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Revocation of Gift (Hibah) According to Islamic Law and its Practice under Syria Civil Law 1949

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Abstract: It is a common phenomenon today to find a variety of products based on gift in the wealth management industry and in Islamic financial markets. There are, however several issues relating to gift that are the cause of some confusion in the Muslim society, among them being the issue of revocation of gift, especially since, there are no specific written laws relating to gift in Malaysia that may be used as a guideline or reference if any problem or dispute should arise. The objective, therefore of this study is to analyse the opinions of the Muslim jurists and their proofs and arguments of reasoning on the Islamic judicial decision (Hukm) of withdrawing the gift before and after action of holding goods (Qabd) as well as the legal rule on a father's revocation of gift intended for his child and its application in the Syrian Civil Law, 1949. This study has employed the content analysis method from both primary and secondary data by comparing the opinions of the Muslim jurists to the provisions of the Syrian Civil Law, 1949. The result of the study found that the majority of Muslim jurists are of the views that the contract of gift is completed and effective from the time of holding the gift by the recipient. The donor of gift entitles to revoke his gift if there is no evidence of acceptance from the recipient, except in the case of gift from a father to his children. Contrarily, according to the views of the Hanafi, Imami and Zaydi schools of thought, there is no impediment upon the donor of the gift to revoke it despite the holding having taken place if there is no presence of one of the conditions that prevent the revocation of gift and their views seem to be in line with the provisions in the Syria Civil Law, 1949.

Key words: Gift, contract, Islamic judicial decision, revocation, Muslim jurists, Syria Civil Law

INTRODUCTION

Gift or hibah in Arabic terminology is a voluntary token made during a person's life in the form of donation or contribution (Tbarru') without any consideration or reward and it is also an Islamic financial planning instrument, the use of which is encouraged by the Holy Quran, al-Sunnah and the consensus of Muslim jurists. Its recommendation in the Islamic law is not to be viewed as a way out of or abandonment of the Islamic inheritance law system but as a complement to the distribution of assets system in Islam. Hibah is a gift of ownership of a person's property that takes effect during the lifetime of the hibah donor, contrary to the division of property by means of inheritance which only takes place after the death of the owner of property.

There is an increasing awareness among Muslims today to distribute their property while they are alive to their loved ones and not wait for the distribution of their property via inheritance. However, there are those who are still apprehensive about gifting their property as a gift directly and unconditionally because of fear of being cast aside by the recipients after giving away all their property to them. There are also those among them who worry that their property will be used for ill-gain or that the recipients will breach their promise or the conditions relating to the gift, knowing that once a gift is made, it cannot be revoked as ownership of the property has now been transferred to the recipient.

Further, there are a few donor of gift who do revoke his gift without regard or consideration for any inconvenience caused to the recipient. These scenarios are among the catalysts that lead to this study, to review the opinions of the Muslim jurists and their arguments regarding revocation of gift and its application under Syria Civil Law, 1949 by considering that Malaysia does not as yet possess any specific written laws on gift.

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LEGAL RULING ON REVOCATION OF GIFT

The Muslim jurists discuss this case based on two situations which are the revocation of the gift before the occurrence of holding by the recipient and the revocation of the gift after the the occurrence of holding. According to Ibn Manzur (2006), the act of holding refers to the act of taking something into possesion with their own hands or to hold something. In technical term, the holding refers to the receipt of an item that allowing to manage it (Ji, 1985). Masud (1998) further describes the holding as an ability to manage the recieved or gifted property.

The revocation of gift before the holding: The Muslim jurists have a different opinions on this situation. Their opinions are as follows:

The Hanafi, Shafi' i, Imami, Zaidi and a view of the Hanbali schools of law permit the revocation of gift before the act of holding by recipient (Muhammad, 2004). Their opinions are based on the consensus of the companions of the Prophet which allowed the revocation of gift before the act of holding made by a recipient.

The Maliki and Zahiri schools of law do not permit the revocation of gift before the holding. Their argumentations are based of a Quranic verse which means:

> Oh you who believe! Fulfil (your) obligations (Al-Maidah, 5:1)

According to these schools, it should be known that the contract of gift comes into effect with the pronouncement of the offer (Ijab) and the acceptance (Qabul) between the one who is giving the gift and the recipient. Consequently, the fulfillment of the promise is thus, made compulsory without the need for holding (Abd al-Bar, 1986). They then go on to state by using of deductive reasoning that the contract of gift is no different to the other contracts whereby the holding is unnecessary to be as a valid condition for the contract (Muhammad, 2004).

The Hanbali school of thought in another view, permits the revocation of gift before holding by the recipient subject to the bestowed property in kind of measured and weighted properties. If the property is not in those kinds, the revocation of gift should not occur because according to them the property of non-measurable and non-weightable comes into effect upon the contract, even though not holding it yet.

The source of disagreement amongst the Muslim jurists with regards to the revocation of the gift stems from the different views on the necessity of the holding within the contract of gift. The group which opines that the gift is not valid without the act of holding, permits the act of revocation of the gift before holding. On the other hand, the group which opines that the holding is not a prerequisite for gift and it is enforceable only by the contract, they do not allow the revocation of the gift before holding.

The revocation of gift after the holding: The revocation of the gift after holding (with the exception of gift from father to son) has also been a point of different opinions amongst the Muslim jurists with regards to its validity. Their difference of opinions can be divided into three groups; the first group is of the opinions of the Shafi' i school, the Hanbali school, Abu Thawr, Ibn Hazm and Dawud al-Zahiri. They opine that the donor cannot revoke the gift which has succesfully been transacted. Their opinions are based upon the following evidences; A Quranic verse which means:

> Oh you who believe! Fulfil (Your) obligations (Al-Maidah, 5:1)

Based on this verse, gift is a present made via a particular contract which must be fulfilled and must not be revoked or taken back. The Prophet said which means:

> The person who revokes his gift is like the dog that licks its vomit (Bukhari, 1987)

To equate a person who revokes gift as a dog that licks its own vomit illustrates the prohibition on the revocation of gift on the ground that the consumption of vomit is unlawful according to Islamic law (Shawkani, 1973).

In the words of the Prophet as narrated by Ibn Abbas and Ibn Umar which means:

> It is unlawful for a person to give a gift then later takes it back, except from a father (to his son) and whomsoever does as such, is like a dog that eats then vomits (what he has eaten) and returns to (eat) its vomit

From the mentioned tradition of the Prophet, it seems that the Prophet equates the revocation of a gift as something awful beyond the inherent nature of a good person that is likening the act of a dog licking its own vomit, unless in the case of revocation of a gift between a father and his children.

The second opinion represents the opinions of the Hanafi, Imami and Zaydi schools of thought (Muhammad, 2004). In the event that the gift was given to a foreigner, means an individual who is not a relative and being forbidden to be married (Mahram) to the donor of the gift then though the gift was completed with the holding, there are no obstacles to its revocation by the donor, unless there is something that prevents its revocation

(Shawkani, 1973). Despite this however, the Hanafi scholars view this action to be unfavourable (Makruh) or something to be discouraged (Qadiri, 1997).

According to the Hanafi school, the following constitutes the conditions that prevent the revocation of gift (Salim, 1994).

There occurs an increase to the bestowed property either by the act of recipient or others and it is inseparable from the property (Masud, 1998). For examples, the recipient builds an extension to a bestowed house or sews a bestowed cloth to be a shirt (Wahbah, 1989). These increases do not include an increase of value because the increase of value does not effect the original shape or form of the gift. Likewise, the increase which is separable or something that might be separated fruits from the bestowed farm where the donor could take back the farm whereas the fruits remains to be owned by the recipient of the gift.

The death of the person involved in the contract of gift after it has been surrendered and the holding has been completed. This is because if the recipient dies, the bestowed property will be owned by his heirs. Likewise, if the donor dies, his heirs have no right to revoke it (Qadiri, 1997).

The gift will be null in the case of death of a party in contract (donor or recipient) before the submission of the gift. Then, the gift will be passed to the descendants of the donor. Thus, the revocation of the gift will not occur because the contract of gift is considered null and void by the death of one of them in contract before the holding of the gift.

There existing of an agreement of exchange or reward. The recipient replaces the gift with something that has been previously agreed upon with the donor (Qadiri, 1997).

The recipient has transacted the gift and it is no longer under his ownership. In the case, that the first recipient gives the gift to the second one, it causes the donor cannot revoke it. But if the first recipient takes the gift back from the second recipient, so the donor can revoke the gift from the first recipient.

Revocation may not occur on the gift made by husband and wife (Masud, 1998), as the basis of such gift is made on the mutual love or affection between them without the expectation of any reward or reciprocacy as compared to the gift which is made to others. The gift in this case should be happening whilst both husband and wife are still under marriage contract. In the case of a gift is given prior to the marriage contract, the donor (husband or wife) may revoke the gift (Qadiri, 1997). But if the gift is given in the period of marriage contract, the gift will not be revoked even though after divorce.

Revocation may not occur if the gift has been given to a relative who is a mahram (forbidden to marry) to the donor (not including mahram who have no actual blood relation such as wet-nurse siblings). The reason for this is due to the fact that to strengthen the bonds of kinship between them (Wahbah, 1989).

Revocation may not occur in the case of the gift has suffered damage or has lost its benefit. The donor may not claim the gift with its value due to the value of the gift is normally not mentioned in the contract and at the same time, the recipient is not burdened by damages (Wahbah, 1989).

The absence of one of pre-conditions mention earlier the revocation will be valid on condition that it has been consented by both parties or through the court order (Salim, 1994).

This group argues based on the following evidences; the tradition of the Prophet which narrated by Abu Hurairah which means:

> The donor has more right to his gift that he does not obtain any reward of it

This hadith explains that for each gift which there is no receiving anything in return or reward, the donor entitles to revoke it (Muhammad, 2004).

They further argue that the purpose of gift is often to gain some reward. People generally offer gifts to those in a higher position than themselves in order to get security or protection whereas gifts are generally offered to those in a lower position in order to get their services and then gifts given to those of the same level are often in the hope that it will be reciprocated something in the future. Therefore if the purpose of giving the gift is no longer existing then the donor may revoke or cancel it, similar to in analogy as a buyer may cancel his contract of sale-purchase agreement if there is a damage in purchased goods (Muhammad, 2004).

A gift that is given to a relative who cannot be married (i.e., mahram) may not be revoked as it may break up the ties of kinship between the donor and the recipient (Qadiri, 1997). This is based on a tradition narrated by Samrah in which the Prophet said which means:

> If a gift is given to your mahram, it is forbidden for you to take it back (Bayhaqi, 1994)

This tradition of the Prophet proves that the donor of a gift may have a right to revoke it which is given to people other than his/her relatives to whom they are forbidden to marry (Muhammad, 2004). However, according to Bayhaqi (1994), this Tradition cannot be considered as a strong one, as it has only been narrated via a singular narrator (Sanad). This opinion is further supported by Darqutni (1966) as stated in his book of Sunan.

A donor of a gift who does not receive anything from the recipient may revoke it (Masud, 1998), similar to the contract of lending. If the lending property can be canceled because of no reward then the same position can be said for gift as they both are including in the contract of tabarru'.

The third opinion which originates from Al-Nakha' i, Al-Thawri and Ishaq where they state that a gift can be revoked (even after the holding) so long as it is not given to relatives or there are no conditions of reciprocation attached to it (Salim, 1994). This opinion is based on the words of the Caliph Umar which means: Whosoever gives a gift to someone who having a kinship between them is permissible and whosoever gives a gift to someone to whom they are not having a kinship, he/she (the donor) has a greater right to his/her gift as there is no reward for it.

Based on the mention earlier words, it is not permissible to revoke a gift which has been given to a person who has a family relationship regardless of whether they are allowed to marry or not, unlike the opinion of Hanafi scholars which only limits its prohibition to those relatives to whom have not been married.

THE REVOCATION OF GIFT BY A FATHER FROM HIS CHILD

The majority of Muslim jurists from the Maliki, Shafi' i, Hanbali and Zahiri schools of law state that it is lawful for a father to revoke his gift that has been given to his children (Damiri, 2004) on a few conditions depending upon with or without the purpose of revocation to equalize the gifts between all his chidren (Ibrahim, 1993). However, the Shafi' i school of thought goes on to further clarify that if the gift was given in a way that was just between his chidren and there are no other lawful need and necessary circumstances according to Islamic law, such as the act of revocation due to the child's disobedience against his/her parent or the gift has been used by the child in sinful acts, then the act of revocation by a father or mather would be considered as unfavourable (makruh) (Ibrahim, 1993).

The majority of Muslim jurists base their opinions on a statement made by the Prophet which was narrated by Ibn Abbas and Ibn Umar which means:

> It is not permissible for one to give a gift then later takes it back, except from a father to his son and whomsoever does as such, is akin to a dog that eats, then vomits (what he has eaten) and returns to eat his vomit

The Hanafi school, al-Thawri and one narration from Ahmad hold a different opinion to the majority Muslim jurists by not allowing the revocation of gift which has been made by a father to his children). This opinion is based on a tradition of the Prophet which means: The person who revokes his gift is like a dog that licks its vomit (Bukhari, 1987). Further, the Caliph Umar had said:

> Whomsoever has given a gift out of his property (hibah) for the purpose of strengthening ties of kinship or as a charity, he should not take it back (i.e., withdraw it)

The majority of Muslim jurists have dissention of opinions regarding the party other than the father who has the same status as a father who is allowed to withdraw a gift that he has given to his child.

The Maliki school of thought is of the opinion that the right to revoke a gift belongs solely to a father (Wahbah, 2007), regardless of whether the recipient (child) is male or female, a young child or an adult or rich or poor provided that the gifted property is still owned by that child and it is not bound with other person's rights (Ibrahim, 1993). However, a mother too has the right to withdraw a gift from a child so long as whose father is still alive, without consideration of whether the child is young or is an adult. But, if the child is still young and has lost his or her father, the mother should not withdraw the gift even if it was given before the father's death because a young child who has lost his father is considered to be an orphan and it is forbidden to withdraw a gift from him, similar to the ruling on charity (sadaqah) (Muhammad, 2004).

The Shafi' i and Hanbali schools of thought are of the opinions that the withdrawal of a gift is permissible for fathers and his origins (usul), i.e., grandfathers and grandmothers as well as for mothers and their origins (Damiri, 2004), even if they are of different religions, according to the most famous view in Islamic law. This permission does not take into consideration the status of the child, i.e., whether he is rich or poor, young or adult before or after the holding. This opinion is based on the saying of the Prophet as narrated by Ibn Abbas and Ibn Umar that allows the withdrawal of a gift of a father from his child (Sharbini, 1994). The permission for a grandfather or grandmother to revoke a gift that has been given to his or her grandchild is based on the Quranic verses that use the term father for also grandfather as in the following verse which means: And I have followed the ways of my fathers-Ibrahim, Ishaq and Yacob (Yusuf, 12:38).

The use of the term which means amy fathers is used for the Prophet Ibrahim and the Prophet Ishaq who were the grandfathers of Prophet Yusuf. Therefore, the status

of a grandfather and grandmother is akin to the position of a father in which they are granted to revoke the gift that has been given to their grandchild as the permission granted to fathers and mothers (Muhammad, 2004).

The conditions which allows the revocation of a gift according to the opinions of the Muslim jurists:

The gifted property is still owned and in the possession of the child (recipient). If the gifted property has been owned by others, for example it has been sold, given as endowment or given as a gift to another person and the holding has taken place, the father cannot therefore withdraw his gift. This condition was determined by the Maliki, Shafi' i and Hanbali schools of thought (Damiri, 2004; Sharbini, 1994).

The gifted property is still taken care of or under the management of the child. If the child has pawned the gifted property given by his father or if he is decided by the court being a bankrupt and prohibited from managing his assets, the father cannot revoke the gift in the interest of the creditor or pledgee. However, if the mortgaged property is returned to the child after he has settled his debts, the father has the right to withdraw the gift. This is the opinion of the Hanbali school (Salim, 1994). However, the jurists of the Shafi' i school do not take mortgages and loans on the gifted property as a prevention to the father from withdrawing his gift as the gifted property is still under the possession of the child (recipient). The exemption of this case if the father has lost his sanity so he or his guardians cannot withdraw the gift that has been given to his child even if the gifted property is still in the possession of the child because a revocation made in a state of insanity is invalid until the time he recovers.

The gift given is not a reason for the public to take pleasure of the child or he has a good status in society. For example by accepting the gift, the people around want to do business with the child or borrow money from him or results in a lady to marry him. In this situation, the father should not revoke the gift according to the opinion of the Maliki school and also a narration from Ahmad because the gift is now related to the rights of others as well as the right of child. The revocation of the gift in this situation will cause detriment to others which is prohibited in Islam (Salim, 1994) on a par with the saying of the Prophet which means: There is neither harming, nor reciprocating harm (Abdullah, 1990).

On the other hand, in another narration of Ahmad opined that as to the mention earlier situation, the father is still permitted to revoke his gift which is based on the saying of the Prophet which means: It is not allowed for someone to give a gift and then takes it back, unless what is given by a father to his son).

There is no increase that is inseparable from the gifted property, such as fat on an animal. This is actually based on a narration of Ahmad that prohibits a father from withdrawing a gift from his child upon which there has occured an inseparable increase on the gift. According to the Maliki school, an increase or decrease that occurs upon a gifted property which has been given to a child, it being a reason to prevent the father from withdrawing the gift (Wahbah, 1989).

However in another narration by Ahmad and it also the opinion of the Shafi' i school, a father is absolutely allowed to revoke his gift in any case, either in the case of inseparable increase or separable increase such as fat on an animal or fruits from an orchard (Damiri, 2004).

The final condition is that there is no intention or ulterior motive to gain reward in the hereafter or to strengthen the bonds of kinship and love between the donor and the recipient. This condition is based on the opinion of the Maliki school of thought.

THE REVOCATION OF GIFT UNDER SYRIA CIVIL LAW OF 1949

Law issues pertaining to gift in Syria are provided under the Syria Civil Law, 1949. The legal provision related to the revocation of gift is provided in Chapter 3, Articles 468-472 of the Syria Civil Law 1949 (Atari, 2010). The revocation of gift is allowed whether through the agreement of the recipient of gift or through a claim made via the court as provided in Articles 468 (1) and (2):

> It is permissible for a donor of gift to revoke his gift subject to the agreement of a recipient of gift. However, if the recipient does not agree, the donor may make a claim through a judge, depending upon a reasonable reason and there is nothing to prevent from the act of revocation

The accepted excuses or reasons for revoking a gift provided in Article 469:

- The recipient has neglected or abandoned his responsibility to the donor or one of his kins, whereby such abandonment constitutes a major violation on the side of recipient
- The donor loses the ability to fulfill the necessities of his life in the appropriate standard based on his social status or becomes incapability to fulfill his legal duties to provide a daily need for others
- The donor is conferred with a son after the gift has been given and the son is alive at the time of revocation of the gift or the donor has a son who is actually still alive who was presumed dead at the time the gift was carried out

The factors that prevent a claim for withdrawal of gift are provided in Article 470: A claim for withdrawal of gift is denied when one of the following factors is found to be present:

- There is an inseparable increase on the gifted property which has caused it to increase in value. However, once this factor is no longer present, the right to withdraw the gift will return to the donor
- One of the parties to the contract of gift has died
- The recipient has completely utilised the gifted property. However, if the recipient has only used a part of the property, the donor may withdraw the remainder of it
- The gift that is given by a husband or wife to his or her spouse, even if the withdrawal is made after divorce
- The gift that is given to relatives who are unlawful to be married (Mahram)
- Damage has occurred to the gifted property while under the control or care of the recipient, either the damage is caused by the actions of the recipient or incident beyond his control or utilisation of the gifted property. If, however, only a part of the gifted property is damaged, the donor may withdraw the remaining of it
- The recipient rewards or replaces for the gifted property
- The gift is given as a charity or as one of other good deeds

The implication of the act of revoking a gift, whether with the consent of both parties or via court proceedings, the position of the gift is considered as having never taken place. Aside from that, the recipient does not have to return any gain produced by the gift unless the gain which is obtained from the time of agreement to withdraw it or from the time a claim is brought to court. The recipient entitles to reclaim any expenditure spent in maintaining the necessities of the gift. Whereas the expenditure which brings the benefit to the gifted property, any claim made for it cannot exceed the the rate of value that increases in the gifted property. Provision as to the revocation of gift and its implications are provided in Article 471. Further, article 472 provides that:

> When a donor takes over or controls a gifted property without the consent of both parties or without referring to the court of law, he is fully responsible for the recipient on any damage to the gifted property, whether the damage is caused by the donor or by the foreigner or by the utilisation of it

Once the decision to withdraw the gift has been made and damage occurs to it while it under the care of the recipient due to there being excuses to return it, the recipient is responsible for the damage that occurred, even if the damage is caused by external factors beyond his control.

CONCLUSION

The legal provisions related to the revocation of gift which are provided in Chapter 3, Article 468-472 of the Syria Civil Law 1949 are considered in accordance with the view of the Hanafi school that allows for the revocation of gift even though the contract of gift and also the holding of it have completely taken place as long as there are no preventions for it. However, the Civil Law of Syria provides that a claim for revocation of gift must be based on acceptable excuses as mentioned in Article 469.

According to the Hanafi school of thought, the donor bears more right to the gifted property; however, it is of primary concern that familial ties based on blood relation and affection must be protected and maintained so that it will not suffer destruction by the act of revocation. Therefore, this school does not permit the act of revocation of a gift that has been given to a relative, who is forbidden for marriage and also does not permit the revocation of gift from a father to his child, contrary to the opinion of the majority of Muslim jurists that allow it. The Syria Civil Law, 1949 does not contain any provision about the revocation of gift of a father from his child.

Looking at in Malaysia that there is still no a specific written law relating to gift, thus this research is hoped may assist Muslims in this country in resolving issues relating to the revocation of gift. At the same time, it is hope that the Malaysian authority does efforts to table and enforce the law of gift which can be practiced by the Syariah Court in order to be referred to by the Muslim community.

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