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

MAWHAM BINTI OERIS

KOLEJ UNIVERSITI ISLAM MALAYSIA
WASIYYAH, HIBAH, & WAQF:
DIFFERENT TYPES OF TRANSACTION TO DISPOSE PROPERTY IN ISLAM

0000019492

Manihah binti Deris
(Matric No. P010248)

Academic Project report submitted in partial fulfillment for the
BACHELOR OF SYARIAH AND JUDICIARY (HONS)

Faculty of Syariah and Law
KOLEJ UNIVERSITI ISLAM MALAYSIA
Kuala Lumpur

March 2004
AUTHOR DECLARATION

بسم الله الرحمن الرحيم

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

Date: 17th March 2004

Signature:  مانی
Name: Manihah binti Deris
Matric No: P010248
Address: Lot 7542, Jln. Masjid,
Kg. Bukit Merbau,
16810 Selising,
Kelantan.
ACKNOWLEDGEMENTS

بسم الله الرحمن الرحيم

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.

First and foremost, I would like to express my thankful to Allah, the Almighty for granting my wish and giving the courage and faith to complete this academic project paper.

With very pleasure, I would like to take this opportunity to give my precious thankful to my supervisor Puan Syahirah binti Abd. Shukor for her advice, criticisms, suggestions and supervision and for the immeasurable amount of support and encouragement during the writing process of this project paper.

I am also indebted to my mother Hasnah @ Siti Fatimah binti Mohamad, also to my father Deris bin Awang Hamat, and also to my family who has given me the support and encouragement to complete this project paper.

Last but not least, I would like to deliver a bouquet of thank with the best compliment to all lecturers in the Islamic University College of Malaysia especially lecturers of Faculty Syariah and Law and my unforgettable friends especially Khamsiah, Adilah, Zarina, Che Nur Ilyani, Nazirah, Atifah and Wan Asma’ Auzani and also to all the third years students in Faculty of Syariah and Law.

Not forgetting to anyone who may have indirectly helped me in the preparation of this project paper. Without their cooperation, the completion of my project paper would not have been possible.
May Allah’s bless you all always Insya’Allah.

Thank you . . . .

Maniha binti Deris
Faculty of Syariah & Law
Islamic University College of Malaysia.
ABSTRAK

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.
هو غرضه هذا البحث المناقشة عن تمييز أنواع الأموال المنقولة في الإسلام كالوصية والرهبة والوقف. ويجادل الآخر، سأوضح في هذا البحث عن تعريفات لكل أنواع ذلك. واستورد الأدلة لكل منها من الآيات والأحاديث. واقترح به اختلافات الآراء من مذاهب الأربعة مذهب حنفي ومذهب مالكي ومذهب شافعى ومذهب حنابلة من حيث يتعلق بالأفكار والآرمان والشروط منها. وبين أصحاب الحقوق الذين يستحقون في تنفيذ تصرفات هذه الأموال. وأخذت حوار البحث في المكتبة من طريق القراءة والتأمل والاستقراء والحاصل منه، الكاتبة تعريف كثيراً منه الآراء المختلفة عن هذه أنواع الأموال المنقولة.
GLOSSARY

Al-ijma’
consensus as a source of Islamic Law

Al-ijtihad
creative self-exertion to derive laws from the legitimate sources.

Al-istihsan
as source of Islamic Law, the acceptance of a rule because of its superior equity in comparison with an already established law.

Al-istishab
the continuation of an established law not known to have been revoked or rescinded.

Al-qiyas
logical deduction from al-Quran al-Karim and the sunnah as source of Islamic Law.

Dhimmī
t (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.

Faraid
(pl. of Farizah). “inheritance”

Fasik
a sinner, guilty not only of great sins but also of everyday trifling offences against the law.

Fatwā
(pl. Fātāwā) A technical term used in Islamic law to indicate a formal legal judgment or view.

Fuqaha’
the experts in Islamic law (from fiqh).

Hadith
(pl. AHADITH) the verbalized form of a tradition of the Prophet Muhammad S.A.W. constitutive of his SUNNAH.

Imam
community leader in religious as well as in lay matters.

Kināyah
the word used in the science of exegesis.

Muslim
the proper designation of the person who adheres to Islam.

Sarīh
explicit or clear. A term used in Muslim law for that which is expresses in contradistinction to that which is kināyah or implied.
<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shara'a</td>
<td>the act of legislation by Allah (SWT) for any matter of concern in human life, personal, familial or public.</td>
</tr>
<tr>
<td>Shariah</td>
<td>the collective name for all the laws of Islam, including Islam whole religious and liturgical, ethical and jurisprudential system.</td>
</tr>
<tr>
<td>Sunnah</td>
<td>the pattern of Allah S.A.W in ordering creation or any part or aspect of it.</td>
</tr>
<tr>
<td>Ulama'</td>
<td>(pl. of 'ālim). “one who knows; learned; a scholar.</td>
</tr>
<tr>
<td>Wadī'ah</td>
<td>a thing put down. The legal term for a deposit.</td>
</tr>
<tr>
<td>Waliyy</td>
<td>(pl. AWLIYA’) friend, patron, saint.</td>
</tr>
<tr>
<td>Zakāh</td>
<td>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.</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Meaning</td>
</tr>
<tr>
<td>--------------</td>
<td>---------</td>
</tr>
<tr>
<td>DBP</td>
<td>Dewan Bahasa dan Pustaka</td>
</tr>
<tr>
<td>n.d</td>
<td>no date / no year</td>
</tr>
<tr>
<td>n.pb.</td>
<td>no publisher</td>
</tr>
<tr>
<td>n.pl.</td>
<td>no place</td>
</tr>
<tr>
<td>p.b.u.h.</td>
<td>peace by upon him</td>
</tr>
<tr>
<td>p.</td>
<td>page</td>
</tr>
<tr>
<td>p.p</td>
<td>pages</td>
</tr>
<tr>
<td>R.A</td>
<td>radiya Allah anhu / anhā / anhum</td>
</tr>
<tr>
<td>SWT</td>
<td>subhanahu wa taālā</td>
</tr>
<tr>
<td>Trans.</td>
<td>translator/translated by</td>
</tr>
<tr>
<td>Vol</td>
<td>volume</td>
</tr>
</tbody>
</table>
CONTENT PAGE

Contents

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Author Declaration</strong></td>
<td>i</td>
</tr>
<tr>
<td><strong>Acknowledgements</strong></td>
<td>ii</td>
</tr>
<tr>
<td><strong>Abstrak</strong></td>
<td>iii</td>
</tr>
<tr>
<td><strong>Abstract</strong></td>
<td>iv</td>
</tr>
<tr>
<td><strong>Mulakhkhas Al-Bahth</strong></td>
<td>v</td>
</tr>
<tr>
<td><strong>Glossary</strong></td>
<td>vi</td>
</tr>
<tr>
<td><strong>Abbreviation</strong></td>
<td>vii-viii</td>
</tr>
<tr>
<td><strong>Content page</strong></td>
<td>ix-x</td>
</tr>
<tr>
<td><strong>List of Cases</strong></td>
<td>xi</td>
</tr>
</tbody>
</table>

CHAPTER 1: INTRODUCTION

1.1 Background of research 1-3
1.2 Aim of research 3
1.3 Objective of research 3-4
1.4 Scope of research 4
1.5 Research methodology 4
1.6 Literature review 4-6

CHAPTER 2: MEANING

2.1 DEFINITION OF WASIYYAH, HIBAH AND WAQF

<table>
<thead>
<tr>
<th>Subsection</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.1.1 The definition of wasiyyah</td>
<td>7</td>
</tr>
<tr>
<td>2.1.2 The definition of hibah</td>
<td>8</td>
</tr>
<tr>
<td>2.1.3 The definition of waqf</td>
<td>8</td>
</tr>
</tbody>
</table>

2.2 AUTHORITY FROM AL-QURAN

<table>
<thead>
<tr>
<th>Subsection</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.2.1 Authority of wasiyyah</td>
<td>9-11</td>
</tr>
<tr>
<td>2.2.2 Authority of hibah</td>
<td>11-14</td>
</tr>
<tr>
<td>2.2.3 Authority of waqf</td>
<td>14-16</td>
</tr>
</tbody>
</table>

2.3 AUTHORITY FROM AL-HADITH

<table>
<thead>
<tr>
<th>Subsection</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.3.1 Authority of wasiyyah</td>
<td>17-18</td>
</tr>
<tr>
<td>2.3.2 Authority of hibah</td>
<td>19-21</td>
</tr>
<tr>
<td>2.3.3 Authority of waqf</td>
<td>21-23</td>
</tr>
</tbody>
</table>

2.4 REPORTED CASES

<table>
<thead>
<tr>
<th>Subsection</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.4.1 The related cases of wasiyyah</td>
<td>23-24</td>
</tr>
<tr>
<td>2.4.2 The related cases of waqf</td>
<td>24-26</td>
</tr>
</tbody>
</table>
CHAPTER 3: THE CONCEPT OF WASIYYAH, HIBAH, AND WAQF

3.1 HUKM OF WASIYYAH, HIBAH AND WAQF
   3.1.1 Wasiyyah 27-28
   3.1.2 Hibah 28-29
   3.1.3 Waqf 29

3.2 THE COMMANDMENT OF WASIYYAH, HIBAH AND WAQF
   3.2.1 Wasiyyah 29-31
   3.2.2 Hibah 31-32
   3.2.3 Waqf 33-34

3.3 THE CONDITIONS OF WASIYYAH, HIBAH AND WAQF
   3.3.1 Wasiyyah 34-38
   3.3.2 Hibah 38-41
   3.3.3 Waqf 42

3.4 THE TYPES OF HIBAH AND WAQF
   3.4.1 Hibah 43-48
   3.4.2 Waqf 49-50

3.5 THE BENEFITS OF WASIYYAH, HIBAH AND WAQF
   3.5.1 Wasiyyah 51
   3.5.2 Hibah 51-52
   3.5.3 Waqf 52

CHAPTER 4: CONCLUSION 53-54

Bibliography 55-57
LIST OF CASES

<table>
<thead>
<tr>
<th>Case</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sheikh Abdul Latif and others v Sheikh Elias Bux [1915] FMSLR 204</td>
<td>23</td>
</tr>
<tr>
<td>Saedah binti Abu Bakar v Hj Abdul Rahman bin Hj Muhammad Yusuf [1918] 1 FMSLR 135</td>
<td>24</td>
</tr>
<tr>
<td>Aminullah bin Hj Ali Hassan v Hajjah Jamilah [ 1975] 1 MLJ 30</td>
<td>24</td>
</tr>
</tbody>
</table>
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 contain 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 coomand 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 waqaf are very wide. However, the scope of this study is to have a general overview on the concept of wasiyyah, hibah, and waqaf. 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 Pengamalanannya Di kalangan Masyarakat Tanjong 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 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

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

---

2.2 AUTHORITY FROM AL-QURAN

2.2.1 AUTHORITY OF WASIYYAH

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

کتب عليكم إذا حضر أحدكم الموت إن ترك خيرا الوصية للوالدين الأقربين بالمعروف
حقًا على التقين

(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.\textsuperscript{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.\textsuperscript{11}

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

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

\textsuperscript{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.

وصية يوصى بها أردين اباؤكم وابناؤكم لا تدرون ابهم اقرب لكم نفعا فريضة من الله ان
الله كان علمًا حكيمًا

(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:

أيها الذين امنوا شهادة بينكم إذا حضر أحدكم الموت حين الوصية اثنين ذو عدل منكم أو أخر من غيركم ان انت ضربتم في الرض فاصابتكم مصيبه الموت تحيضوها من بعد الصلوة فتفسمن بالله ان ارتبتم لا تسترى بهما ولو كان ذا قرب ولا نكم شهادة الله اذا لمائم الآتين

(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:

\[
\text{ليس البر ان تولو وجهكم قبل المشرق والمغرب ولكن البر من امن بالله واليوم الآخر}
\]

\[
\text{الملئة والكتب والنبيين واتى المال على حبه ذوى القرى واليمنى والمسكين وابن سبيل السائلين وفي الرقاب واقام الصلوة واتى الزكوة والموقوف بعهد هم اذا عاهدوا والصرى ف}
\]

\[
\text{البأساء والضراء وحين البأس أولئك الذين صدقوه وأولئك هم المتقنون.}
\]

(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, ad 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 surah al-Baqarah:

وما انفقتم من نفقة أو 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 Surah an-Nisa’:

واتوا النساء صدقاتهن نحلة فإن طين لكم عن شيء منه نفسا فكلوه هنينا مريما.

(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:

يأتيها الذين امنوا لا تخلو شعائر الله ولا الشهر الحرام ولا الهدى ولا القلالاند ولا آمن البيت الحرام يبغون فضلا من رحم ورضوان وإذا حللتهم فاصطادوا ولا يجرمنكم شنان قوم ان صدكم عن المسجد الحرام ان تعتدوا وتعاونوا علئه البر والقوى ولا تعاونوا على الالثم 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 تفرضوا الله قرضًا حسنًا يضعنه لكم ويغفر لكم والله شكور حليم.

(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:

لا نتناولوا الضر حتي تنفقو مما تحبون وما تنفقو 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:

بين ادم اما باتينكم رسول منكم يقصون عليكم ابن اتقي واصلح فلا خوف عليهم ولا هم يحزنون.

(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 وثمانية عشر فميم ليلة ربه اربعين ليلة وقال موسى لأخيه هرون اخلفين في قومي واصبح ولا تتبع سبيل المسلمين.

(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 humankinds 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 surah Hud:

قال يقوم ارعيتم ان كنتم على بئنة من ربي ورزقين منه رزقا حسنا وما اريد ان اخالفكم إلى مالفكم عنه ان اريد الا الاصلاح ما استطعت وما توفقي الا بالله عليه توكلت واليه انبي.

(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 humankinds. Allah doesn’t command humankinds do anything accept goodness.

Verse 77 of surah al-Hajj:

يأيها الذين امنوا اركعوا واسجدوا واعبدو ربكما واعفوا 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 humankinds 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 أمرىء مسلم له شيء يريدان يوصى فيه بيث ليلتين إلا ووصيه مكتوبة عنده تابعه محمد بن مسلم، عن عمرو، عن إبن عمر، عن النبي صلى الله عليه وسلم.12

Meaning: Narrated Abdullah bin Umar RA: Allah’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 فتيبة 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


Meaning: Narrated Ibn Abbās r.a: I recommend that people reduce the proportion of what they bequeath by will to the fourt (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 رضي الله عنهما قال: كان المال للولدين وكانت الوصية للولدين، فنسخ الله من ذلك ما أحب فجعل للذكر مثل حظ الأثنين، وجعل للأبوين لكل واحد منها 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 eight 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.

2.3.2 AUTHORITY OF HIBAH

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

حدثنا عبد الله بن يوسف: أحبرنا مالك، عن ابن شهاب، عن حميد بن عبد الرحمن، محمد بن النعمان بن بشير: أن أمها حديثنا عن النعمان بن بشير: أن أباه أتى به إلى رسول الله صلى الله عليه وسلم فقال: إن نزلت أبى هذا غلاما، فقال: أكل ولدك نحلت مثله؟ قال، لاأ، قال: فارجعه. 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: أحبرنا هشام، عن معمر، عن الزهرى قال: أحبرن عبيد الله بن عبد الله: قالت عائشة رضي الله عنهم: لما نقل النبي صلى الله عليه وسلم فاشتد وقعه استأذاز أزواجه أن يمرض في بين فاذن له، فخرج بين رجليه نخط رجلاه الأرض، وكان

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:


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 came 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).

2.3.3 AUTHORITY OF WAQF

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

 حدثنى محمد بن عبد الرحيم: أخبرنا روح بن عبادة: حدثنى ذكريا بن اسحاق قال: حدثنى عمر بن دينار، عن عكرمة، عن ابن عباس رضي الله عنهما: إن رجلاً قال لرسول الله صلى الله عليه وسلم: إن أمه توفيت ابنعمهما إن تصدقك عنها؟ قال: نعم قال: فإن ل خرافا فأننا أشهدك أن قد تصدقك 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.”

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 رضي الله عنه وجد ما لا يخير فأتى النبي صلى الله عليه وسلم فأخبره قال: إن شئت تصدقت بما في الفقراء والمساكين وذوى القرى 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:

حديثي إسحاق: أخبرن عبد الصمد قال: سمعت أبي: حدثنا أبو التابع قال: حدثني أنس بن مالك رضي الله عنه: لما قدم رسول الله صلى الله عليه وسلم المدينة أمر بالمسجد وقال:

يا بين النجار ثامنون حائطكم هذا، فقالوا والله لا نطلب منه 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-Najjar! 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*, 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
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 Jamilah26, 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:

(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 *waqf* 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 Dhir 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 22⁶th 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

---

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*.\textsuperscript{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*.\textsuperscript{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.\textsuperscript{34}

\textsuperscript{32} Ibid. p. 458.
\textsuperscript{33} Ibid. pp. 458-459.
\textsuperscript{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

---

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 person\(^ {39}\)

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


\(^{37}\) Mudzakir AS, Drs. pp.222-223.

\(^{38}\) Ibid. p.223.

\(^{39}\) Ibid. p.223.

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*"\(^1\)

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

---

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)\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

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.\textsuperscript{45}

However the school of Imamiah 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 pronunciation of the will

The pronunciation 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.\textsuperscript{46}

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

49 Wahbah Al-Zuhalili. Ahmad Shahhari 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.\(^5^0\)

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

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.

---


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 للورث.

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

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.\textsuperscript{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.\textsuperscript{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 shoud try the Sunnah of the Prophet p.b.u.h. If such in evidence is found, it should be accepted, as if acceptance from Allah virtue of His command to obey His Messenger.\textsuperscript{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 entitle to inherit, they are so by virtue of the law of inheritance but when they are not entitled to enherit, it is not obligatory that they should inherit by a bequest.\textsuperscript{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 entitle to inherit. So it is not permissible for him who bequests to do so to persons other than relatives.\textsuperscript{60}

\textsuperscript{56} Ibid. p. 331.
\textsuperscript{57} Ibid. p. 332.
\textsuperscript{58} Ibid. p. 332.
\textsuperscript{59} Ibid. p. 332.
\textsuperscript{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.  

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.  

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. 

---

Based on the opinion of Abu Hanifah and Abu Yusuf, a father can’t reciprocation 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

---

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 its 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.”

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*.

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.

---

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.\(^7\)

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.\(^8\)

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.

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.

---


\(^{83}\) 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.  

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 being compensated. This is because the acceptance of replacement guarantee is bigger than the acceptance of trust.

c) If the gift 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 it’s 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 being 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.\textsuperscript{89}

\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{92}

\textsuperscript{91} Osman bin Jantan, Hj. 2001. Pedoman Muamalat dan Munakahat. p.102.
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 people\(^{93}\). 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.\(^{94}\)


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 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.
BIBLIOGRAPHY


Barmawi Umari, Drs. Hj. 1986. *Ilmu Fiqih (Ibadat, Muamalat, Munakahat)*. n.pl: Ramadhani.


Muhammad bin Abdul Aziz Al-Musnad. 1996. *Islamic Fatawa Regarding Woman.*


Musthafa Dilbu Indah Semarang, Dr. n.d. *Fiqih Menurut Mazhab Syafi'i.* Semarang: Cahaya Indah.


Syed Vickar Ahamed, Prof. Dr. 1999. *Interpretation Of The Meaning Of The Glorious Qur’an*. TR Group Of Companies.


