

**WASIYYAH, HIBAH, & WAQF:
DIFFERENT TYPES OF TRANSACTON
TO DISPOSE PROPERTY IN ISLAM**

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
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AUTHOR DECLARATION

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

I hereby declare that the work in this academic project is my own except for quotations and summaries which have been duly acknowledged.

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

In the name of Almighty Allah, The Merciful, The Compassionate, praise and gratitude are to Allah for His Guidance and Inspiration. Peace and all blessing are upon the beloved Prophet Muhammad p.u.b.h., the last Messenger of Allah Taala.

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May Allah's bless you all always Insya'Allah.

Thank you

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ABSTRAK

Tujuan kajian ini ialah untuk membincangkan tentang perbezaan jenis perpindahan harta dalam Islam melalui *wasiyyah*, *hibah* dan *waqf*. Selain itu, kajian ini dijalankan untuk menghuraikan mengenai takrif atau pengertian *wasiyyah*, *hibah* dan *waqf*. Melalui kajian ini penulis dapat mengetahui dalil-dalil daripada al-Quran dan al-Hadith mengenai *wasiyyah*, *hibah*, dan *waqf*. Melalui kajian ini juga penulis membahaskan tentang perbezaan pendapat empat mazhab iaitu mazhab Syafii, Hanafi, Hanbali, dan Maliki mengenai konsep, rukun, dan syarat *wasiyyah*, *hibah*, dan *waqf*. Di dalam kajian ini, penulis cuba menghuraikan mereka yang berhak memperolehi harta *wasiyyah*, *hibah*, and *waqf*. Hasil daripada kajian ini, penulis dapat mengetahui dengan lebih mendalam mengenai perbezaan perpindahan harta melalui *wasiyyah*, *hibah* dan *waqf*.

ABSTRACT

The purpose of this research is to discuss about the differences type of disposing the property in Islam through *wasiyyah*, *hibah*, and *waqf*. Besides that, this research has been carried out to explain about the definitions of *wasiyyah*, *hibah*, and *waqf*. Through this research, the writer could know evidences from *al-Quran* and *al-Hadith* about *wasiyyah*, *hibah*, and *waqf*. The writer also highlighted about the difference opinions of four schools, which are Syafii School, Hanafi School, Hanbali School, and Maliki School about the concepts, the commandments and the conditions of *wasiyyah*, *hibah*, and *waqf*. Through this research, the writer tries to explain the person who has right to get the property of *wasiyyah*, *hibah*, and *waqf*. The writer could know in detail about the difference of the property movement through *wasiyyah*, *hibah*, and *waqf* in Islam by carrying out this research.

MULAKHKHAS AL-BAHTH

وهو غرضه هذا البحث المناقشة عن تمييز أنواع الأموال المنقولة في الإسلام كالوصية والهبة والوقف. ويجانب آخر، سأوضح في هذا البحث عن لتعريفات لكل أنواع ذلك. واستورد الأدلة لكل منها من الآيات والأحاديث. واقترب به إختلافات الآراء من مذاهب الأربعة مذهب حنفى ومذهب مالكى ومذهب شافعى ومذهب حنبلى من حيث تتعلق بالأفكار والأركان والشروط منها. ويبين أصحاب الحقوق الذين يستحق في تنفيذ تصرفات هذه الأموال. وأخذت حوار البحث في المكتبة من طريقة القراءة والتأمل والإستقراء. والحاصل منه، الكاتبة تعريف كثيرا منه الآراء المختلفة عن هذه أنواع الأموال المنقولة.

GLOSSARY

<i>Al-ijma'</i>	consensus as a source of Islamic Law
<i>Al-ijtihad</i>	creative self-exertion to derive laws from the legitimate sources.
<i>Al-istihsan</i>	as source of Islamic Law, the acceptance of a rule because of its superior equity in comparison with an already established law.
<i>Al-istishab</i>	the continuation of an established law not known to have been revoked or rescinded.
<i>Al-qiyas</i>	logical deduction from al-Quran al-Karim and the sunnah as source of Islamic Law.
<i>Dhimmi</i>	(pl. DIMMIYYUN). Covenanter, or he who covenants with the Islamic state to make peace with it under the guarantee of Allah Himself (SWT); generally, the non-Muslim citizens of the Islamic state.
<i>Faraid</i>	(pl. of Farizah). "inheritance"
<i>Fasik</i>	a sinner, guilty not only of great sins but also of everyday trifling offences against the law.
<i>Fatwā</i>	(pl. Fātāwā) A technical term used in Islamic law to indicate a formal legal judgment or view.
<i>Fuqaha'</i>	the experts in Islamic law (from fiqh).
<i>Hadith</i>	(pl. AHADITH) the verbalized form of a tradition of the Prophet Muhammad S.A.W. constitutive of his SUNNAH.
<i>Imam</i>	community leader in religious as well as in lay matters.
<i>Kināyah</i>	the word used in the science of exegesis.
<i>Muslim</i>	the proper designation of the person who adheres to Islam.
<i>Sarīh</i>	explicit or clear. A term used in Muslim law for that which is expressed in contradistinction to that which is kināyah or implied.

<i>Shara'a</i>	the act of legislation by Allah (SWT) for any matter of concern in human life, personal, familial or public.
<i>Shariah</i>	the collective name for all the laws of Islam, including Islam whole religious and liturgical, ethical and jurisprudential system.
<i>Sunnah</i>	the pattern of Allah S.A.W in ordering creation or any part or aspect of it.
<i>Ulama'</i>	(pl. of 'ālim). "one who knows; learned; a scholar.
<i>Wadī'ah</i>	a thing put down. The legal term for a deposit.
<i>Waliyy</i>	(pl. AWLIYA') friend, patron, saint.
<i>Zakāh</i>	the obligatory sharing of wealth with the poor and the community at the yearly rate of 2 ½ percent of appropriated wealth above a certain minimum.

ABBREVIATION

DBP	Dewan Bahasa dan Pustaka
n.d	no date / no year
n.pb.	no publisher
n.pl.	no place
p.b.u.h.	peace by upon him
p.	page
p.p	pages
R.A	radiya Allah anhu / anhā / anhum
SWT	subhanahu wa taālā
Trans.	translator/translated by
Vol	volume

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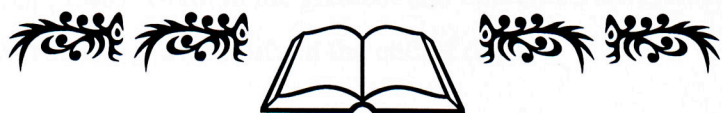
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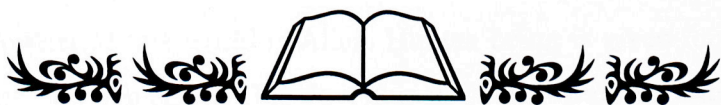
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CHAPTER
ONE



CHAPTER ONE



CHAPTER 1: INTRODUCTION

1.1 BACKGROUND OF RESEARCH

Islam is the universal religion that is suitable for everyone, anywhere and anytime. Since the existence of Islam, the universal concept of Islam has been understood. As a universal religion, Islam has changed the history and civilization of the world. Besides bringing a great revolution to the Arab countries the coming of Islam has introduced the new era of happiness. Islam is the greatest and contented religion comprises of law for life in this world and peaceful life in the end of days.

Allah has created everything on the earth, either inside it at the bottom of the sea and on the sky, is only for the need and importance of human being. Allah S.W.T creates human beings as the best and the great creature beside Him.

Basically, the owner of this world is Allah. Human being is given the responsibilities by Allah to care and manage it. One day, human being would be asked by Allah and penalized if they have betrayed their responsibilities because they didn't managed the trust given truthfully as ordered by Islam. If they succeed in protecting this trust they would get great rewards from Allah. To be a successful caliph of Allah in this the world and in the end of days, all Muslims have been ordered to do all the good things and leave behind the bad things.

Helping the needy such as rich person gives his properties *zakat* (obligatory alms made annually under Islamic law). A strong person uses his energy to help the weak, an intellectual spreads his knowledge, a thinker brings out his great ideas and so on. All these good deeds are contain in the concept of doing good and charity program for the people's benefits.

All these good deeds are contained in the concept of doing good and charity program for the people's benefits.

In Islam there are many ways to do a charity. The concepts of *wasiyyah*, *hibah* and *waqf* are derived from Islamic teachings. These charity figures could be seen through the wide scope of spiritual and material aspects. Their roles as the tools for the peace of social life and economic is the truth that we couldn't deny.

Nowadays, the understanding of Muslims has changed the structures and its roles. The influence of the colonist thinking upon Muslims in our country specifically had caused *wasiyyah*, *hibah* and *waqf*, being neglected. However, there are signs of practicing these concepts again in our society. For example, Bumiputra-Commerce has introduced *hibah*, it is a private contractual arrangement whereby a person (the donor allocates his property, during lifetime.

The issues about *wasiyyah*, *hibah* and *waqf* are starting to get the public attention such as in seminars, office, mass media and also electronic media. It has been hotly discussed and debated by intellectuals and Muslims scholars on the issues of practicing these concept in this modern society. Legal rules on *wasiyyah*, *hibah* and *waqf* are gifts from Allah to the human being as provided in *al-Quran* and *al-Sunnah*. But, there are great differences on the distributions of properties by way of *wasiyyah*, *hibah*, and *waqf*. There are evidences from *al-Quran* and *al-Hadith* from Prophet Muhammad p.b.u.h that stated about the command using it based on the meaning, law, unity and of four schools, *ulama'* and others.

To practice *wasiyyah*, *hibah* and *waqf* one needs knowledge on its concepts, and application. The rules are considered by *syara'*. Based on today's practice some people do not follow the existing principles. This problem happened because of they do not understand the concepts and the applications of *wasiyyah*, *hibah*, and *waqf*.

According to achieve the foremost advantages that are trying to be achieved through the concept of distributing *wasiyyah*, *hibah* and *waqf*, so the conduction must be made to somebody who wants to distribute his properties in the way of *wasiyyah*, *hibah* and *waqf*, so that the main propose to bring the goodness for everybody would be achieved.

The advantages and benefits left behind by someone who has using *wasiyyah*, *hibah* and *waqf* would bring the goodness and peacefulness hopefully to the family's life specifically and the society generally and also to himself or to the giver.

1.2 AIM OF RESEARCH

The idea of writing on the topic of *wasiyyah*, *hibah*, and *waqf*: different types of transaction to dispose property in Islam are to identify the meaning of *wasiyyah*, *hibah* and *waqf*.

The second aim of this academic project paper is to explore these three types of transaction based on the Islamic perspective including *hukm*, the commandment, and the conditions underlying these transactions and the benefits of *wasiyyah*, *hibah*, and *waqf*.

The third aim is to explore the opinions of the Muslim scholars on these three types of transaction by referring to the Four Sunni schools and contemporary of *Ulama'* and *Fuqaha'*.

1.3 OBJECTIVE OF RESEARCH

The objectives of undertaking this researcher are as follow:

- To explore concepts of *hibah*, *wasiyyah* and *waqaf* from the Islamic perspective.
- To differentiate these three transactions
- To explore briefly the opinions of the four Sunni Schools such as Shafii, Maliki, Hanafi and Hambali and contemporary *ulama'* and *Fuqaha'* on these concepts.

1.4 SCOPE OF RESEARCH

The scope of *wasiyyah*, *hibah* and *waqf* are very wide. However, the scope of this study is to have a general overview on the concept of *wasiyyah*, *hibah*, and *waqf*. This research is limited to primary sources in *al-Quran* and *al-Hadith* and also the opinions of the Muslims scholars.

1.5 RESEARCH METHODOLOGY

In order to complete this research, the writer had used some methods such as library research. This is done by doing the references from the results of other researches with problems that had to be solved. The researcher used the secondary source. Beside that, the researcher also uses sources of references come from knowledge, articles, magazines, newspapers, and reference books.

1.6 LITERATURE REVIEW

Existing literature is very important to do this academic project paper the researcher must refer the various books or other materials. For example, in the book entitled

“Shariah: The Islamic Law”. By Abd. Rahman (1984) he explains about the meaning of *wasiyyah*, *hibah* and *waqf*. In this book it highlights the authorities from *al-Quran* and *al-Hadith*, on these matters the purpose of evidence is to show with detail what is the *al-Quran* mention and what is the *Hadith* mention. Beside that, this book define the views of *Ulama'* and *fuqaha'* about *wasiyyah*, *hibah*, and *waqf*.

While, in the book of “*Fiqh & Perundangan Islam*”. The author of this book is Wahbah al-Zuhaili translated by Dr. Ahmad Shahbari Salamon (1996). In this book just defines the definition and ruling of *hibah*. This book also defines that the conditions of *hibah* cause inhibition to take back a gift for the children. The researcher refers to this book because it is suitable with the researcher’s research.

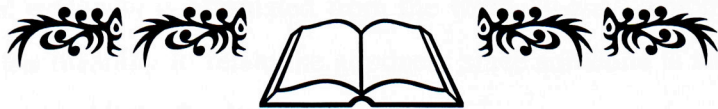
In the book of “*Hukum-hukum Fiqh Islam Yang Berkembang Dalam Kalangan Ahlus Sunnah*”. The author of this book is Prof. T. M. Hasbi Ash Shidiqiey (1989). This book explains about the meaning of *hibah*, *wasiyyah*, and *waqf*. Beside that, this book also explains the different views of *Ulama'* and *fuqaha'* about *wasiyyah*, *hibah*, and *waqf*.

In a book entitled “*Fiqh Syafii*”, written al-Ustaz H. Idris Ahmad S.H (1995). This book defines the meaning of *hibah*, *waqf* and *wasiyyah*. It is also find out the authentic from *Hadith*. Then this book defines the ruling and conditions of *waqf* and *wasiyyah*. On the other hand, in the book entitled “*Terjemahan Fathul Mu'in*”. Written by Drs aliy As'ad, this book explains the meaning of *hibah*, *waqf* and *wasiyyah*. Besides that, this book lists down the conditions and benefits of *hibah*, *waqf*, and *wasiyyah*.

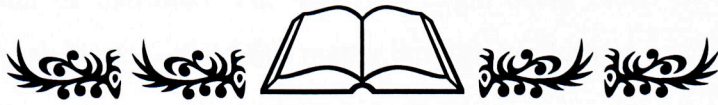
Beside that to do this research the researcher had read two researches from University Malaya (UM) student. The title is “*Pentadbiran Harta Waqf*” and the other one is “*Wasiat Dalam Islam: Konsep dan Pengamalannya Di kalangan Masyarakat Tanjung Karang, Selangor*”. In her opinion, the first one is the researcher had used wide scope and the second one the researcher used the case study in one place. In this research, the researcher defines briefly the concept of *wasiyyah*, *hibah* and *waqf*.

However, this research is different from the existing literature, because this research is to look at the concept of the three different types of transaction to dispose property in Islam through *hibah*, *wasiyyah*, and *waqf*. Besides that, the writer highlights on the different meaning of *wasiyyah*, *hibah*, and *waqf*, the authority from *al-Quran* and *al-Hadith*, the law, the commandment, the conditions, the types, and the benefits of *wasiyyah*, *hibah*, and *waqf*. Many of the books and other materials not highlights the different types of property through *wasiyyah*, *hibah*, and *waqf* from the meaning, the authority from *al-Quran* and *al-Hadith*, the law, the commandment, the conditions, the types, the benefits, and also the related cases of *wasiyyah*, *hibah*, and *waqf*.

CHAPTER TWO



CHAPTER TWO



CHAPTER 2: GENERAL OVERVIEW ON *WASIYYAH*, *HIBAH*, AND *WAQF*

2.1 DEFINITION OF *WASIYYAH*, *HIBAH* AND *WAQF*

2.1.1 DEFINITION OF *WASIYYAH*

A few *ulama'* has explained that the word *wasiyyah* originated from the word “*wassa*” which means ordering, advising and promising. Imam Syafii has given his opinion that the *wasiyyah* is originated from the word “*wasa*” which means relating or giving with the meaning to relate the goodness since someone is still alive and got the rewards given by Allah after he had died.¹

Whereas, based on the concept of this term, *wasiyyah* has been specified to the giving of properties to somebody whom the giver likes after his death. That group of people is the group that does not considered as heir who inherited the properties left behind by the giver after he had died. The *wasiyyah* could occur either by speech form or written form. Allah has explained this matter through *al-Quran*.²

In the dictionary of Islam stated that, *wasaya*, which term is held by Muslim legists to mean an endowment with the property of anything after death, as if one person should say to another, give this article of mine, after my death, to a particular person.³

¹ Mustafa Hj. Daud. 1997. *Institusi Kekeluargaan Islam*. Kuala Lumpur: Dewan Bahasa & Pustaka. p.138.

² Mustafa Hj. Daud. 1997. *Institusi Kekeluargaan Islam*. P. 138.

³ Thomas PatrickHudges, B.D, M.R.A.S. n.d. *A Dictionary of Islam*. n.pl. Kazi Publication. p. 667.

2.1.2 DEFINITION OF *HIBAH*

Hibah literally means the gift.⁴ Whereas according to *syara'*, it means some promise containing the owning gift by someone when he still alive without hoping for any outcome.⁵

According to the Dictionary of Islam, stated that *hibah* is a legal term for Muhammadan law, which signifies a deed of gift, a transfer of property, made immediately and without any exchange (gifts).⁶

2.1.3 DEFINITION OF *WAQF*

Waqf in Arabic means “*habs*” (to stop). It is said that *waqafa-yaqifu-waqfan* means *habasa-yahbisu-habsan*.⁷ Literally, *waqf* means stop. Whereas by the term means to stop the properties which are lawful in their figures so that they could be used in the right way for goodness.⁸

According to the dictionary of Islam, *waqf* is a term; literally, it means that the law signifies the appropriation or dedication of property to charitable uses and the service of God. An endowment the object of such an endowment or appropriation must be of a perpetual nature, on such property or land cannot be sold or transfer. If a person builds the mosque, his right of property is extinguished as soon as prayers have been recited in the building.⁹

⁴ Zaleha Kamaruddin, Dr. & Raihanah Abdullah. 2002. *Kamus Istilah Undang-undang Keluarga Islam*. n.pl. Zebra Editions Sdn. Bhd. p. 5.

⁵ Mohd Rizuan Awang. 1987. *Konsep Undang-undang Tanah Islam, Pendekatan Perbandingan*. Kuala Lumpur:Al-Rahmaniah. p. 5.

⁶ Thomas PatrickHudges, B.D, M.R.A.S. n.d. *A Dictionary of Islam*. n.pl: Kazi Publication. p. 173.

⁷ Mudzakir AS, Drs. 1988. *Fiqih Sunnah*. N.pl. Mu'ammal. vol.14. p. 148.

⁸ Abu Urwah. 1986. *Wanita & Kekeluargaan*. Petaling Jaya:Pustaka Salam. p. 132.

⁹ Thomas PatrickHudges, B.D, M.R.A.S. n.d. *A Dictionary of Islam*. n.pl: Kazi Publication. p. 664.

2.2 AUTHORITY FROM AL-QURAN

2.2.1 AUTHORITY OF *WASIYYAH*

The related verse on *wasiyyah* is verse 180 of Sūrah al-Baqarah:

كتب عليكم إذا حضر أحدكم الموت إن ترك خيرا الوصية للوالدين الأقربين بالمعروف
حقا على المتقين

(Al-Quran. Al-Baqarah 2: 180)

Meaning: It is prescribed, When death approaches any of you, if he leaves any goods, that he makes a will to (give to the) parents and next of kin, according to reasonable usage: this is due from those who fear Allah.¹⁰

The above verse explains that it is the responsibility of the pious that fear Allah leave *wasiyyah* behind. These verse was revealed when there no law was yet has been fixed in the matter of inheritance.¹¹

In another verse, 11 of Sūrah an-Nisa':

يوصيكم الله في أولادكم للذكر مثل حظ الأنثيين فإن كن نساء فوق اثنتين فلهن ثلثا ما
ترك وإن كانت واحدة فلها النصف ولأبويه لكل واحد منهما السدس مما ترك إن كان له
ولد فإن لم يكن له ولد وورثه أبوه فلأمه الثلث فإن كان له إخوة فلأمه السدس من بعد

¹⁰ All Quranic translation in this writing are based on Syed Vickar Ahamed, Prof. Dr. 1999. *Interpretation of the meaning of the Glorious Quran*. TR Group Companies. Translation from other sources will be cited accordingly.

¹¹ Abd Rahman I. Doi. 1984. *Shari'ah: The Islamic Law*. Kuala Lumpur, Malaysia: A.S Noordeen. p. 328.

وصية يوصى بها أودين اباؤكم وابناؤكم لا تدرون ايهم اقرب لكم نفعا فريضة من الله ان

الله كان عليما حكيما

(Al-Quran. An-Nisa' 4: 11)

Meaning: Allah directs you regarding (the inheritance for) your children: To the male, a portion equal to that of two females: if only daughter, two or more, their share is a half. For parents, a sixth share of the inheritance to each, if the deceased left children; if no children, and the parents are the only heirs, the mother has the third; if the deceased left brothers (or sisters) the mother has a sixth. (The distributions in all cases is) after the payment of legacies and debts. You know not whether your parents or you children are nearest to you in benefit. There are portions settled by Allah; and Allah is all-knowing, all-wise.

The above verse stated that Islam has provided a complete guidance to the Muslims concerning matters to inheritance and the fixed portions for each heir.

Besides that, the verse 106 of Sūrah al-Maidah is also related with the *wasiyyah*:

يأيتها الذين امنوا شهادة بينكم إذا حضر احدكم الموت حين الوصية اثن ذوا عدل منكم
او اخرن من غيركم ان اتم ضربتم في الرض فاصابتكم مصيبة الموت تحبسونهما من بعد
الصلوة فيقسمن بالله ان ارتبتم لا نشتري به ثمنا ولو كان ذا قربي ولا نكتم شهادة الله انا
اذا لمن الاثمين.

(Al-Quran. Al-Maidah 5: 106)

Meaning: O you who believe! When death comes near any of you, (take) witnesses among yourselves when making (Lager or last time) changes, two just men from your

own (community) or others from outside, if you are traveling through the earth (world) and the chance of death comes to you (thus) if you doubt (their truthfulness) make them both stay after prayer, and let them both swear by Allah: “We do not wish for any worldly Gain in this (matter) Even though the (beneficiary) be our near relation: We shall not hide the evidence before Allah if we did, then look! The sin (will) be upon us!”

If death comes near any of somebody, they should be leave wasiyyah to heirs according the shariah and also should appoint two just witnesses among Muslim or non-Muslim, if somebody not trust to both of them the giver should be pray may Allah bless them.

2.2.2 AUTHORITY OF *HIBAH*

The related verse in deciding the rule of law on *hibah* is verse 177 of Sūrah al-Baqarah:

ليس البر ان تولو وجوهكم قبل المشرق والمغرب ولكن البر من امن بالله واليوم الاخر
والملة والكتب والنبين واتى المال على حبه ذوى القربى واليتيمى والمسكين وابن السبيل
السائلين وفى الرقاب واقام الصلوة واتى الزكوة والموفون بعهدهم اذا عاهدوا والصبرين فى
البأساء والضراء وحين البأس أولئك الذين صدقوا وأولئك هم المتقون.

(Al-Quran. Al-Baqarah 2: 177)

Meaning: It is not rightful conduct that you turn your faces towards East or West; but it is righteousness- to believe in Allah, and the Book, and the messengers; to spend from your (own) wealth, out of love for Him, for your kin, for orphans, for the needy, for the wayfarer, for those who ask, and for the ransom of slaves; to be steadfast in

prayer, and practice regular charity; to fulfill the contracts which you have made; and to be firm and patient, in pain (or suffering), and adversity, and throughout the periods of panic. Such are the people of truth, those who fear Allah.

The verse above explain about in junction of spending in the part of Allah (*infaq*) which is mention in that verse especially encourages Muslims to offer gifts for the heirs, children's, wife, orphans, poor, and those are needy.

Verse 270 of sūrah al-Baqarah:

وما انفقتم من نفقة او نذرتم من نذر فإن الله يعلمه وما للظلمين من انصار.

(Al-Quran. Al-Baqarah 2: 270)

Meaning: and whatever you spend in charity or in love, be sure Allah knows it all.

Allah knows whatever you do either good or bad and also in the night wherever the humankind cannot see but Allah can see what do you do you.

In Sūrah an-Nisa':

واتوا النساء صدقتهن نحلة فإن طبن لكم عن شيء منه نفسا فكلوه هنيئا مريئا.

(Al-Quran. Al-Nisa' 4: 4)

Meaning: and give the woman (in marriage) their dowry as a free gift; but if they, with their own good pleasure, give back any part of it to you, take it and enjoy it with right good cheer.

Based on this verse the husband must be giving dowry as a free gift (*hibah*) to his wife because it is one of the duties of the husband to do that during the marriage ceremony.

In Sūrah al-Maidah:

يأيتها الذين امنوا لا تحلوا شعائر الله ولا الشهر الحرام ولا الهدى ولا القلائد ولا آمين البيت الحرام يبتغون فضلا من ربهم ورضوانا وإذا حللتم فاصطادوا ولا يجرمنكم شنان قوم ان صدكم عن المسجد الحرام ان تعتدوا وتعاونوا على البر والتقوى ولا تعاونوا على الاثم والعدوان والتقوا الله ان الله شديد العقاب.

(Al-Quran. Al-Maidah 5: 2)

Meaning: O you who believe! Do not change the holiness of The Sacred symbols of Allah, nor of the Sacred Month (of Ramadan), nor of the animals, nor of the people resorting to the Sacred House, while seeking the bounty and God pleasure of their Lord. But when you are away from the Sacred Ground and (out) of the pilgrim clothes, you may hunt: And let not the hate of some people who (earlier) shut you out of the Sacred Mosque Lead you to overstepping your (own) limits (and bitterness on your part) you help one another in righteousness and in Holy deeds, but do not help one another in sin and evil: Fear Allah: because Allah is strict in punishment.

The above verse stated that Allah prohibit humankind do the morally bad in the earth beside that Allah decline to do desirable among humankind such as gift something for someone (*hibah*).

In Sūrah al-Taghabun:

ان تقرضوا الله قرضا حسنا يضاعفه لكم ويغفر لكم والله شكور حلیم.

(Al-Quran. Al-Taghabun 64: 17)

Meaning: If you loan to Allah a beautiful loan, He will double it to your (credit), and He will grant you Forgiveness: For Allah is most ready to appreciate (service), Most-Forbearing.

The above verse stated that as a Muslim we should spend our money (hibah) to help those are needs such as poor, orphans, disability and widow. If somebody does that may Allah appreciate more than that.

2.2.3 AUTHORITY OF *WAQF*

The related verse in deciding the rule of law on *waqf* is verse 92 of sūrah al-Imran:

لن تنالوا البر حتى تنفقوا مما تحبون وما تنفقوا من شيء فإن الله به عليم.

(Al-Quran. Al-Imran 3: 92)

Meaning: by no means shall you reach righteousness unless you give (freely) of that which you love; and whatever you give, truly, Allah knows it well.

The dedication of the property or giving it away in charity for the benefit of certain property for a good purpose other religious, pious or charitable.

Verse 35 of sūrah al-A'raf:

يبيى ادم اما ياتينكم رسل منكم يقصون عليكم ايتى فمن اتقى واصلح فلا خوف عليهم

ولا هم يجزنون.

(Al-Quran. Al-A'raf 7: 35)

Meaning: O you children of Adam! Whenever there come to You Messengers from among you, reciting My Signs to you, those who are righteous and Correct (themselves), for them there shall be no Fear and they will not be sad.

Allah give good news to humankind like does whatever Allah command such as goodness (*waqf*), by the way anybody live peace without stress.

Verse 142 of Sūrah al-Araf:

ووعدنا موسى ثلاثين ليلة وتمناها بعشر فتم ميقات ربه اربعين ليلة وقال موسى لاجيه هرون
اخلفنى في قومى واصلح ولا تتبع سبيل المفسدين.

(Al-Quran. Al-A'raf 7: 142)

Meaning: we set out thirty nights for Mussa (Moses), and completed (the period) with ten (more): Thus the term of (holy fellowship) with his Lord, was completed in forty nights. And Mussa (Moses) had instructed his brother (Haroon, before he went upon the mountain): “(take over and) act for me among my people: Do right, and do not follow the way of those who do mischief”

Allah promised to Musa a.s to ask Him after thirty (30) nights. As the conclusion, Allah command Musa a.s to control humankind to do whatever goodness and leave each prohibited and also always something who can make among Muslim happy such as give a *waqf*.

Verse 88 of sūrah Hud:

قال يقوم ارءيتم ان كنتم على بينة من ربي ورزقني منه رزقا حسنا وما اريد ان اخالفكم الى ما نهىكم عنه ان اريد الا الاصلاح ما استطعت وما توفيقى الا بالله عليه توكلت واليه أنيب.

(Al-Quran. Hud 11: 88)

Meaning: O my people! Do you see whether I have a clear (sign) from my Lord, and He has given me good (and pure) livelihood from Himself? Against your wishes I do not wish to do what I forbid you to do. I only wish for (your) betterment to the best of my ability; and my success can only come from Allah. In Him I trust, and to Him I look.

Allah is who gives the property to humankind. Allah doesn't command humankind to do anything except goodness.

Verse 77 of sūrah al- Hajj:

يا أيها الذين امنوا ار كعوا واسجدوا واعبدوا ربكم وافعلوا الخير لعلكم تفلحون.

(Al-Quran. Al-Hajj 22: 77)

Meaning: O you who believe! Bow down, prostrate yourselves and love your Lord; and do good: that you may prosper.

Allah orders the humankind to do something who can bring somebody to success in his or her life such as waqf it property to build mosque or school.

2.3 AUTHORITY FROM HADITH

2.3.1 AUTHORITY OF *WASIYYAH*

There are some *Hadith* of the Prophet on which the law of *wasiyyah* is based:

حدثنا عبد الله بن يوسف: أخبرنا مالك، عن نافع، عن عبد الله بن عمر رضي الله عنهما: أن رسول الله صلى الله عليه وسلم قال: ما حق امرئ مسلم له شيء يريد أن يوصي فيه يبيت ليلتين إلا ووصيته مكتوبة عنده تابعه محمد بن مسلم، عن عمرو، عن ابن عمر، عن النبي صلى الله عليه وسلم.¹²

Meaning: Narrated Abdullāh bin Umar RA: Allāh’s messenger SAW said: “it is not permissible for any Muslim who has something to will to stay for two nights without having his last will and testament written and kept ready with him”.¹³

The right Muslim to another Muslim is given the *wasiyyah* before die.

The Prophet p.b.u.h. has said:

حدثنا فتية بن سعيد: حدثنا سفيان عن هشام بن عروة، عن أبيه، عن ابن عباس رضي الله عنهما قال: لو عض الناس إلى الربع لأن رسول الله صلى الله عليه وسلم قال: الثلث والثلث كثير.¹⁴

¹² Muslim. n.d. *Sahih al-muslim*. Bayrut: Darul Ihya’ al-Thurath. Kitab al-wasiyyah. Juz’ 5:p. 1249. #1627.

¹³ All Hadith translation in this writing based on Dr Muhammad Muhsin Khan. 1987. *The Translation Of The Meaning Of Sahih Al-Bukhari (Arabic-English)*. Kitab Bhavan: New Delhi. Islamic University: Medina Al-Munawwarah.

¹⁴ Muhammad bin Ismail Abu Abdullah. 1987. *Sahih al-Muslim*. Bayrut: Darul Ibnu Kathir al-Yamamah. Bab wujub al-Nafkah ala ahli wal’iyal. Juz’5:p. 2047. #5039.

Meaning: Narrated Ibn Abbās r.a: I recommend that people reduce the proportion of what they bequeath by will to the fourth (of the whole legacy, for Allah's messenger p.b.u.h said, "one-third, yet even one third is too much").

The giver of *wasiyyah* should be give the *wasiyyah* not more than one-third it is because one third is too much and it is enough for receive of *wasiyyah*.

The Maliki Jurists have based their authority on the Hadith of the Prophet p.b.u.h:

حدثنا محمد بن يوسف، عن ورقاء، عن ابن أبي نجيح، عن ورقاء، عن ابن أبي نجيح، عن عطاء، عن ابن عباس رضى الله عنهما قال: كان المال للولدن وكانت الوصية للولدین، فنسخ الله من ذلك ما أحب فجعل للذكر مثل حظ الأنثيين، وجعل للأبوين لكل واحد منهما السدس، وجعل للمرأة الثمن والربع، وللزوج الشرط والربع.¹⁵

Meaning: Narrated Ibn Abbas RA: The custom (in old days) was that the property of the deceased would be inherited by his offspring; as for the parents (of the deceased), they would inherit by the will of the deceased. Then Allah cancelled from that custom whatever He wished and fixed for the male double the amount inherited by the female, and for each parent a sixth (of the whole legacy) and for the wife an eighth or a fourth and for the husband a half or a fourth.

Hadith above stated that amount given the *wasiyyah* for each people who have the right for receive of *wasiyyah*.

¹⁵ Muhammad bin Ismail Abu Abdullah. 1987. *Sahih al-Muslim*. Bab walakum nisfu ma taraka azwajakum. Juz' 6:p. 1670. #4302.

2.3.2 AUTHORITY OF HIBAH

Beside that the related *Hadith* of *hibah*, the Prophet has said:

حدثنا عبد الله بن يوسف: أخبرنا مالك، عن ابن شهاب، عن حميد بن عبد الرحمن،
ومحمد بن النعمان بن بشير: أنهما حدثناه عن النعمان بن بشير: أن أباه أتى به إلى رسول
الله صلى الله عليه وسلم فقال: إني نحت أبنى هذا غلاما، فقال: أكل ولدك نحت مثله؟
قال، لا، قال: فارجه.¹⁶

Meaning: Narrated An-Nu'man bin Bashir that his father took him to Allah's Messenger S.A.W and said, "I have given this son of mine slave." The Prophet S.A.W asked, "Have you given all your sons the like?" He replied in the negative. The Prophet S.A.W said, take back your gift them".

Hadith above explains about the situation if somebody gives something to a few his sons, it is not permissible unless he does justice to all of his sons and gives the same portions to the other sons equally, but no one has the right to bear witness to what one's father does.

In another *Hadith* of the Prophet p.b.u.h:

حدثنا إبراهيم بن موسى: أخبرنا هشام، عن معمر، عن الزهري قال: أخبرني عبيد الله بن
عبد الله: قالت عائشة رضى الله عنهما: لما ثقل النبي صلى الله عليه وسلم فاشتد وجعه
استأذن أزواجه أن يمرض في بيتي فأذن له، فخرج بين رجلين تخط رجلاه الأرض، وكان

¹⁶ Muhammad bin Ismail. 1978. *Sahih al-Bukhariyy*. Bayrut: Darul Ibnu Khathir. Bab min ra'yu al-
hibah al-ghaibah ja izah. Juz' 6:p. 913. #2444.

بين العباس وبين رجل آخر، فقال عبيد الله: فذكرت لإبن عباس ما قالت عائشة فقال لى:
وهل تدري من الرجل الذى لم تسم عائشة؟ قلت: لا، قال: هو علي بن أبي طالب.¹⁷

Meaning: Narrated Az-Zuhari: Ubaidullah bin Abdullah told me that Aisha r.a had said, “when the Prophet S.A.W became sick and his condition became serious, he requested his wives to allow him to be treated in my house, and they allowed him. He came out leaning on two men while his feet were dragging on the ground. He was walking between Al-Abbas and another man” Ubaidullah said, “when I informed Ibn Abbas of what Aisha had said, he asked me whether I knew who was the second man whom Aisha had not named”. I replied in the negative he said, “he was Ali bin Abi Talib.

The above *Hadith* stated that giving gifts by a husband to his wife, and by a wife to her husband is valid.

The Prophet p.b.u.h. has said:

حدثنا فتية بن سعد: حدثنا الليث، عن ابن أبي مليكة عن المسور بن مخرمة رضى الله
عنهما أنه قال: قسم رسول الله صلى الله عليه وسلم أقيية ولم يعط مخرمة منها شيئا فقال
مخرمة: يا بنى انطلق بنا إلى رسول الله صلى الله عليه وسلم، فانطلقت معه فقال: ادخل
فادعه لى، فدعوته له فخرج إليه وعليه قباء منها. فقال: أخبرنا هذا لك، قال: فنظر إليه
فقال: رضى مخرمة.¹⁸

¹⁷ Muhammad bin Ismail. 1978. *Sahih al-Bukhariyy*. p. 2160 #5384.

¹⁸ Muhammad bin Isa. n.d. *Sunan al-Tirmizi*. Bayrut: Darul Ihya' al-thurath al-Arabi. Juzu' 5:p. 731.
#2818.

Meaning: Narrated Al-Miswar bin Makhrama RA: Allah’s Messenger p.b.u.h. distributed some cloaks but did not give anything thereof to Makhrama. Makhrama said (to me), “O son! Accompany me to Allah’s Messenger p.b.u.h.”. When I went with him, he said, “Call him to me”. I called him (i.e. the Prophet p.b.u.h.) for my father. He come out wearing one of those cloaks and said, “ we kept this (cloak) for you, (Makhrama).” Makhrama looked at the cloak and said, “Makhrama is pleased,” (or the Prophet p.b.u.h. said) “is Makhrama pleased?”

The above *Hadith* explains on the procedures to take over the slave property (given as gifts).

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2.3.3 AUTHORITY OF *WAQF*

The *Hadith* related to waqf is based on what the Prophet said:

حدثني محمد بن عبد الرحيم: أخبرنا روح بن عبادة: حدثنا ذكريا بن اسحاق قال: حدثني عمر وبن دينار، عن عكرمة، عن ابن عباس رضى الله عنهما: أن رجلا قال لرسول الله صلى الله عليه وسلم: إن أمه توفت اينفعهما إن تصدقت عنها؟ قال: نعم قال: فإن لي مخرافا فأنا أشهدك أني قد تصدقت به عنها.¹⁹

Meaning: Narrated Ibn Abbas RA: a man said to Allah’s Messenger S.A.W, “My mother died, will it benefit her if I give in charity on her behalf? “The Prophet S.A.W replied in the affirmative. The man said, “I have a garden and I make you a witness that I give it in charity on her behalf.”

¹⁹ Muhammad bin Isa. n.d. *Sunan al-Tirmizi*. Juz’ 6:p. 1260. #2618.

The above *Hadith*, stated that if somebody gives a piece of land as an endowment (*waqf*) and does not mark its boundaries, the endowment (*waqf*) is valid. The same is applied to objects of charity.

The Prophet p.b.u.h. has said:

حدثنا أبو عاصم: حدثنا ابن عون، عن نافع، عن ابن عمر: أن عمر رضى الله عنه وجد ما لا بخير فأتى النبي صلى الله عليه وسلم فأخبره قال: إن شئت تصدقت بها في الفقراء والمساكين وذى القربى والضعيف.²⁰

Meaning: Narrated Ibn Umar RA: Umar RA got some property in Khaibar and he came to the Prophet S.A.W and informed him about it. The Prophet p.b.u.h. said to him, “ If you wish you can give it in charity” so Umar gave it in charity (i.e. as an endowment) the yield of which was to be used for the good of the poor, the needy, the kinsmen and the guests.

The above *Hadith* explains that *waqf* or endowment may be spent to those are need such as charity for the good poor, the needy, the kinsmen and the guests. That means *waqf* cannot be given to rich, because it is not suitable to do that. The purpose of *waqf* is to help those are need.

²⁰ Muhammad bin Isa. p. 1020. #2621.

Another Hadith about *waqf* is the Prophet p.b.u.h. has said:

حدثني إسحاق: أخبرني عبد الصمد قال: سمعت أبي: حدثنا أبو التياح قال: حدثني أنس بن مالك رضى الله عنه: لما قدم رسول الله صلى الله عليه وسلم المدينة أمر بالمسجد وقال: يا بني النجار ثامنوني حائطكم هذا، فقالوا والله لا نطلب ثمنه إلا الله.²¹

Narrated Anas bin Malik R.A: when Allah's Messenger p.b.u.h. came to the Medina, he ordered that a mosque be built. He said, "O Bani An-Najjār! Suggest me a price for the garden of yours." They replied, "By Allah, we will not ask its price except from Allah."

Hadith above stated that the establishment of an endowment (*waqf*) of a piece land for building a mosque to use for public people.

2.4 REPORTED CASES

2.4.1 THE CASES WHICH ARE RELATED TO *WASIYYAH*

In Malaysia, the principle of *wasiyyah* has been used since the British period. In the case of *Sheikh Abdul Latif and others v. Sheikh Elias Bux*²², the Selangor Appeal Court has decided that any will and a distribution of a Muslim's property must follow the Islamic Law such as which is administered in Associated Malayan States, and under the Islamic Law, someone could not make a will of his properties for more than one-third on his death and the balance of his properties must be divided to his heirs based on division which is allocated by Islamic Law (*Faraid*) except his heirs agree with another plan.²³

²¹ Ibid. p. 1020. #524.

²² *Sheikh Abdul Latif and others v. Sheikh Elias Bux* [1915] FMSLR 204

²³ Mohd. Rezuan Awang. 1987. *Konsep Undang-undang Tanah Islam Pendekatan & Perbandingan*. n.pl:Ar-Rahmaniah. p. 421.

Whereas one case of *wasiyyah* which is dissented with Islamic *faraid* Law which has been used and administered in the court with assumption that the *wasiyyah* is not authentic and has been cancelled as such as the case which happened to *Saedah binti Abu Bakar v. Hj. Abdul Rahman bin Hj. Muhammad Yusuf*.²⁴ The Selangor High Court has decided that the allocation in *wasiyyah* that 'wasi' must manages his property for 10 years from his death date and after 10 years, a 'wasi' must distributed his property to his heirs who have the right to receive it. Based on the traditional of Prophet Muhammad p.b.u.h, it is not authentic because under the Islamic Law, the heirs have their right to continually get the heritage after his death. A claim by his widow and children in this case whom asserted that *wasiyyah* was not authentic has been accepted.²⁵

Whereas in the case of *Amanullah bin Hj. Ali Hassan v. Hajjah Jamilah*²⁶, the High Court has decided that a person who made a *wasiyyah* and tried to give more than one-third from his property and give it to one heir was not authentic.²⁷

2.4.2 REPORTED CASES OF *WAQF*

Sometimes the courts in Malaysia give more priority to the decision, which has been made by Privy Council, even though the opinions from that decision is clearly disserted with some *fatwa* which has been brought out by *Mufti* or disserted with the allocation of Islamic Religion Administration Law Enactment of related states.²⁸

For example in a case of the *Terengganu Islamic Religion Affairs Commissioner v. Tengku Mariam*, the High Court has decided that the *waqf* is not authentic, because:

²⁴ *Saedah binti Abu Bakar v. Hj. Abdul Rahman bin Hj. Muhammad Yusuf* [1918] 1 FMSLR 135.

²⁵ Mohd. Rezuwan Awang. 1987. *Konsep Undang-undang Tanah Islam Pendekatan & Perbandingan*. n.pl:Ar-Rahmaniah.p. 422.

²⁶ *Aminullah bin Hj. Ali Hassan V. Hajjah Jamilah* [1975] 1 MLJ 30.

²⁷ Mohd. Rizuan Awang. 1987. *Konsep Undang-undang Tanah Islam Pendekatan & Perbandingan*.n.pl:Ar-Rahmaniah. p. 422.

²⁸ Mohd. Rizuan Awang. 1987. *Konsep Undang-undang Tanah Islam Pendekatan & Perbandingan*. p. 456.

- (a) A *waqf* is a permanent gift to the family and immediate gift to the charity and the last gift to the charity is an imagination and
- (b) A *waqif* has a power to cancel any *waqf* is disserted with the basic principle which has been allocated in some *waqf*.

The Judge Wan Suleiman, he stated that “*waqf* is for his family forever and the last gift for the charity is imaginative and isolated”. Because of that, *waqf* has been cancelled (*void ob initio*).²⁹

The Judge Wan Suleiman has referred to the previous two decisions, which have been made by Privy Council in the case of *Abdul Fata Mohamed Ishak v. Rusamay Dhur Chowdry* of the case *Fatuma binti Mohamed bin Salim Bakhshuwen, & Anor v Mohamed bin Salim Bakhshuwen*. The decisions made by Privy Council in both cases have been followed by the courts in Malaysia in deciding about the family *waqf*.³⁰

The petition (based on the decision of the Judge Wan Suleiman) has been made to the Federal Court and the Court decided that;

- (i) The *waqf* is not authentic, but related people has stopped from argued of authenticity of that *waqf*, because they or their ancestors have agreed to obey the decision made by Mufti in this case and
- (ii) The respondent of this case has stopped himself from argued about the authenticity of that *waqf* because one rule (*fatwa*) which has an authority to tie them up has been brought out by Mufti, because of that Appeal Court has no power to listen to that petition.³¹

Whereas the *waqf* which, has been made by Tengku Chik bin Abd. Rahim which dated 25 Muharram 1360 equal to February 22nd 1941, where it has been registered in Terengganu Islamic Religion Affairs Department (No.22) in the registration book of page (68069) is authentic under the sect of Abu Hanifah which permitted someone to

²⁹ Mohd. Rizuan Awang. p. 456.

³⁰ Ibid. p. 457.

³¹ Ibid. p. 457.

make *waqf* for his own benefit for certain period in order to allow and attracted Muslims to make *waqf*.³²

The evocative questions of this case is, are that the decision and *fatwa* which have been brought out by that Mufti has tied up the Civil Courts in making decision about the *waqf* of Muslims?

If we look through the decision, which has been made either in the High Court or in the Federal Court, it could be seen that the Judges who Judge that case has decided that *fatwa* has not tie up the Civil Court.

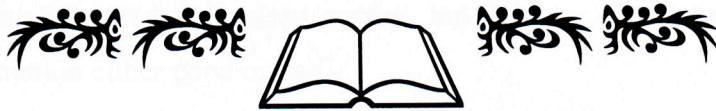
Based on opinion of the Judge Wan Suleiman “any *fatwa* which has been made by Mufti could not tie up this court and the court is freely hold to someone’s decision, as such as how far the court could accept. That *fatwa* and the court also could accept that *fatwa* and the court could refuse that *fatwa*.³³

From the decision above, the conclusion is position of *waqf* for family, is not valid because the decision of Privy Council Judges has equable as it is, except one new federation made to legitimate the *waqf* as same as which has been done at India. *Fatwa* that has pushing out by *Mufti* not bound the Civil Courts in Malaysia, but the decisions that has been made by Privy Council more concern than from *fatwa* that has been given by Mufti himself.³⁴

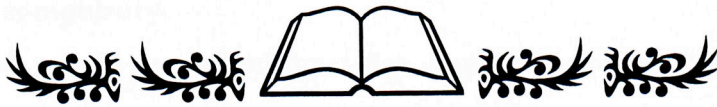
³² Ibid. p. 458.

³³ Ibid. pp. 458-459.

³⁴ Ibid. p. 459.



CHAPTER THREE



CHAPTER 3: THE CONCEPT OF *WASIYYAH*, *HIBAH* AND *WAQF*

3.1 *HUKM OF WASIYYAH, HIBAH AND WAQF*

3.1.1 *HUKM OF WASIYYAH*

Based on the opinion of four imams and also based on the opinions of Zaidiyah's stream, they stated that the will is not a responsibility upon anybody who has left his properties and also is not a responsibility towards the parents and relatives who are not inherit the properties left by the dead person, but the law of *wasiyyah* is different based on the situation either good or bad.

Hukm of *wasiyyah* has been compulsory, encouraged, unlawful, abominable and permissible based on related situation either good or bad.

1) *Wasiyyah* is compulsory

The law related to will is compulsory when someone who has passed away has responsibility towards the *syara'*. It is afraid if it that if he does not make, it would be useless as he has the responsibility towards afraid if it Allah S.W.T and also towards human being. For example, when he has responsibility to bring out obligatory alms, which is, still remains, the hajj to Mecca and still one someone, which only him knew about it.³⁵

2) *Wasiyyah* is encouraged

³⁵ Mudzakir AS, Drs. 1988. *Fiqih Sunnah*. n.pl:Pt alma'arif. Vol. 14. p. 222.

2) *Wasiyyah* is encouraged

Hukm of *wasiyyah* has been encouraged when it is done for the charity, poor relatives and for the pious person.³⁶

3) *Wasiyyah* is unlawful

The law of *wasiyyah* will be unlawful when such will affect heir. Such will is regarded as, even though that *wasiyyah* has not reached the 1/3 from the properties. The example of unlawful *wasiyyah*, is *wasiyyah* upon liquor, building up the church, entertainment places and anything, which is unlawful in Islam.³⁷

4) *Wasiyyah* is abominable

The will be abominable when the person who made a will leave behind a little amount of properties and at the same time he only has one heir or many heirs who inherit his properties. *Wasiyyah* will be abominable when the dead person made a *wasiyyah* upon someone who is *fasik* because they would use those properties in the wrong way.³⁸

5) *Wasiyyah* is permissible

The law of *wasiyyah* is permissible when the death that person has made the *wasiyyah* of his property to a rich person who is related to the death person³⁹

3.1.2 HUKM OF HIBAH

Hibah is one of the ways helping to do a charity of each other and it is one of the positive actions. The *ulama' fiqh* has been united in stating that *hukm* of *hibah* is encouraged, based on what has Allah mentioned in Surah an-Nisa', verse 4.⁴⁰ The

³⁶ Mudzakir AS, Drs. 1988. *Fiqh Sunnah*. p.222.

³⁷ Mudzakir AS, Drs. pp.222-223.

³⁸ Ibid. p.223.

³⁹ Ibid. p.223.

⁴⁰ Wahbah Al-Zuhaili. 1996. *Fiqh & Perundangan Islam*. Ahmad Shahbari Salamon, Dr (trans.). Kuala Lumpur: Dewan Bahasa & Pustaka. Vol.4.p.2.

meaning of that verse explained that Islam advised the Muslims to help each other, it is because Islam is allowed the rich to help the needy through the concept of *hibah*.

3.1.3 HUKM OF WAQF

It has been known generally that *waqf* is one of the methods, which brings into the charity. The gift in the way of *waqf* is one of the actions, which is allowed in Islam. The *waqf* is considered in the good deed because the gift given by Allah is still continue by the time they are still have been used and have given a lot of advantages to the people. Because of that *waqf* has been allowed by Islam but it has not been to do a responsibility to do a *waqf* upon their properties.

3.2 THE COMMANDMENT OF WASIYYAH, HIBAH AND WAQF

3.2.1 WASIYYAH

There are four commandments of *wasiyyah*, that are “*mushi*” (the will maker) “*mushalah*” (the properties which have been made upon *wasiyyah*, “*musha bih*” (the person who would receive *wasiyyah*) and the say of the will.

1) “*Mushi*”⁴¹

The will maker must be *mukallaf* that is one who reached puberty, free and also with it is by his own will; even though the will maker is a foolish or a non-Muslim. All schools have agreed in considering that the *wasiyyah* of a foolish person that has been made in that situation and the *wasiyyah* of children who have

⁴¹ Idris Ahmad S.H, Al-Ustaz H. 1995. *Fiqh Syafii*. Kuala Lumpur:Pustaka Antara Sdn. Bhd. Vol.2. p. 151.

reached puberty are illegitimate. But all schools have different opinion about wasiyyah of the children who have reached puberty.

Based on the opinion of Maliki, Hambali and Syafii, they stated that ten years old child is authentic because of the Caliph Umar RA said that in that case, this condition is authentic. Whereas the school of Hanafi said that this is illegitimate except *wasiyyah*, which is related to the preparation to bury him. Even though in the truth, as already known, *wasiyyah* is not required in the matter.

2) “*Musha lah*” (the person who would receive the *wasiyyah*)⁴²

The four schools have agreed that *wasiyyah* cannot be given to the heirs except if another heirs have agreed to it. The four schools also agreed that a non-muslim (*dzimmi*) could make *wasiyyah* for a non-muslim (*dzimmi*) and a non-muslim (*dzimmi*) could also make *wasiyyah* for a Muslim as Allah mentioned in *al-Quran*.⁴³

However the Ulama’ have different opinions about *wasiyyah* of a Muslim for a non-muslim (*Harbi*). Based on the schools of Maliki, Hambali, and Syafii, they have agreed that *wasiyyah* of a Muslim for a Harbi who non-muslim is authentic whereas the schools of Hanafi and Imamiyah stated that it is illegitimate.⁴⁴

3) “*Musha bih*” (the properties which have been made upon *wasiyyah*)

All schools have agreed that the properties, which have been made upon *wasiyyah* by a dead person, are of the own. For example, properties and house, *wasiyyah* will be unlawful if the dead person has made *wasiyyah* upon his properties which are not existed such as the insects or unlawful things by *syara*’ such as liquor, stolen

⁴² Sulaiman Rasjid. 1998. *Hukum Fiqh Lengkap*. n.pl: Dewan Pustaka Fajar. p. 400.

⁴³ Muhammad Jawab Mughniyyah. 1994. *Fiqh Lima Mazhab*. Vol. 2. n.pl: Busrie Press. p. 240.

⁴⁴ Muhammad Jawab Mughniyyah. 1994. *Fiqh Lima Mazhab*. p. 241.

things and other unlawful property. All schools have agreed that it is authentic making *wasiyyah* on the fruits in the orchard for the next year or forever.⁴⁵

However the school of Imamah has given the opinion that it is authentic that the dead person made a *wasiyyah* upon things which are not existed but that things which are going to exist or the things which are cannot given by the giver of *wasiyyah* such as birds in the sky and fishes in the ocean.

4) The pronouncement of the will

The pronouncement of the way is that the will maker must say the words that could be understand clearly by the receiver of *wasiyyah* or someone else. For example, building, “when I die one day, I make a will that these properties are for built up the mosque” or “ if I die, please help me to pay RM200 to someone I have owed and so on.

3.2.2 HIBAH

The *Ulama'* have agreed that *hibah* has its commandment which must be followed so that *hibah* is authentic. The *Ulama'* have different opinion about the commandment of *hibah*. For the school of Hanafiah, they stated that the commandments of *hibah* comprise of *ijab*, that is the speech of giving the properties, *qabul* that is the speech of accepting and *qabd* which means that properties that have been made as *hibah* could be owned by their receiver directly.⁴⁶

⁴⁵ Idris Ahmad S.H, Al-Ustaz Hj. 1995. *Fiqh Syafi'i*. n.pl:Pustaka Antara Sdn. Bhd. Vol. 2. p. 151.

⁴⁶ Rahman Ritanga., M.A, Dr. 1999. *Fiqh Muamalat*. Kuala Lumpur:Edaran Kalam. p.2.

Whereas the *Ulama'* has debated that the commandment of *hibah* occurred in four conditions:

1) Giver

A giver is a person who owned whether the properties or things which would be given. If the giver is the owner of the properties authentically, he has the right to give that property to anybody whom he likes. According to the *Ulama'*, if the owner of the properties was not in the good condition and then he gave something to someone, and not long after that, he passed away, his gift must be 1/3 or 20% percent from his properties.⁴⁷

2) Receiver

A receiver is someone who gives his properties to another person with agreed. Whereas the gift of all his properties to a few numbers of his children is abominable based on the *Ulama'* although there are a few of them have the same opinion of the law for that case is permissible.⁴⁸

3) Properties being given

The whole properties owned by someone have been given to someone else.

4) The say (word)

A say is the whole things which have been asked in *ijab* or *qabul* either by words or actions such as the say of gift, *hibah* or giving and something or some action like that. Where as an *ijab* occurs when it is clearly said for example the giver said that "I give this thing to you" or an *ijab*, which is not clearly said such as the giver, said that "I give my own to you".⁴⁹

⁴⁷ Wahbah Al-Zuhaili. 1996. *Fiqh & Perundangan Islam*. Ahmad Shahbari Salamon, Dr (trans.). Kuala Lumpur: Dewan Bahasa & Pustaka. Vol.4. p.4.

⁴⁸ Wahbah Al-Zuhaili. 1996. *Fiqh & Perundangan Islam*. Ahmad Shahbari Salamon, Dr (trans.). p.4.

⁴⁹ Wahbah Al-Zuhaili. Ahmad Shahbari Salamon, Dr (trans.). pp. 4-5.

3.2.3 WAQF

There are four commandments of *waqf* the maker of the *waqf*, the properties or things, which have been made as *waqf*, the receiver of the *waqf* and the say (word) of *waqf*.

1) The maker of the *waqf*

Someone who made a *waqf* must fulfill the required conditions as a complete person. This means *waqf* made by children or mad person or foolish person is unlawful in Islam. The maker of *waqf* has made *waqf* for charity or sincerely without any force from anybody who irresponsible. *Waqf* is not enforceable if someone made *waqf* of his properties because someone forces him to do so.⁵⁰

2) The properties or things which have been made as *waqf*

The maker of *waqf* must own the properties or things, which have been made, as *waqf* authentically and the properties are moraine immovable property. For example *al-Quran*, *al-Hadith*, books, chairs, clothes, animals, and cars are the examples moveable the properties, which could be moved from one place to another place. Whereas land, well, mosque, school, and trees are the examples of the properties which could not be moved from one place to another. For examples, land, well, mosque, school, and tree.

Among the reason for someone to make a *waqf* upon his properties is to get the rewards continuous either the properties for *waqf* is moveable or immovable property or not. *Waqf* is unlawful if the maker of the *waqf* made the *waqf* upon something, which is not lasting such as food, drinks, candles and others.

3) The receiver of the *waqf*

The receiver of the *waqf* must exist, if made a *waqf* made upon someone or some group, they must fulfilled the conditions for someone who has the right to receive the

⁵⁰ Idris Ahmad S.H, Al-Ustaz 1995. *Fiqh Syafi'i*. n.pl:Pustaka Antara Sdn. Bhd. Vol. 2. p.129.

waqf, that is someone who have the right to own something. It is unlawful if someone made a *waqf* on his properties to the baby in the womb and to the slave because both of them have no right to own property.

4) The pronouncement

The pronouncement of the *waqf* is very important for someone who makes *waqf* upon his properties. The word of *waqf* will explain that the giver of the *waqf* has given his properties to somebody, he must say “the word of the *waqf*” such as “ I would *waqf* this land for building up mosque” that say showed clearly that the person has *waqf* upon his land to build up mosque.

The *Ulama*’ have divided the word of *waqf* into two sections, the first one by using the express term or also known as *sarih* such as “I *waqf* this building for the hostel of the students of this religious school”.

Whereas, the second one is by using the word, which is implicit, but it could be understood as *waqf* or also known as the word of “*kinayah*” such as “I want to make this land everlasting for the poor”. *Waqf* with the word of “*kinayah*” could be accepted as a *waqf* if there is intention because without intention, *waqf* which has been said with the say of the *waqf*, is unlawful, it is not enforceable

3.3 THE CONDITIONS OF *WASIYYAH*, *HIBAH* AND *WAQF*

3.3.1 *WASIYYAH*

The conditions of a *Wasiyyah* need a person who gives *wasiyyah*, a person who is given *wasiyyah* and the property, which would be declared as *wasiyyah*. All these three conditions are as followed:

i) A person who gives *wasiyyah*

A person who gives *wasiyyah* is a person who participates in charity and who has an authentic competency.

Competence is based on mind, maturity, freedom, effort and he is not being restrained by foolishness or carelessness. When the person who gives *wasiyyah* is lack of competence because of lack of maturity or mad or slave freedom, his *wasiyyah* is not valid.⁵¹

If a person who receives the *wasiyyah* has heir and his heir agrees with his *wasiyyah*, so that *wasiyyah* must be carried out to all his property otherwise if he does not have heir.

Based on the Hanafi School, if a person who has given *wasiyyah* but the heir does not agree with his *wasiyyah*, that *wasiyyah* can only be carried out one-third from his property.⁵²

According to Imam Malik has different opinion; Imam Malik has in own opinion stated that in making a *wasiyyah* upon a person who is weak in thinking and a child who could understand the meaning of worship to Allah. He stated that a person who is weak of thinking, foolish person and sick person, the *wasiyyah* is being considered, when they have mind, which could understand what they do. It is also happen to children. When they know what they are doing (making a *wasiyyah*) and do not state any words which are not disobedient their *wasiyyah*, so that *wasiyyah* could be carried out.

⁵¹ Mudzakir AS, Drs. 1988. *Fiqh Sunnah*. n.pl: Pt alma'arif. Vol. 14. p. 224.

⁵² Mudzakir AS, Drs. 1988. *Fiqh Sunnah*. p. 224.

ii) A person who receives *wasiyyah*

The only essential condition is that he must not be among the heirs, unless with the agreement of other heirs. The Maliki Jurists have based their authority on the hadith of the Prophet p.b.u.h:

إن الله قد أعطى كل ذي حق حقه-فلا وصية للوريث.

Meaning: There is no any wasiyyah for heirs.

The Maliki School also allows the wasiyyah in favour of a dead person knowing that the person is actually dead. The wasiyyah in fact is intended to go to his heirs. Wasiyyah can also be made in favour of a mosque for its maintenance. In such a case it will be the waqf for the mosque for all time to come.⁵³

The wasiyyah can be made in favour of an animal although the animal is not capable of having anything. It will really mean that the wasiyyah is made to the person taking care of the animal feed and look after it. Wasiyyah can be also made to the heir to give out zakat if it is due out of the estate. But if the wasiyyah for the payment of zakat is the for the past years, it will be to the proportion of the one-third of the wasiyyah.⁵⁴

Imam Muhammad Idris al-Shafii has discussed the following two verses of the Holy Quran showing an example of abrogating (Nasikh) and abrogated (Mansukh) verses and the role of Sunnah and Ijma' in deciding the rule of law on wasiyyah.⁵⁵

⁵³ Abd Rahman I.DoI. 1984. *Shariah: The Islamic Law*. Malaysia: A.S Noordeen. p. 331.

⁵⁴ Abd Rahman I.DoI. 1984. *Shariah: The Islamic Law*. p. 331.

⁵⁵ Abd Rahman I.DoI. p. 331.

Thus Allah provided (legislation) for the inheritance of parents as well as for near relatives whether together with them or as successors, and for the inheritance of the husband.⁵⁶

The two foregoing verses may be interpreted either to confirm bequests for the parents and the near relatives, bequests for the wife and inheritance together with bequests, so that inheritance and bequests are lawful or that the legislation concerning inheritance abrogates that concerning bequests.⁵⁷

Since both interpretations are possible, it is obligatory upon the learned Ulama' to find an evidence in the book of Allah as to which of the two is valid if nothing is found in the text of the Book of Allah they should try the Sunnah of the Prophet p.b.u.h. If such an evidence is found, it should be accepted, as if acceptance from Allah virtue of His command to obey His Messenger.⁵⁸

A great number of jurists also have held that the legislation concerning bequests for relatives was abrogated and is no longer obligatory for whenever they are entitled to inherit, they are so by virtue of the law of inheritance but when they are not entitled to inherit, it is not obligatory that they should inherit by a bequest.⁵⁹

Tawus bin Kaysan and a few other authorities, however, held that the legislation concerning bequests for parents has been abrogated, though it was confirmed for relatives not entitled to inherit. So it is not permissible for him who bequests to do so to persons other than relatives.⁶⁰

⁵⁶ Ibid. p. 331.

⁵⁷ Ibid. p. 332.

⁵⁸ Ibid. p. 332.

⁵⁹ Ibid. p. 332.

⁶⁰ Ibid. p. 332.

iii) The property which would be considered as *wasiyyah*

To fulfill condition of *wasiyyah* property, which would be declared after the *wasiyyah* giver had passed away, it is because, *wasiyyah* is valid about all valuable properties, either things or benefit. *Wasiyyah* is also valid in the form of fruits from crops and a baby in the womb of a cow because of they could own through legacy.⁶¹

To make a *wasiyyah* upon his debt and benefit such as houses and wealth is valid. Whereas to make a *wasiyyah* upon things which are not in the form of property such as carcass and not valuable for a person who does an *aqad* of *wasiyyah* such as liquor for Muslims is not authentic.⁶²

3.3.2 HIBAH

The conditions of *hibah* comprise of giver and gift.

i) A giver

Giver must have certain criteria such as sound mind, *mumayyiz* and also mature or clever. These conditions must be fulfilled because *hibah* is a voluntary *aqad*. Hence, the giver must not be a child or a mad person. This is because both of them are unable to donate tricky and dangerous situation. A father is also unable to give *hibah*, because he does not have much property. These situations Ulama' not have no any dissention because giver of *hibah* ability are limited to the form of benefits and gift, which is his donation or contribution has given him tricky situation. So, the father who has faced that kind of situation must not donate his property.⁶³

⁶¹ Mudzakir AS, Drs. 1988. *Fiqih Sunnah*. n.pl: Pt alma'arif. Vol. 14. p. 229.

⁶² Mudzakir AS, Drs. 1988. *Fiqih Sunnah*. p. 229.

⁶³ Wahbah Al-Zuhaili. 1996. *Fiqh & Perundangan Islam*. Ahmad Shahbari Salamon, Dr (trans.). Kuala Lumpur: Dewan Bahasa & Pustaka. Vol.4. p. 8.

Based on the opinion of Abu Hanifah and Abu Yusuf, a father can't recipretion some gift to his children. This is because, the gift with the condition to replace it just a voluntary *aqad* in beginning, that is before receiving the gift, and then becomes a business at the end, which is after receiving the gift. And the father is unable to give a donation.⁶⁴

Based on Muhammadan, the *hibah* gift from father with the condition of replacing is could be done because this thing is of the meaning of business based on teaching method through the meaning accommodation.⁶⁵

ii) Gift

i) The property is truly exist

Gift would not occurred if it is existed at the time of *aqad* such as giving date tree which produces fruits this year, or a kid of a goat which would borned this year. *Hibah* would not occur because of giving the gift, which does not exist. Such *aqad* is cancelled. Another example is by giving a kid goat to which is still in its mother's womb and giving a power to hold it after it is born, so that *hibah* would not happen because there are two possibilities either the kid is exist or not. This is because big stomachs of a goat milk a big.⁶⁶

Similarly with giving flour, which is still inside the wheat seeds, butter inside milk, olive oil inside the olives seeds. It could not been done even though the receiver receives that gifts after all things have been processes. This is because during the gift is not exist. Hence, everything which is not exist could not been

⁶⁴ Wahbah Al-Zuhaili. 1996. *Fiqh & Perundangan Islam*. Ahmad Shahbari Salamon, Dr (trans.). p. 8.

⁶⁵ Wahbah Al-Zuhaili. Ahmad Shahbari Salamon, Dr (trans.). p. 8.

⁶⁶ Ibid. p. 8.

replaced by one to another. The *aqad*, which has been made, would be terminated by itself, and *aqad* must be done again.⁶⁷

Besides that, gift for milk which is still in the milk, the sheep fur which is still on it's body and dates which are still on the trees are the examples of solid *hibah* which is being afraid would happen next time. If the *hibah's* giver cuts the fur of sheep's or plucks dates and gives them to the receiver, it is could be done because the gift exists and own by someone else.⁶⁸

However, such gift could not be done if does not discard the obstacles, that is the ver is busy with another matter. The giver who cuts the fur's off sheep or plucks the dates are busy.

The *Ulama'* of the Syafii and Hambali schools have the same opinion with the Hanafi school about conditions of *hibah*. They stated that everything, which is authentic in buying and selling matter, it is also authentic to be as a gift. Whereas, according to the Maliki School has different opinion about it. Maliki school stated that the gift of not valid in buying and selling matter such as a slave escapes from the conquer, things which are not being known and the fruits which are not ripe.⁶⁹

ii) Lawful property

Hibah's giving could not happened except for property such as hot, carcass, blood and hunting in Mecca in *ihram* situation. It is also could not happen to unlawful things in Islam such as liquor.⁷⁰

⁶⁷ Ibid. pp. 8-9

⁶⁸ Ibid. p. 9

⁶⁹ Ibid. p. 9.

⁷⁰ Ibid. p. 9.

iii) Property own by a given

Gift could not occur if the gift belongs to another person, this is because *hibah's* giver could not give the gift to anyone. This condition must be carried out based on the Hanafi School. Based on that condition *hibah's* could give gift to somebody else if that thing is of his own. The *hibah* could also been carried out if it is debt thing.⁷¹

iv) Protected or chosen thing

Based on the opinion of Hanafi School, *hibah's* gift is not valid if there is possibility of distribution such as house or big place, which is being damaged. But, if the *hibah* thing still good that means not damaged, so that gift is valid.⁷²

The *hibah* gift is also could be carried out if that gift could not be distributed such as car, bathroom, a small place and others. The gift also could be carried out if he is in emergency situation, which he must give a part of his property, for example if somebody has many siblings anybody must be share a part of piece land with his siblings.

Whereas, based on the school of Maliki, Syafii, and Hanbali, buying and selling could carry out the gift. Receiving gift is valid such as in receiving sale. The reception criterion is a giver gives related things to the receiver. So, he has done a right of the receiver.⁷³

⁷¹ Ibid. p. 9.

⁷² Ibid. p. 9.

⁷³ Ibid. p. 10.

3.2.3 WAQF

i) The property which has been considered as *waqf* must be forever which is not limited to time if a *waqf*'s giver said that: " I do a *waqf* upon this land to the poor for two years; so that *waqf* is not valid because it is not everlasting or forever."⁷⁴

ii) Thing or property which has been considered as *waqf* must be in the form of cash, because *waqf* means a movement of someone's possession to someone else. If there is a condition with the choice such as a *waqf* giver said that: " If I come, I do a *waqf* of this property to that school; that *waqf* is not authentic because it is not in the form of cash, except if it is related to a death such as when someone said: " I do a *waqf* upon my rubber estate to the Islamic Studies Faculty of Universiti Kebangsaan Malaysia after I died", that word become a *wasiyyah* and not as a *waqf*.

iii) *Waqf*'s giver must explain clearly to whom the property would be given as a *waqf*. If he said that: " I do *waqf* upon this house". This *waqf* is not authentic because *waqf* giver has not clearly explained to whom or which party would receive this *waqf*.⁷⁵

iv) The *waqf* thing must be hard and could keep its advantages such as rock, cement, mast and so on. It is not authentic to do a *waqf* upon food, drink, and something, which would damage or disappeared quickly. When someone does a *waqf* upon his thing, this means that he has no right upon it for his own benefits and his family. This is such as he sells it and gives it to someone else.⁷⁶

⁷⁴ Haron Din, Prof. Dato' Dr. 1999. *Manusia dan Islam*. n.pl: Percetakan AEE Sdn. Bhd. p. 526.

⁷⁵ Haron Din, Prof. Dato' Dr. 1999. *Manusia dan Islam*. p. 526.

⁷⁶ Idris Ahmad SH, Al-Ustaz Hj. 1995. *Fiqh Syafi'i*. n.pl:Pustaka Antara Sdn. Bhd. Vol. 2. pp. 129-130.

3.4 THE TYPES OF *WASIYYAH*, *HIBAH*, AND *WAQF*

3.4.1 THE TYPES OF *HIBAH*

i) *Hibah* at the time of *Mard-al-Maut*

The word '*Mard-al-Maut*' means an illness, which could cause death. The following conditions are for deciding "*Mard-al-Maut*", which are:

- (a) An illness which would cause death.
- (b) An illness, which could cause an emergency, a death in the mind of a dead person.
- (c) An illness, which could cause an emergency, a death in the mind of a dead person.⁷⁷

Hibah at the time of *Mard-al-Maut* is a gift given by someone who is in critical situation, which could bring to a death. In Islamic Law, that gift fall into two types of laws which are the law of *hibah* and the law of *wasiyyah*. This concept is equal to the principle of "*Donatio Martis Causo*", in the British Law in Islamic Law, if the giver had passed away, followed by that gift saying, the gift is the gift in the way of *wasiyyah* and include to the law of *wasiyyah*:

- (a) A gift must not be more than one-third of dead person's property.
- (b) A gift could not be given to the heirs except another heirs accepted it.⁷⁸

However, if a *hibah*'s giver is still alive the gift is include in the gift by way of *hibah*, that means it is not *hibah Mard-al-Maut* and include to the law of gift when he is still alive (*inter vivos*) that is a giving of the right of the *hibah* giver to the *hibah* receiver.

⁷⁷ Mohd Rezuwan Awang. 1987. *Konsep Undang-undang Tanah Islam Pendekatan & Perbandingan*. n.pl:Ar-rahmaniah. p. 424.

⁷⁸ Mohd Rezuwan Awang. 1987. *Konsep Undang-undang Tanah Islam Pendekatan & Perbandingan*. p. 424.

In the Law of *Majallah*, the word *Mard-al-Maut* has been defined as a sickness which mostly could bring to a death, which that sickness could weaken the patient (man) to work and weaken the patient (woman) to do household works and these patients died in that situation before one year goes on either on bed or otherwise.⁷⁹ If their illness is still continue, and one year has gone, so its law is equal to normal person, means all matter and *tasarruf* (related matter) is equal to normal person as long as their sickness has not changed. But if the sickness is more critical and their situation have been changed, and the ill situation (from at the time of a change happen until their death) has been considered as '*Mard-al-Maut*'.⁸⁰

Besides the Law of *Majallah* has explained some allocation about *hibah*. A few of them are:

First: When someone who has no heir *hibah* upon all his property to someone else at the time of '*Mard-al-Maut*', and then that gift has been received that *hibah* is valid. After his death, the *Baitul-Mal* could not consider that the property as a heritage.

Second: When a husband does a *hibah* of all his property upon his wife or from the wife to her husband, at the time of '*Mard-al-Maut*' that *hibah* has been received, it is because they have no heirs, so that *hibah* is valid.

Third: When someone does a *hibah* of some property to one of his heirs at the times of '*Mard-al-Maut*' and after his death, but another heirs are not agreed with that *hibah*, so that *hibah* is not valid.

Fourth: When someone who has a lot of debts, does a *hibah* of his property to his heirs and has been received, so that *hibah* is not valid, its means people

⁷⁹ Mohd Rezuan Awang. p. 425.

⁸⁰ Ibid. p. 425.

who gave debts to him could cancel that *hibah* and that property is divided to others people who gave debts to him.⁸¹

There are two types of acceptance of gift by *hibah* based on the opinion of the school of Hanafi, which are originally acceptance and acceptance by attorney.

i) Originally acceptance

Originally acceptance is to hold a property for himself, the condition is just has a mind. Children who are *mumayyiz* (knowing about either something is good or bad) and also mad person could not hold it. A person who has reached the puberty is not considered as authentic to receive by way of *istihsan*. So, soundman children could hold something, which has been given to them.⁸²

Whereas, by way of *qias* which is an opinion except opinion of the school of Hanafi, they considered that has reached the puberty as a condition because they said that the acceptance is included in the power matter and children have no power upon themselves, because of this, the children could not involved in business matter.⁸³

ii) Acceptance by attorney

Acceptance of the gift by attorney can be divided into two types, which are acceptance of gift itself and a type refers to the acceptance itself.

⁸¹ Wahbah Al-Zuhaili. 1996. *Fiqh & Perundangan Islam*. Ahmad Shahbari Salamon, Dr (trans.). Kuala Lumpur: Dewan Bahasa & Pustaka. Vol.4. pp. 18

⁸² Wahbah Al-Zuhaili. 1996. *Fiqh & Perundangan Islam*. Ahmad Shahbari Salamon, Dr (trans.). p.18.

⁸³ Wahbah Al-Zuhaili. Ahmad Shahbari Salamon, Dr (trans.). p. 18.

i) Acceptance for children

The first type is acceptance for children. It could be done when there is a guardian a person who gives maintenance, which protecting those children who have no parent.⁸⁴

If somebody else gives something to a child, and his parent receive it, so it must be based on the procedures, which have been decided by the school of Hanafi, beginning from the father and then the grandfather. If they are not exist and hard to find, that property's guardian must move to father heir, as same as an arrangement in having a power as a *waliyy* because the late attendance of origin *waliyy* to be there would gives problem to the children. If a *waliyy* or guardian has not there, so the right to protect those children moves to the closest person after his father and grandfather.⁸⁵

If one of the *waliyy* gives something or property in their hands to the children, that gift is authentic and there is a guardian to keep the property on behalf of those children. And also if a father sells his small children's property, and then there is nothing anymore because of selling, so that destroyer is also put into that children because they are also considered as a gift receiver with his father's acceptance.⁸⁶

If a small child who has *mumayyiz* receives gift, which has been given by one of stated *waliyy*, it could be done based on the *istihsan*. Based on *qiyas* it would not be done as being explained on the part of originally acceptance.⁸⁷

⁸⁴ Ibid. p. 18.

⁸⁵ Ibid. pp. 18-19.

⁸⁶ Ibid. p. 19.

⁸⁷ Ibid. p. 18.

It is also could not be done except four *waliyy* which are stated above. If anybody except these *waliyy* has received the gift on behalf of that child, either anyone else or his relatives such as his brother, uncle or mother because they don't have power to protect that child's property.⁸⁸

If one of four *waliyy* is not there, the guardian of that child must receive it based on a method of *istihsan*. Whereas, based on *qiyas*, it could not be done because the guardian has no power to protect it, but based on *istihsan*, this matter could be done because he is a person who takes care of him and he has power to receive it. The acceptance of a gift of children is only done to benefit things.

ii) Type which refers to the acceptance

The second type is the acceptance by attorney. The acceptance exists because of an attorney received the *hibah* method either acceptance of gift or better than that, as stated above:

- a) If anything given to the receiver as *wadi'ah* or loan. The gift would be done and could not be renew the acceptance after the *aqad* ceremony based on *istihsan* method. But based on *qiyas*, someone could not renew the acceptance after the *aqad* between the receiver and the gift. This is because; the power to receive *wadi'ah* is same with *wadi'ah* giver. Because of the similarity, the acceptance of the property must be open to renewing.
- b) If the gift is in the hand of the receiver in the condition of has been compensated such as confiscate things and has been hold upon the property which has to be keep for selling and also damaged things, so that gift is

⁸⁸ Ibid. p. 19.

authentic and would not be compensated. This is because the acceptance of replacement guarantee is bigger than the acceptance of trust.

- c) If the gift is in the hand of the receiver in the condition that being guaranteed by someone else, such as pawn property is being guaranteed by debt and things sold are guaranteed by price payment. Based on the opinion of Karkhi, the owner of things gives them to the receiver have not been considered as receiver of gift if he does not renew his acceptance. This is because, it is the acceptance of pawn property and the buying and selling goods. Even though, with that acceptance, there is a replacement guaranteed but its leave is not authentic. So, there is no possibility to give a leave because of the gift in order to be trust acceptance, and then followed by similarity of two acceptances. At that time, it is cancel the acceptance of replacement guaranteed. If those two acceptances are different, it could not be replaced. This is different with confiscate goods or the property, which is being kept just for selling because of that guaranteed could, ensures the leave from it. The giver permits the gift and acceptance to continually everlasting without guarantee. So, the similarity of two acceptances could replace one another.

In the book of al Jami' al Saghir and Bada'i which are more authentic stated that a receiver as a holder in other person's guarantee because the acceptance which has a guarantee is stronger than the trust acceptance.⁸⁹

⁸⁹ Ibid. p. 20.

3.4.2 WAQF

Waqf can be divided into two types:

i) *Waqf Ahli* (Family Waqf)

Waqf of member or *waqf* of family is also known as *waqf* specific which is *waqf* that refers to certain people, are person or more, either to a family or not. For example, someone did *waqf* upon his books for children, who are able to use them, and then to his grandchildren. This *waqf* is considered as authentic, and the people who are able to use that *waqf* property are those who are being mentioned in *sighah* (say) of *waqf*.⁹⁰

If there is nobody from his lineage who is able to use that book that has been *waqf*, so how about them? When this happened, the problem can be solved by refers to the conditions of *waqf* could not being a cancelled based on certain time, so even though his heirs are not there anymore to use the books of *waqf* were damaged but they still as a *waqf* property which could be used by his family or by public.⁹¹

The purpose of *waqf* of member is ben made is to ensure that the charity of his close relatives and his family. In order to ensure that they could get the advantages from that *waqf* for their lives and then has been given as charity for the poor after his death.⁹²

⁹⁰ Osman bin Jantan, Hj. 2001. *Pedoman Muamalat dan Munakahat*. Singapura: Pustaka National Pte Ltd. pp. 101-102.

⁹¹ Osman bin Jantan, Hj. 2001. *Pedoman Muamalat dan Munakahat*. p.102.

⁹² Amir Husin Mohd. Noor, Dr. 2002. *Falsafah Perundangan Islam*. n.pl: Mahzum Book Service. p. 232.

ii) *Waqf khairi* (welfare)

The purpose of *waqf khairi* and a *waqf* of welfare are made sincerely for the public advantages and not for certain people⁹³. For example, as Umar has done *waqf* of his property during the p.b.u.h as seen in *waqf* performed by Umar who Prophet p.b.u.h did *waqf* upon his property for the public advantages. Even though among the purposes of *waqf* was also for his family, but the main purpose was for the public advantages. Actually, his family means to remind his family in order to use that *waqf* by a Caliph, Umar r.a together.

Whereas, he stated about the poor is on the purpose of *waqf*. Actually they are included in the group of the poor either they come from the family of Umar or not.

A *waqf khairi* is a noble way of donating one's property it is in line and with the Islamic teaching as always stated that the rewards would remain forever with the *waqf's* giver even though after he had passed away, as long as the property which is given as *waqf* is still being used or benefits to the human being.

Waqf khairi is also *waqf*, which would be used sincerely by the society widely, and one of the suggestions is to bring happiness to them either in socio-economic, education, culture or religious matter.⁹⁴

⁹³ Osman Jantan, Hj. 2001. *Pedoman Muamalat dan Munakahat*. Singapura: Pustaka National Pte Ltd. p. 103.

⁹⁴ Wahbah Al-Zuhaili. 1996. *Fiqh & Perundangan Islam*. Ahmad Shahbari Salamon, Dr (trans.). Kuala Lumpur: Dewan Bahasa & Pustaka. Vol. 4. pp. 18-20.

3.5 THE BENEFITS OF *WASIYYAH*, *HIBAH*, AND *WAQF*

3.5.1 *WASIYYAH*

Each action, which has been ordered by Allah, has many advantages for humankind. *Wasiyyah* also has its own advantage especially to the giver as by Allah mentioned which means “a hand which gives is better than a hand which receives”. *Wasiyyah* also could ties up the relationship between a family of the deceased with the person who receive the *wasiyyah*.

Beside that, property of *wasiyyah* could be improved effectively if the receiver has skill and expertise especially in business which did not own by the heirs of late giver. Here, it is clearly showed that Islam always protecting the individual and society advantages as to build happiness.

3.5.2. *HIBAH*

Hibah also has advantages such as below:

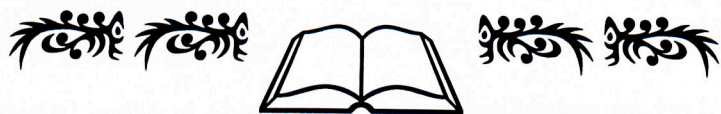
- i) The gift of *hibah*, could ties up the relationship between the family of the giver and the receiver. This practice can be seen in the practice of Rasulullah p.b.u.h and his friends in giving and receiving gifts from individual and also from the Arab society at that time.
- ii) *Hibah* is given to children, wife, Muslims or non-Muslims, charity homes and so on would attract them and also help them of their difficulties. Besides, the relationship between them is better than before.

- iii) *Hibah* is also could be given by a father to his child who needs more attention because of mental illness or physical illness. Through the gift of *hibah*, the justice upon them has been done.

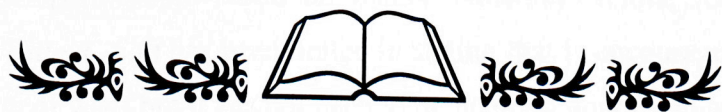
3.5.3 *WAQF*

Besides wasiyyah and *hibah*, a *waqf* also has its advantages. The owner of the property could use *waqf* in the way of Allah by doing *waqf* upon his property, which is a great continuous even though he had passed away. Prophet p.b.u.h has explained this matter in a hadith narrated by Muslim. “The meaning of that *hadith* is when a person had passed away, so his practices are break off except three things, which are a *waqf* (donation) or his knowledge which could brings a lot of benefits or pious children who are always save prayers to him”.

As explained by al-Syaukani in his book ‘Nail al-Autar’ that Umar bin al-Khattab obtained a piece of land in Khaibar, so he met Prophet p.b.u.h and asked for his opinion about the land is a new property to Umar R.A Prophet p.b.u.h advised that, the land should be which *waqf* because Allah grants a continuous rewards. This is because *waqf* could give a lot of benefits to all people including the poor, family and also to people of *jihad* to Allah.



CHAPTER FOUR



CHAPTER 4: CONCLUSION

In this research the writer have seen different concept of transaction to dispose property in Islam regarding *wasiyyah*, *hibah*, and *waqf* has been demonstrated. In conclusion *wasiyyah* has been specified to giving of property to somebody whom the giver likes only after his death. While, *hibah* is a promise by the owner to give the property to someone while the owner is still alive return. Whereas, *waqf* is to stop the property from being misused the property should be remain need for a good deed.

Allah has mentioned in the *al-Quran* and the Prophet Muhammad p.b.u.h has laid the basic foundation for the concept of disposal one's property. However, the concept has been developed by the Muslims jurists to suit with the need of the society.

Even though, the law of *wasiyyah* has been compulsory encourage, unlawful, abominable and permissible based on related situation. While, the law of *hibah* according the *Ulama' fiqh* has been united in stating that is encourage. And Islam has allowed the law of *waqf* but it has not been to do an obligatory to do a *waqf* upon their properties.

In cases of *wasiyyah*, there are four requirements of *wasiyyah*, there are "*mushi*" (the will maker), "*musha lah*" (the person who would receive *wasiyyah*), "*musha bih*" (the properties which have been made upon *wasiyyah*), and the pronouncement of the will. While, the commandment of *hibah* required four conditions there are the giver, receiver, properties being given and the say. Whereas *waqf* also has four commandments there are the maker of the *waqf*, the properties or things, which have been made as *waqf*, the receiver of the *waqf* and the word.

In the cases of *wasiyyah* it needs a person who will give the *wasiyyah*, a person who will receive *wasiyyah* and the property, which would be, declared as *wasiyyah*. While,

the conditions of *hibah* are comprised of giver and gift. Conditions of *waqf* are the property, which has been considered, as *waqf* must be forever, in the form of cash, the *waqf* giver must explain clearly to whom the property the *waqf* thing must be hard. There are two types of *hibah*, there are *hibah* at the time of *Mard-al-Maut* and the time of still alive. As for the types the types of *waqf* there are also two types there are a *waqf* of member and *waqf khairi*.

A person who will receive *wasiyyah* is not the heir of the giver. For *hibah* cases, usually it is made for other sons, to the living heirs, for example, husband and wife. To some extend, it can be made to a non-Muslim. *Waqf* property cannot be sold because it is for advantages public people and the given of the *waqf* can be the benefits until eternity.

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