer of ownership to the beneficiary or the trustee. These two restrictions could hinder the implementation of *hibah* in the country.

5.1.3 Controversy Among Muslim Jurists

Muslim jurists in the country may not be agreeable to all the concepts of *hibah*. Several modified concepts of *hibah* have been introduced by the banks and trustee companies in Malaysia. For example, the appointments of agent to receive the property donated in *hibah* contract on behalf of the beneficiary and at the same time giving the donor rights to use the property give rise to controversy. Appointment of agents to receive the property donated in *hibah* contract is probably controversial as some Muslim jurists may argue against it.

At least there are some writers who view it as acceptable. This was the same case as some of the Islamic banking products that received criticism during the early days of their implementations. But through the course of time those products are now acceptable by many. It is believed that 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 the nature of Islamic law- which is dynamic and progressive as history has shown it.

5.1.4 Possible Confusions

It must be noted that a lot of confusions in *hibah* concept is finally accepted and enacted. Even though the scope of *hibah* can be readily spread among the people by educating them of the subject matter, but the implementation of the concept might cause some problems, such as:

- (i) The nature of contract concerning *hibah*
- (ii) appointment of trustees
- (iii) fees for the trustees
- (iv) compulsory stamp duty
- (v) governing principles
- (vi) judicial procedures
- (vii) the dividing line between *hibah* and *faraid*

It is suggested that it is most important to look back at some of the problems as mentioned above so as to make *hibah* another universally accepted tool for property disposition. The understanding of the concept and the support of academicians and Muslim Jurists and finally the acceptance of the general public would make this method of property disposition a success.

5.2 Solutions

5.2.1 Spreading the Concept Nationwide

The concept and meaning of *hibah* is very wide. Most of us had in the past practiced *hibah* in one way or another without even knowing it. The understanding of the concept through the reinterpretation of the Holy Quran and the Sunnah and employing *ijtihad* in the application of *hibah* must be fully understood. Muslims in Malaysia should be broad based and the provisions of the accepted school of *fiqh* be

taken into consideration for the purpose of the reinstatement and codification of the Muslim Law.

The balance is too, held in favor of one which is more akin to the basic norm of Islam and the genius of the people, so to meet and answer the challenges of the time.

There is a need for the concept to be understood and most importantly the benefits of *hibah* must be spread widely through seminars and other various mediums such as radio and television, books and magazines, so long as to make the Malaysian population aware of the advantages derived from its application. As at the moment the Muslim community is not aware of its existence. Education program, training and research about *hibah* should be done extensively throughout the nation, if possible the reinterpretation of *hibah* with much wider coverage and making comparison with other methods of property disposal such as *faraid* and *wassiah*. This enrichment of knowledge through research, training and specialized education at higher levels such as colleges and universities on the concept of *hibah*, and a further reinterpretation is being hoped to enlighten the society to the importance of the new concept of property disposal. All the while only *faraid* and *wassiah* are the only methods of property disposition known to them.

It is most important to understand the *hibah* concept has to be achieved first, considering the contemporary socio economic reality of the Muslims . A lot of wisdom is needed in order to attain the results. Achievement in this context goes as far as maintaining, protecting and better management of Muslim wealth and properties. Thus creating or even rediscovering new dimensions for property and wealth management.

Adequate research, training and specialized education on *hibah* are required to be taken into consideration as an urgent task by the government with the participation of the various institutions of higher learning and training institutes. Education program, training and research about *hibah* should be done extensively throughout the nation, if possible the reinterpretation of *hibah* with much wider

coverage and making comparison with other methods of property disposal such as *faraid* and *wassiah*.

This enrichment of knowledge through research, training and specialized education at higher levels such as colleges and universities on the concept of *hibah*, and a further reinterpretation is being hoped to enlighten the society to the importance of the new concept of property disposal.

5.2.2 The Administration of Hibah

As far the administration of *hibah* the Religious Authorities play little or no part at all, but are taken over by the commercial or business organizations such as Amanah Raya Berhad , the banks and financial institutions who saw the business potentials of this concept. The concept is now being spread by these commercial organizations as can be seen through the various seminars and conventions now being organized throughout the country.

In order to implement *hibah* as a concept of property disposal among Muslim it is important for the State Religious authorities to have proper planning so as not to cause difficulty. It is important to focus attention to the creation and the management of instruments used, because any weakness or shortcomings will result in negative implications and is not inline with the wishes of the property owners.

Code and regulations about *hibah* should be regulated just as in countries like Jordan and other Muslim countries which enabled the revocation of *hibah* by a father or grandfather. However there had been some problems associated with it especially the authorization and the power of the relevant authorities concerning *hibah*. There had been numerous cases decided by the Syariah Court, but there had been cases decided by the Civil Court. The legality of *hibah* through trustee companies had raised questions also among Muslim jurists. It needs *fatwa* if it is thought to be not binding it it is not gazetted by the authorities as yet. To date on the State of Selangor had enacted the *hibah* Act, but has yet to be gazetted.

5.2.3 Task of the National Fatwa Board

The National Fatwa Board has the duty to discuss the issue which requires to be taken into consideration as an urgent task. Even though the *hibah* concept was already approved by the Jawatankuasa Perundangan Hukum Syarak (Majlis fatwa) Wilayah Persekutuan on 11th October 2000, the concept was not fully implemented by other Religious Authorities of other States, but was somehow implemented by the banks, financial institutions like Bumiputra Commerce Trust Berhad and the trustee companies like Amanah Raya Berhad after realizing its business potential. The discussions should include the application of *hibah* in the financial and the property development in the country.

Whatever result discussed by this Board shall then be brought to the relevant regulatory authorities such as the State Islamic Religious Department to endorse and accept. It then becomes the duty of the regulatory authorities to enact a regulatory framework (Legislation on *al-hibah*). The establishment of this Regulatory Structure governing the institution of *hibah* shall be in accordance with the new dimensions for property and wealth management in the country.

It is indeed necessary to form a National Advisory Body to deal with *hibah*. The composition of this body should be broad enough to include, in addition to Islamic scholars and jurists, bankers, lawyers and academicians so that the advice of the council should incorporate the requirements of banking, insurance and the financial community and of the law in everyday practice and also to account the current trends and thought.

This is necessary in order to make the advice and ruling of the National Advisory Body relevant and contemporary. This will also integrate *hibah* laws into existing legal system. Any attempt to segregate *hibah* law from the general body of law or the dispute resolution process from the mainstream system should be avoided. At the same time the Trustee Act 1949 may be amended to incorporate the relevant provisions affecting the application of *hibah*.

5.2.4 The Involvement of the Syariah Court

At the moment there is no law or procedures concerning *hibah*. At the same time the Trustee Act 1949 may be amended to incorporate the relevant provisions affecting the application of *hibah*.

At the present time any issues involving dispute in *hibah*, except for the Federal Territory of Kuala Lumpur and Labuan, if any, is heard by the civil court. The Syariah Court in these states must be empowered to decide cases involving *hibah* by individuals, banks and financial institutions, lawyers and the court as well as government departments such as the Land Office.

5.2.5 Problems and Limitations of Property Disposal by Way of Faraid

The well known concept of property disposition of *faraid* however has many disadvantages to heirs of a deceased person. The process of distributing the property by way of succession or *faraid* in many cases is time consuming, complicated and costly. Not to mention the process sometimes disrupted relations among family members because of disputes. Admittedly, the administration of *faraid*, has to a certain degree created harm to the well being of the Muslim community.

Fractional shares of the *faraid* sometimes are not acceptable by some people and in many cases are being hampered by limitations created by certain land laws now in force. The wife's entitlement of 1/8 of the husband's property is not enough to support her and her family upon the demise of her husband. Even though the law on '*harta sepencarian*' is now recognized in Malaysia, wives still have to apply to the Syariah Court for the order, which sometimes takes a very long time to settle. This right of '*harta sepencarian*' is therefore not automatic upon death.

Islamic *faraid* or *mirath* does not differentiate between movable and immovable properties in estate distribution. All properties are considered as the same as far as distribution is concerned and all heirs are entitled to these properties

according to their fractional shares. Distribution of movable properties such as money or thing which have monetary value according to their fractional shares is less complicated and relatively easy and can be done speedily. Immovable properties pose a problem when they come for distribution according to these fractional shares. The problems that sometimes occur are the difficulty of settling differences among heirs or the finding of lost and unknown heirs. If the transfer is finally made, division of land is sometimes not possible if the size of land is too small to permit such a division. This would lead to land fragmentation and finally leads to economical loss of the land as the heirs are not cooperative enough to cultivate or develop the land.

5.2.6 Hibah as Solution

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 of 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 chosen and decided by the donor.

The Islamic rule 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. Thus the rule of inheritance as prescribed in the Quran as far as the heirs are concerned is not binding upon them. They have the rights not to follow the rules of the *faraid* by releasing their claims unilaterally or by agreement. But if a person decides to arrange the distribution of his property before his death but at the same time retaining the right to transact the property, there is no harm the *Syariah* Law to use the right technique of the *Syariah* to achieve this.

CHAPTER VI

CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

Hibah as an instrument of property disposal has been proven to be a practical method to be implemented. Being safe and do not consume much time in its exercise, should be considered by Muslims in the country. This should be considered without prejudice to the commonly used method of the *faraid*. Initial skepticism about this system and its inherent ability to meet the demands of the modern day property industry is hoped to be lessened and finally disappeared. It is also hoped that there is growing understanding and appreciation about *hibah*. With the passage of time and the experience over the years in seeing the practical implementation and the working of the system, the way forward shall become more clearly defined. The areas where new laws have to be enacted, existing laws revised and consequently amendments made to other applicable laws and procedures have come into focus.

6.2 Achievement of Research Objectives

It had been found out that this method of property disposal is suitable in the country as there are numerous advantages to Muslim property owners. The only foreseeable problem is the acceptance of the people. With the participation of the

financial and the *hibah* institutions in promoting this instrument of property disposal more and more Malaysians are using this method.

It is commonly known that we, unknowingly had been involved and had taken part in this technique when we opted for the Islamic insurance of Takaful and *waddiyah* saving account in the insurance and financial institutions, because the concept of *hibah* had been implemented.

6.3 Limitation of Research

This research was based on written materials from various books, seminar papers and documents obtained from various institutions that deal with the subject matter only. Interviews and discussions were the only methods of obtaining insights and further information of this concept and how it is practiced by the various institutions.

6.4 Further Research

This writing deals with the principles and mechanism of *hibah* in Malaysia reality, not much had been researched towards the success and failures of such technique in other Muslim countries. Knowledge of such technique among Muslim property owners and the general public is believed to be limited. If given the choice the public would only opted for the commonly known and traditional method of *wassiah* and *faraid*.

It is hoped that the writing of such research will encourage the general public and institutions whether in the public or the private sector to go deeper in the principles of this subject. By that time the unforeseen problems would be dealt with new suggestions of solutions and hopefully new ideas for further improvements from experts. Following which they will become as new regulations and enactments.

6.5 Recommendations

Hibah is not yet well rooted in the property disposition system in the country, but it has some potential to be one. Little efforts are being made for *hibah* to become a truly viable alternative property disposition system. But, with the support of the government and the relevant authorities, it is being hoped that it shall one day be an important tool in the field of property disposition.

What need to be done is the refinement and putting into place the necessary legal infrastructure, both the substantive laws and procedures. The urgency for this to be done is keenly felt by the Islamic property industry and the Muslims at large together with the practitioners (*hibah* consultants), bankers, lawyers, land administrators, academicians, the Islamic theologians and the people alike. It is again hoped that the relevant authorities will take the necessary actions urgently.

6.6 Conclusions

It is hoped that the objective of this writing could be achieved and that the general public would trust this method of property disposition and in future become a common tool for property disposition.

The use of this method is also hoped that property owners realized that there exist another method of property disposition other than the traditional method of *wassiyah* and *faraid* of which they are being applied after their demise.

Whatever is documented in this thesis and further research by experts would then become as the guide for *hibah* as an alternative instrument for property disposition.

Glossary of Arabic words

<i>Akidah</i>	dogmatic theology
<i>Al Hibah</i>	gift
<i>Al ijma</i>	consensus of opinion of the juristic opinions of the <i>ulama</i> of the <i>ummah</i> after the death of the Prophet Muhammad SAW
<i>Al ijtiihad</i>	an effort or an exercise to arrive at ones own judgment, by use of human reasons in the elaboration and explanation of the <i>Syariah</i> Law.
<i>Al qiyas</i>	Islamic theological parlance or the legal principle introduced in order to derive at a logical conclusion of a certain law on a certain issue that has to do with the welfare of the Muslims and must be based on the Quran and Hadith
<i>Al Quran</i>	the Holy Book revealed by Allah SWT to Prophet Muhammad SAW
<i>Al ukhwah</i>	
<i>Amanah</i>	trust, it refers to deposit in trust. A person can hold a property in trust for another, sometimes by expressed contract and sometimes by implication of a contract. Amanah entails absence of liability for loss except for breach of duty. A bank current account can be regarded as <i>Amanah</i> (trust)
<i>Aqad</i>	contract
<i>Aqidah</i>	dogmatic theology
<i>Ariyat</i>	gratuitous lease, a license
<i>Dhawi al qurba</i>	related ones
<i>Faraid</i>	law that deals with the distribution of estates of a deceased Muslim among his heirs in accordance with Allah's decree in the Holy Quran or according to the hadith
<i>Fatwa</i>	formal legal opinion issued by a Mufti
<i>Fiqh</i>	practical laws of Islam
<i>Gharar</i>	any element of uncertainty in any business or contract about the subject of the contract or its price, or mere speculative risk. It leads to undue loss to a party and unjustified enrichment of

	another. Any transaction under Islamic Law is invalid if it involves <i>gharar</i>
<i>Hadith</i>	the tradition of Prophet Muhammad SAW
<i>Halal</i>	permissible by <i>Syariah</i>
Haram	not lawful, not permissible by <i>Syariah</i>
<i>Hibah</i>	gratuitous transfer of property as a gift
<i>Hukum syara'</i>	practical laws of Islam
<i>Ibadah</i>	devotional matters
<i>Ijab</i>	offer in contract
<i>Ijarah</i>	letting on lease. Sale of a definite usufruct of any asset in exchange of definite reward. It refers to a contract of land leased at affixed rent payable in cash and also to a mode of financing adopted by Islamic Banks. It is an arrangement under which the Islamic Bank lease equipment, building or other facilities to a client, against an agreed rental.
<i>Ijma</i>	consensus of opinion of all jurists of the learned <i>ulama</i> and the <i>ummah</i> after the death of the Prophet and the agreement reached on the decision taken by the learned Muftis on various Islamic matters
<i>Ijtihad</i>	inferences of ruling of <i>syariah</i> from its sources or applying the rules of <i>syariah</i> particular issues or an effort or an exercise to arrive at ones judgment Islamic Law: the law of Islam as provided for, administered and applied in Malaysia
<i>Istiklah</i>	public interest (also called as <i>istihsan</i> or <i>masalih</i>)
<i>Istihsan</i>	Equity, juristic preference. It is a doctrine of Islamic law that allows exception to strict legal reasoning, or guiding choice among possible legal outcomes, when considerations of human welfare so demand.
<i>Iwad</i>	consideration, e.g. money
<i>Khalifah</i>	he descendants or successor of the Prophet- the elected ruler of an Islamic nation
<i>Masar</i>	all types of hazards or gambling
<i>Maliki</i>	one of the four Sunni school of jurisprudence
<i>Mard al maut</i>	near death

<i>Masalahah a'mmah</i>	public interest
<i>Mawat land</i>	waste land
<i>Mazhab</i>	refers to one of the four recognized Islamic School of jurisprudence namely Hanafi, Maliki, Syafie and Hambali
<i>Mirath</i>	inheritance
<i>Muamalat</i>	human relation, such marriage, divorce and succession
<i>Mudharabah</i>	Copartners where at least two parties are involved in commercial transaction in which one party provides capital while the other offers skill in carrying out the business successfully in view if sharing the profit and loss accordingly. This a financial technique adopted by Islamic financial institutions and in commercial activities in the contemporary as opposed to the <i>riba</i> .
<i>Mufti</i>	jurist consult who is authorized to issue a fatwa
<i>Musha</i>	joint or undivided property
<i>Qabul</i>	acceptance, in contract
<i>Qiyas</i>	analogical deduction of Islamic Law
<i>Rahn</i>	charges and pledges
<i>Riba</i>	a premium that must be paid by the borrower to the lender along the principal amount as a condition for an extension of maturity.
<i>Ruqba</i>	waiting for the appointed time
<i>Sadaqqah</i>	charitable donations
SAW	Peace be upon Him
<i>Safih</i>	stupid
Shuf'ah	pre-emption
<i>Sunnah</i>	the tradition of the Prophet Muhammad SAW including his deeds, saying and approval
<i>Surah</i>	chapter of the Quran
<i>Syafie</i>	one of the four school of Sunni school of jurisprudence
<i>Syariah</i>	the collective 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, ibadah and mu'amalah</i>

<i>Surah an Nisa</i>	chapter four of Al Quran
<i>Tabarru</i>	any benefit that is given by a person to another without getting anything in exchange is tabarru. Gracious repayment of debt, absolutely at lender's own discretion and without any prior condition or inducement for reward, is also covered in tabarru. Repaying a loan in excess of principal and without a precondition is commendable and compatible with the Sunnah of the Holy Prophet SAW, but it is matter of individual discretion and cannot be adopted as a system because this would mean that loan would necessarily yield a profit. If such reward takes the form of a system, it would be considered as riba.
<i>Ulamak</i>	scholars in charge of the theoretical interpretation of the
<i>Syariah</i>	
<i>Umbra (umra)</i>	making ones person as the owner of a gift
<i>Ummah</i>	Muslim community
<i>Waqf</i>	charitable endowment, property held in perpetuity with the income devoted for the upkeep of s charity including the support of the family of the <i>waqafi</i>
<i>Waqf al Ahli</i>	family <i>waqf</i>
<i>Waqf al Khairi</i>	welfare waqf
<i>Wassiah</i>	bequest
<i>Wuratha</i>	heirs and representative

REFERENCES

Afzul-Ur-Rahman, (1975) *Economic Doctrine of Islam*, Muslim Educational Trust, London. Islamic Publication Ltd., Lahore, Pakistan

Ahmad Hidayat Buang, (2002), *Appreciation of al hibah in Property Management in Contemporary Malaysian Society – Syariah Perspective* University Malaya.

Ahmad Ibrahim, (1991), *Pewarisan Harta Dalam Islam*, Dewan Bahasa dan Pustaka, dari buku Al Akam Jilid 3, Undang Undang Harta Dalam Islam.

Ahmad Ibrahim, 1999, *Undang Undang Pentadbiran Pusaka bagi Orang Islam diMalaysia*, Pentadbiran Pusaka Menurut Islam, Terbitan Institut Kefahaman Islam Malaysia (IKIM).

Ahmad Ibrahim, 1989, *Islamic Concepts and the Land Laws in Malaysia, The Centenary of the Torrens System in Malaysia*. Malayan Law Journal, Kuala Lumpur.

Farhat J Zaideh, (1979), *Property Law in the Arab World*

Farid Sufian Shuib, Tajul Aris Bustami, Mohd Hisham Mohd Kamil, (2001), *Administration of Islamic Law in Malaysia*, Malaysia Law Journal.

Maasum Billah, *Takaful (Islamic Insurance) Premium: A Suggested Regulatory Framework*. International Journal of Islamic Financial Services, Vol. 3 No. 1

Al-Muwata of Iman Malik ibn Anas, (1989), the First Formulation of Islamic Law, Translated by Aisha Abdurrahman Bewley, Madinah Press Granada, Spain

The Mejelee (Translation of Majallahel-Alhkam -Adliya, translated by C.B. Tyser ,B.A.L 1967

Mohd Daud Bakar, 1999, *Konsep dan Matlamat Harta Dalam Pembangunan Ummah*, Pentadbiran Harta Menurut Islam, Institut Kefahaman Islam Malaysia, (IKIM), Cetakan Maziza Sdn Bhd.

Mohd Fadli Yusof, (1996) *Takaful, Sistem Insuran Islam*, Siri Pengurusan dan Perniagaan Utusan

Muhammad Abdul Munim Al Jamal, Terjemahan Salahuddin b. Abdullah, (2000) *Ensiklopedia Ekonomi Islam* DBP

Muhammad Khalid Masud, *Shatibi's Philosophy of Islamic Law*, IBT

Nor Mohamad Yaacop, (1966) *Teori, Amalan dan Prospek Sistem Kewangan Islam di Malaysia*, Utusan Publication & Distributors Sdn. Bhd,

Ridzuan Awang, (1994), *Undang Undang Tanah Islam*, Pendekatan Perbandingan, Dewan Bahasa dan Pustaka

Weeramantry C.G, (2001) *Islamic Jurisprudence*, an International Perspective, The Other Press, Kuala Lumpur