

MODERN APPLICATIONS OF *HIBAH* IN THE LIGHT OF SHARĪ'AH OBJECTIVES OF GIFT AND DONATION CONTRACTS (*Al-TABARRU'ĀT*)

Mohammed Farid Ali

After presenting the Sharī'ah objectives of both *tabarru'āt* and *hibah* briefly, this paper looks at the applications of *hibah* as a “supporting Sharī'ah concept” in four contracts proposed to the Shariah Advisory Council of Bank Negara Malaysia (SAC). The four contracts are (1) Interbank Mudarabah Investment Contract, (2) al-Ijarah thumma-l-Bay' Contract, (3) *Wadi'ah* Contract, and (4) *Qard* Contract. Do these modern applications of *hibah* realize the *maqāṣid* of *al-tabarru'āt* and *hibah*? Beside positive *maqāṣid*, the paper also looks into instances in which *hibah* is utilized to serve purposes which are negative in nature such as *ribā'* and bribery (*rishwah*). Based on the *maqāṣidic* approach to *tabarru'āt* and *hibah*, the paper recommends terms and conditions when combining *hibah* with other transactions and contracts. These conditions will seek to overcome the violation of the original *maqāṣid* of the *hibah* and *tabarru'āt*.

Keywords: Islamic Gift Economy; *Hiba*; Gifts and Charitable Donations in Islam; *Sharī'ah*-Objectives; Endowments; Buying and Selling in Islam; Donations; Islamic Economics.

TABARRU'ĀT (GIFTS AND CHARITABLE ACTS)

The term *tabarru'* (pl. *tabarru'āt*) is derived from the root *b-r-'*, meaning “to excel”. For instance, “He excelled in knowledge, courage, or other

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qualities; or he excelled his companions in knowledge; or he was, or became accomplished; perfect or complete, in every excellence, and in goodness”.¹ *Tabarru^c bil-^catā^c* means, “he gave what was not incumbent or obligatory on him; he gave supererogatorily; or he gave gratuitously, unasked, or unbidden.” The jurists, taking into consideration the basic linguistic meanings and the essence projected by *wasiyyah*, *waqf*, *hibah*, *ariyah*, *qard* and other similar contracts derive the technical meaning of *tabarru^c* as, “a contract which extends wealth or its benefit to others, immediately or in the future, without desiring a compensation and with the intention of doing a pious deed (*bi qasd al-birr wal-ma^crūf*). This definition presents *tabarru^c* contract as the genus and places *wasiyyah*, *waqf*, and the like as its sub-contracts (*anwā^c*). *Tabarru^cat*, inclusive of its sub-contracts, are acts of piety and charity.² This is grounded in Q 5: 2: “*Help ye one another in righteousness and piety, but help ye not one another in sin and rancor: Fear Allah. For Allah is strict in punishment.*”

The Qur[’]ān commentator, al-Jaṣṣāṣ al-Rāzi (d. 369/980) elaborates: The verse enjoins every Muslim to support another in all types of acts which come under piety.³ Acts of charity that support each other either in kind or cash or in any other form of benefit are part and parcel of piety. Another verse (Q 2:180) states: *It is prescribed, when death approaches any of you, if he leave any goods, that he make a bequest to parents and next of kin, according to reasonable usage; this is due from the God-fearing.*

Even though the verse is specifically on the topic of bequest (*wasiyyah*), it sheds light on the essence of *tabarru^cāt*. The verse encourages the dying person to consider his or her parents and next of kin in the spirit of love. The person is advised to allocate certain amount for parents and next of kin from his or her property without asking for anything in return.

The spirit in *tabarru^cāt* is to share wealth and benefit others because of love and not because of personal gain. *Tabarru^cāt* is about caring for each other. Another verse of the Qur[’]ān emphasizes that righteousness is not about performing salutary regulations only, but it is also about caring for each other. With the salutary regulations, a righteous man should strive for love of Allah and the love for his fellow-men: *It is not righteousness that ye turn your faces*

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1. al-Jawharī, Ismā‘il b. Hammād. *al-Ṣiḥāḥ: Tāj al-luġha wa-ṣiḥāḥ al-‘arabiyya*. Ed. Aḥmad ‘Abd al-Ghafūr ‘Aṭṭār. 7 vols. 4th ed. Beirut: Dār al-‘Ilm lil-Malāyin, 1410/1990.
 2. *Al-Mawsū‘a al-fiqhiyya*. 45 vols. Kuwait: Wizārat al-Awqāf wa al-Shu‘ūn al-Islāmiyya, 1404-1423, “*Tabarru^c*”.
 3. Abu Bakar Ahmad Ibn Ali al-Rāzi al-Jaṣṣāṣ, *Aḥkām al-Qur‘ān* (Beirut: Dār al-Kutub al-‘Ilmiyyah, 3rd edn., 2007), vol. 2, p. 381.

towards east or west; but it is righteousness to believe in Allah and the Last Day, and the angels, and the Book, and the Messengers; to spend of your substance, 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 fulfil the contracts which ye have made; and to be firm and patient, in pain (or suffering) and adversity, and throughout all periods of panic. Such are the people of truth, the God-fearing.⁴

In this verse, extending assistance to kin, orphans, needy, wayfarer, beggars, and slaves are all considered as acts of piety, providing that the assistance rendered should proceed from love and no other motive.

Hadiths also shed light on the importance of *tabarru'āt*. Jurists present “*tahāddu tahhabū* (exchange gifts so that you may love one another)”⁵ as the principle source on which the legality of *Hibah* is based. This hadith touches upon the essence of *tabarru'āt*, which is to give gifts to friends and relatives out of love. The legality of *tabarru'āt* is established through consensus as well; the Muslim *ummah* agree on it to be a pious act.⁶

In order to perform acts of *tabarru'āt* as a contract, a Muslim has to deal with its components (*arkān*). According to the majority view, these are four:

1. Donor (*Mutabarrī'*)
2. Recipient (*Mutabarrū' lahu*)
3. Donated-item (*Mutabarrī' bihī*)
4. Contract-words which inform the donating intention of the donor (*ṣīghah*)

Each component has its conditions (*sharā'it*) and the validity of the *tabarru'āt* contract depends on these conditions. These conditions are many and vary according to the sub-contracts of *tabarru'āt*. Works of *Fiqh* discuss these conditions in detail.

The legal outcome of *tabarru'āt*: If the terms and conditions of *tabarru'āt* contracts are met, as a result the donated item will transfer from the donor to the recipient. This transfer depends on the nature of the item. For instance, if the donated item is a bequest (*waṣīyyah*) then its ownership will transfer from the deceased to the recipient. Similarly, if the donated item is a loan (*ʿarīyah*),

4. Al-Baqarah (2: 177).

5. Jamāl al-Dīn Abī Muḥammad ʿAbd Allāh b. Yūsuf al-Zaylāʿī, *Nashb al-Rāyah Takhrīj Aḥādīth al-Hidāyah* (Beirut: Dār al-kutub al-ʿIlmiyyah, 2nd edn., 2002), vol. 4, p. 297.

6. *Al-Mawsūʿah al-Fiqhiyyah*, “*Tabarru'*”.

then the right to reap benefit from the item will transfer to the borrower. In this way the donated item in *waqf* and other sub-contracts of *tabarru'āt* will transfer to the recipient according to nature of the contract. These preliminary details of *tabarru'āt* lead us to the discussion of its aims and objectives (*maqāṣid*).

THE AIMS (MAQĀṢID) OF TABARRU'ĀT

Sharī'ah rules set by God are associated with the profound and wise purposes and the most sublime aims in order to achieve human interest in this world and the Hereafter (*maṣāliḥ al-khalq wa al-ākhirah*). These interests are inclusive of acquiring what is good and beneficial (*jalb al-maṣaliḥ*) and rejecting what is evil and harmful (*darr al-mafāsīd*). This intent of Sharī'ah is known as the higher objective (*maqāṣid al-sharī'ah al-ʿāliyah*). According to Jamal Eldin Attia, Ibn ʿĀshūr has referred to this intent with different terms such as “general intents (*al-maqāṣid al-ʿāmmah*)”, “the supreme intent (*al-maqṣid al-aʿzam*)”, “overall intents (*al-maqāṣid al-jumlah*)”, and “higher intents”.⁷ A passage from Ibn ʿĀshūr’s Treatise furnishes a better understanding of the term in discussion. He writes:

From a comprehensive thematic analysis of the textual sources of the sharī'ah pertaining to the objectives of legislation, we can draw the following conclusions. Both its general rules and specific proofs indicate that the all-purpose principle (*maqṣad ʿāmm*) of Islamic legislation is to preserve the social order of the community and insure its healthy progress by promoting the well-being and righteousness (*ṣalāḥ*) of that which prevails in it, namely the human species. The well-being and virtue of human beings consist of the soundness of their intellect, the righteousness of their deeds as well as the goodness of the things of the world where they live that are put at their disposal.⁸

These higher objectives are not exclusively associated with a particular type of *Sharī'ah*-ruling. These objectives are observable in many types of rulings. A higher objective of legislation is to set things right (*ṣalāḥ*) in all types of human activity and remove corruption (*fasād*) from it. In other words, the higher objective of *Sharī'ah* is to pursue overall well-being of people both on individual level and organizational level. Setting things right here is not confined to religious matters only such as setting right beliefs and acts of ritual

7. Gamal Eldin Attia, *Towards Realization of Higher Intents of Islamic Law*, translated from Arabic by Nancy Roberts, Washington: The International Institute of Islamic Thought, 2007, p. 101.

8. Muḥammadal-Ṭāhir Ibn al-ʿĀshūr, *Treatise on Maqāṣid al-Sharī'ah*, Translated from Arabic by Mohamed El-Tahir El-Mesawi (Washington: The International Institute of Islamic Thought, 2006), p. 87.

worship, but it also relates to “worldly condition and social affairs”.⁹

Coming back to *Tabarru‘āt*, it serves the higher objective of *Sharī‘ah*. It promotes mutual help (*muwāsāt*) among the members of the society. Mutual help achieve numerous benefits for the humans on individual and society level such as assisting the destitute, enriching the poor, education, environment preservation, unity and so on. Human well-being depends on these types of acts. A major obstacle to these acts is human greed which in this case is the corruption (*fasād*). Human greed gives birth to negative traits such as selfishness, betrayal, cheating, and other likes. These vices counteract human and social well-being. By legislating *tabarru‘āt* the sharī‘ah not only instills mutual help as a constituent of well-being, but protects from those vices which obstruct the very pursuit of well-being.

As for the specific objectives (*al-maqāṣid al-khāṣṣah*) of *tabarru‘āt*, Ibn ‘Āshūr mentions four for the purpose of legislating *tabarru‘āt*:

1. Proliferating donations and charitable acts
2. Donations must be made voluntarily
3. Providing room to the terms held by the benefactors
4. Avoid making donation an instrument to violate property of the other

Proliferation of donations and charitable acts (*takhīr al-tabarru‘āt*):

There are benefits both for individuals and community in *tabarru‘āt*. The sharī‘ah, in order to increase charitable acts, has taken special measures in promoting and encouraging *tabarru‘āt*. Human vices such as greed and other vices emerging from it are obstacles which put righteous acts like donation to a halt. If not halting, at the minimum it disturbs the continuity of such acts. The Qur’ān in this regard says: *But those who before them had homes and had adopted the Faith, show their affection to such as came to them for refuge, and entertain no desire in their hearts for things given to the (latter), but give them preference over themselves, Even though poverty was their (own lot). And those saved from the covetousness of their own souls - they are the ones that achieve prosperity.*¹⁰

The verse describes the Anṣār of Madinah, who shared whatever means they had with the new migrants from Makkah. This contribution was only possible for them when they freed their hearts from avariciousness (*shuḥḥ*). We can understand from this that the sharī‘ah rules alone are not enough to

9. Muḥammad al-Ṭāhir Ibn al-‘Āshūr, *Treatise on Maqāṣid al-Sharī‘ah*, p. 88, 89.

10. Q 59: 9.

convince people to perform righteous acts. Encouragement, stimulation, and reward are important factors which can convince people to take part in good actions. So the shari‘ah, besides laying down rules pertaining to *tabarru‘at*, encourages and calls people to participate in charitable activities. Imam Mālik allocated a special chapter on hadiths which promote charitable acts in his *al-Muwatta’*. He titled the section as: “Bāb al-Targhīb fil-Ṣadaqāt (Chapter on Encouragement to give Charities)”. *Al-Qabas*, a commentary of *al-Muwatta’* states that “Imam Mālik provided great benefit through this title. Through this title, he separated the traditions pertaining to rules from the traditions on virtues of donations and charitable acts.”¹¹ The verses of the Qur’ān, Hadiths, and practice of companions in relation to giving gifts, waqf, zakāt, and other forms of charity are many. Ibn al-‘Ashūr discussed these with quotations and derived the objective of shari‘ah to be proliferation of *tabarru‘at* contracts which will increase the benefits for the community at all levels.¹²

To Make Donations Voluntarily and without Hesitation

The second specific objective is to make donations voluntarily and without any hesitation. This is because the act of giving a portion of one’s wealth without any compensation is the act of well-known (*ma‘rūf*) kindness. Intention of such acts should be to sincerely benefit society and the donor should aspire for a reward from Almighty Allah only. In addition, such kindness should not lead to harm. The Qur’ān supports this: *No soul shall have a burden laid on it greater than it can bear. No mother shall be treated unfairly on account of her child. Nor father on account of his child, an heir shall be chargeable in the same way.*¹³

The verse indicates that “if giving charity results in harm, it will cause people to fear doing good, for good must not result in evil”.¹⁴ A hadith about it uses the term *ṭīb nafs minhu* which means sincere consent: “Property of a brother is not permissible for another except one which he gave with sincere consent (*‘an ṭīb nafsīn*).”¹⁵

11. Mālik bin Anas, *Al-Muwatta’ of Imam Mālik*, translated by Aisha A. Bewley (Spain: Madinah Press Granada, 1997), p. 419.

12. Muḥammad al-Ṭāhir Ibn al-‘Ashūr, *Treatise on Maqāṣid al-Shari‘ah*, pp. 303-304; ‘Izzuddin Ibn Zaghībah, *Maqāṣid al-Shari‘ah al-Khāṣṣah bi al-Tabarru‘āt wa al-‘amal al-khairī*, p. 9.

13. Al-Baqarah (2: 233).

14. Muḥammad al-Ṭāhir Ibn al-‘Ashūr, *Treatise on Maqāṣid al-Shari‘ah*, p. 304.

15. ‘Umar b. ‘Ali b. al-Mulaqqin, *Al-Badr al-Munir fi Takhrij al-Aḥādith wa al-Āthār al-Wāqī‘ah fi al-Sharḥ al-Kabir*, edited by Mustafa Abu al-Ghayt Abd al-Hayy (Saudia: Dar al-Hijrah, 1st edn., 2004), vol. 6, p. 693.

The recipient has to make sure that the donation he received is accompanied with sincere consent of the donor. To assure sincere consent, the donor is given enough time to consider his contract binding after he or she has made decision to donate. There is flexibility compared to the interval provided by the exchange contracts. Ibn al-‘Āshūr argues that donor’s reflection and resolution regarding donation stretches until the recipient has taken possession (*taḥwīz*) or until the witness has confirmed the donation (*ishhād*). Ibn ‘Āshūr quotes a hadith as well as opinions of legal schools who held that possession is necessary condition for *tabarru‘āt* contract to become binding. He comments that those legal schools which did not see possession as a requisite ignore the element of kindness and benefaction in *tabarru‘āt* contracts. They treat them just like the exchange contracts. The flexibility provided by the Sharī‘ah is to protect the benefactors from harm. The Sharī‘ah requires them to donate with sincere concern and not because of any internal or external pressure. This flexibility is a motivational factor for people to partake in good actions.¹⁶

Providing Room to the Terms Held by the Benefactors

The third objective of the Sharī‘ah in relation to *tabarru‘āt* is to provide room to the terms and conditions set by the benefactors. These terms play important role in validating the *tabarru‘āt* contract. This objective is connected to the first objective (proliferation of donation and charitable acts). Giving a portion from one’s wealth requires good motive which comes from religious munificence (*arīḥah dāniyah*) and noble morality. This good motive can easily be obstructed by evil thoughts. A verse states: *The evil one threatens you with poverty and bids you to conduct unseemly. Allah promised you His forgiveness and bounties. And Allah cares for all and He knows all things.*¹⁷

The verse, already quoted under the first objective, “*And those saved from the covetousness of their own souls—they are the ones that achieve prosperity*”, is about those internal factors which weaken the good motive. Q 2: 268 is about external factors which can also discourage the benefactors. Stipulation of strict conditions like the ones in exchange contracts can easily obstruct good motives of benefactors. To overcome this situation, the Sharī‘ah made room for the terms and conditions set by the benefactor. For instance, Sharī‘ah permits the benefactor to stipulate the commencement of his donation with his death. This is done through wills and testaments. Disposal of property in normal circumstance is only valid in the lifetime of a person, but here a level

16. Ibn al-‘Āshūr *Treatise on Maqāṣid al-Sharī‘ah*, pp. 304-308; ‘Izzuddin Ibn Zaghībah, *Maqāṣid al-Sharī‘ah al-Khāṣṣah bi al-Tabarru‘āt wa al-‘amal al-khairī*, p. 14.

17. Al-Baqarah (2: 268).

of flexibility is provided by the Sharī‘ah. The Sharī‘ah allows the donor to lay down conditions according to the nature of *tabarru‘āt* whether they are general (*ta‘mīm*), specific (*takhsīs*), temporary (*ta‘jīl*), permanent (*ta‘bīd*), and other forms of conditions. This is so, provided that the conditions do not contravene the higher objective of the Sharī‘ah.¹⁸

Avoid Making Donation an Instrument to Violate Property of the Other

The fourth specific objective Ibn ‘Āshūr presents is that *tabarru‘āt* should not be used as an instrument to violate other’s property (*dhari‘ah ilā idā‘ati mā al-ghayr*). For instance the benefactor, in order to prevent his children from inheriting his property, gives his entire property as *waqf*. The practice of the pagan Arabs in the pre-Islamic era was similar to this. Bequests (*wasāyah*) were used by them to deprive their next of kin and allocate their property for the notables of their tribe. After the advent of Islam, bequests were reduced to one third only, any amount beyond that belonged to the next of the kin after paying the creditors. Since this transition was still new for the Muslims, the old practice of giving bequests exceeding 1/3 was still in practice. There are incidents where the Prophet, upon him peace and blessing, reminded his companions to give bequests no more than a 1/3. When Sa‘d Ibn Waqqāṣ fell sick in Makkah, the Prophet, upon him peace and blessings, visited him and Waqqāṣ said, “I have lot of wealth and only two daughters. Do I bequeath two thirds of my property?” The Prophet, upon him peace and blessings, replied, “No!” Then I said, “one third”. The Prophet, upon him peace and blessings, said: “a third and a third is a lot. Leaving your heirs rich is better than leaving them poor to beg from people.”¹⁹ People used bequests and donations to alter inheritance or harm creditors. The new legislations brought by Sharī‘ah were to prevent people from using *tabarru‘āt* in manipulative ways.²⁰

APPLICATION OF HIBAH (GIFT CONTRACT) AND MAQĀSĪD

Hibah literally means conveying a benefit to someone without any consideration for return.²¹ Technically, the Ḥanafī and the Shāfi‘ī jurists define Hibah as: “A voluntary contract that results in uncompensated ownership transfer between

18. Ibn al-‘Āshūr, *Treatise on Maqāṣid al-Sharī‘ah*, pp. 308-309.

19. Muḥammad Ibn Ḥibbān al-Bustī, *Ṣaḥīḥ Ibn Ḥibbān bi Tartīb Ibn Bilbān*, edited by Shu‘ayb al-Arnūṭ (Beirut: Mu‘assisah al-risālah, 2nd edition, 1414 AH), Hadīth no. 4249.

20. Ibn al-‘Āshūr, *Treatise on Maqāṣid al-Sharī‘ah*, pp. 309-310.

21. Qāsim Ibn ‘Abd Allāh al-Qunawi, *Anīs al-Fuqahā fī Ta‘rifāt al-Alfāz al-Mutadāwilah bayna al-Fuqahā’* (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2004), p. 95.

living individuals”. A more specific definition is provided by the Ḥanbali jurists: “Hibah is a contract initiated by an eligible party to transfer ownership of existent and deliverable properties to another without compensation. The properties may be known or unknown, but they must be conventionally given as gifts, and the contract language must specify that it is a gift or a property transfer, etc.”²² These definitions concentrate on individuals as donors. This was the practice during the early times. The contemporary practice has given rise to a new scenario. Instead of individuals, organizations and institutions now play an important role as donors. The higher objective of *tabarru‘āt* which we discussed earlier (i.e. mutual help) does not necessarily have to be offered by individuals. Organizations can offer it as well.

Based on the literal meanings and the technical definitions, the purpose of the Hibah contract is to convey benefit to the recipient by gifting them a property free of compensation. It is a manifestation as such of *Ihsān* (beneficence) which takes a high profile in Islamic ethos. The verses of the Qur’ān and the hadith which recommend Hibah also support this. For instance, Q 4: 4: “*But if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer*”. Similarly, the hadith: “Exchange gifts so that you may love one another”.²³

Love, affection, and fraternity are important elements in human relations for mutual welfare and well-being. One of the ways to realize these objectives is to offer and exchange gifts in family, society, and within the circle of friends. Hibah serves philanthropic purposes. Through hibah, people’s needs are satisfied. Furthermore, charitable foundations can fulfill their social responsibilities through receiving and distributing hibah.

In the areas of inheritance, hibah can serve the purpose of overcoming some of the rigidities of distribution that may be caused by adverse circumstances. If, for example, a person has sons and a grandson who is invalid due to injuries or accident, and the estate is divided according to the inheritance law, the disadvantaged grandson will be excluded from taking a share by his father and uncles. In this situation, the grandfather can use hibah to allocate a part of his estate to his grandson in his lifetime. In modern commerce, hibah ascertains the smooth flow of transactions in the market place. When hibah is

22. Wahbah al-Zuhayli, “Financial Transactions in Islamic Jurisprudence” in *Al-Fiqh al-Islāmi wa Adillatuh*, translated by Mahmoud A. El-Gamal (Beirut: Dār al-Fikr al-Mouaser, 2nd edn., 2007), vol. 1, 539.

23. Jamāl al-Dīn Abī Muḥammad ‘Abd Allāh b. Yūsuf al-Zayla‘ī, *Naṣb al-Rāyah Takhrīj Aḥādīth al-Hidāyah* (Beirut: Dār al-kutub al-‘Ilmiyyah, 2nd edn., 2002), vol. 4, p. 297.

applied in conformity with its true purpose it can facilitate new transactions and transfer ownership.²⁴

Hibah is widely used in the promotion of Islamic financing products. Some of the modern applications of hibah have also come under increasing scrutiny as to whether they do or do not comply with the basic purposes of the contract. Here we examine the application of hibah as “supporting shari‘ah concepts” in the resolutions of the Shari‘ah Advisory Council (SAC) of Bank Negara. There are four contracts in which application of Hibah was proposed to SAC. The proposed contracts and SAC’s resolution in given in summary:

1. Hibah in Interbank Mudarabah Investment Contract

Participants of Islamic Interbank money market invest on the principles of mudarabah. The investor financial institution determines its rate of return (‘r’ rate) based on the rate of the investee’s financial institution. The ‘r’ rate indicates the efficiency of financial institutions in managing their Islamic funds and assets. Higher ‘r’ rate indicates efficient financial institution (FI) which will offer high return to the FI whereas lower ‘r’ rate indicates less efficient FI. Given this, the investor FI does not want to invest with investee FI which has an ‘r’ rate lower than the market ‘r’ rate. To solve this problem, a proposal was presented to SAC. The proposal suggested that the IF with ‘r’ rate lower than the market ‘r’ rate will offer “hibah as a consolation gift to the investor FI who is willing to invest with the former”.²⁵

The SAC in its 8th meeting (December 12, 1998), resolved the proposal as “not allowed”. The basis of the resolution SAC presented was that the hibah in this application was amounting to a guaranteed profit in the form of ‘r’ rate which the investee FI will give to the investor FI. This opposes the very nature of mudarabah contract which is based on profit sharing. In mudarabah contract the *rabbul-māl* is supposed to share profit and bear loss if any. Application of hibah in the proposal denies the aforementioned element.²⁶

2. Hibah in the Contract of *al-Ijārah thumm-l-Bay‘* (AITAB)

24. In a discussion with Hashim Kamali, he commented that: “Hibah is also utilized for the purpose of cleansing impermissible income or profit which is obtained through doubtful means, especially in the banking sector. Hibah can also be given to the non-Muslims by the state or charitable foundation for their welfare and also help them adjust to what might mean to some a new life.

25. Bank Negara Malaysia, *Shariah Resolutions in Islamic Finance*, Kuala Lumpur: Bank Negara Malaysia, p. 117.

26. *Ibid.*

A proposal was presented to SAC that an FI would like to offer hibah in *al-Ijārah thumma al-Bayʿ* contract (AITAB) as an incentive and encouragement to customers to pay their monthly rent in accordance with the “prescribed schedule”. In this arrangement, the FI offers hibah to customers who will pay their monthly rents in the first year on schedule without any delay. 1% of the financing amount will be credited into the eligible customers account on the 13th month.²⁷

The SAC in its 13th meeting (10, April 2000) resolved the proposal as “permissible”. The basis of resolution was that exchanging gifts is highly recommended in the Qurʾān and hadith. It is a benevolent act and is at the discretion of the giver.²⁸

3. Hibah in *Wadiʿah* Contract

Wadiʿah yad dhamanah is one of the methods Islamic Financial Institutions (IFI) in Malaysia apply to accept deposits from depositors. Some of the IFIs give hibah to *wadiʿah* depositors as a token of appreciation for their confidence in the institutions. One of the concerns raised in the proposal was that the practice of giving hibah to the depositors in this manner will become an outspread practice (*ʿurf*) forbidden by the Sharīʿah.²⁹

The SAC in its 35th meeting (22 May 2003), resolved the proposal as “permissible”. However a condition was stipulated that this practice should not become custom which resembles a condition in a *wadiʿah* deposit contract.³⁰ The resolution was based on the Sharīʿah rulings of loan based on *qard*. The terms and conditions of *qard* are applicable on the *wadiʿah* deposits. Any condition which gives benefit to the lender, which in this case is the depositor, is not permitted. This ruling is on the basis of the hadith: “Every loan that gives benefit to the lender is a *ribāʿ*.”³¹

3. Hibah in *Qard* Contract

In *Qard* contracts the borrower is obliged to return the loan to the lender without promising to pay any compensation. The proposal mentioned that in some instances, the borrower gives hibah to the lender at his own discretion.³² SAC was referred to on the issue as to whether giving hibah in *qard* contract

27. Ibid., p. 119.

28. Ibid.

29. Ibid., 120

30. Ibid.

31. *Ṣaḥīḥ al-al-Bukhārī*, hadith no. 2305.

32. Ibid., p. 117—122.

is permissible.

The SAC in its 55th meeting (29 December 2005), resolved the aforementioned practice as “permissible” with the condition that such practice should not become norm and resemble as a condition in the qarḍ contract. The basis was similar to the one presented in hibah in *wadi‘ah* contract.³³

MAQĀSID-BASED DISCUSSION

As far as the applications of hibah by Islamic financial institutions (IFIs) are concerned, there seems to be no objection. Through these applications, the IFIs serve the first specific shari‘ah objective of *tabarru‘at* i.e. proliferation (*takthīr*). IFIs should be moving towards increasing the hibah related products and other contracts of *tabarru‘at* as much as possible in order to increase the benefits for the people. However tying hibah with other contracts puts a limit to proliferation of gifts and charitable acts. Originally hibah was applied as a stand-alone contract. The practices of IFIs on the other hand apply hibah only as a “supporting concept” or only in contracts where there is a benefit for the IFIs. Transition from the original hibah to new applications of hibah has to assure that it will not affect the proliferation of charitable acts.

These modes of hibah application pose two questions. Can hibah be given for a consideration (*‘iwad*)? As we have seen in the proposals sent to SAC that hibah in all the applications is in return of a favor rendered by IFIs. This type of hibah is termed as *hibah al-thawāb* (gift for gift) in the fiqh discussions. The Ḥanafī jurist Abu-l-Ḥusayn Aḥmad Ibn Muḥammad al-Qudūrī (d. 427/1036) in his *al-Tajrīd* wrote that it is permissible if someone insists on a consideration for hibah. The opposing scholars objected that insisting on a consideration will rule out the hibah contract from its objective. Al-Qudūrī argued that consideration is always inherent within the intent of hibah contract. One either intends for a consideration in exchange for hibah, or one expects love and friendly ties (*mawaddah*) in return of hibah. In both cases the consideration does not oppose the objective of the hibah contract.³⁴ Other than the Zāhiri School, majority of the scholars have given preference to the position explained by al-Qudūrī. However, the Shāfi‘ī School distinguished between known and unknown consideration (*thawāb ma‘lūm wa majhūl*). They allow the hibah contract if the consideration is unknown. For instance if someone says “I am giving you a gift with the condition that you will reward me”, the hibah will be valid. In relation to the known consideration the Shāfi‘īs hold two opinions.

33. Ibid.

34. Abu al-Hasayn Aḥmad b. Muḥammad b. Jaḥar al-Qudūrī, *Mawsū‘at al-fiqhīyah al-muqāranah al-musammāt bi al-Tajrīd* (Cairo: Dar al-Salam, 2006), vol. 8, p. 3840.

According to one opinion it is not permitted, because stipulating a condition to reward a known consideration opposes the particular objective of hibah. Their second opinion accords the opinion they gave in relation to unknown consideration.³⁵ The pivoting point on which the jurists differ from each other is departure from the objective of hibah contract. If hibah is given for an especially known consideration then hibah will bear a resemblance to sale contract in principle. This is the reason why some Shāfi'ī jurists raised the concern that hibah for a known consideration is sale in substance and hibah in form. Since this is the case, if a person gifts one dirham for two dirhams, it will be unlawful because such exchange is tantamount to *ribā*.³⁶ Having said this, the modern applications of hibah come under the purview of gift for gift (*hibah al-thawāb*). If hibah applications are always in return of a known consideration, then the IFIs would fall short in serving the higher objective of *tabarru'āt* which is mutual help (*muwāsāt*) in the form of assisting the destitute, enriching the poor, and so on. Moreover not all recipients of hibah are resourceful enough to give something in return.

Known consideration will also affect the second specific objective of *tabarru'āt*, i.e giving gifts voluntarily. Sincere consent (*tīb al-nafs*) is the backbone in rendering benefits to the recipients voluntarily. Widespread use of hibah for known consideration will oppose this objective of *tabarru'āt*. The donors will then give hibah for a return only, hence they will donate to selective recipients capable of providing benefit in return.

The second question posed on the modern application of hibah is whether it is permitted to stipulate hibah with conditions especially with those which could oppose the very objective of hibah contract? The previous discussion was on stipulating a consideration (*shart al-ʿiwāḍ*), whereas this question is on conditions other than that consideration. Stipulating hibah with conditions is not permitted as it is not permitted in a sale contract. Ibn Qudāmah (d. 620/1223) in *al-Mughnī* mentioned that stipulating hibah is not permitted with conditions such as “the gift which I will give you, do not sell it or do not gift it, or sell it, or gift it, or give a portion of this gift to so and so”. The reason he explained behind the prohibition is that these conditions oppose the objective of hibah contract.³⁷ The particular objective of hibah is to convey benefit to the recipient by gifting him/her a property free of any compensation. The aforementioned conditions in contrary are preventing the recipient from

35. *Al-Majmū' Sharḥ al-Muhaddhab*, vol. 15, p. 358.

36. *Ibid.*, vol. 15, p. 357.

37. Muwaffiq al-Dīn Ibn Qudāmah al-Maqdisī, *al-Mughnī* (Cairo: Dār al-Ḥadīth, 2004, vol. 7, p. 568.

possessing the property for his own benefit. The other important factor here is that the recipient should have his freedom in enjoying the property gifted to him in any manner he prefers. The donor should not restrict him with conditions. Shaykh Muḥammad Abu Zahrah (d. 1394/1974) was asked regarding a person who received money for hajj as a gift, but that year the recipient could not perform his hajj. With the intention of hajj, the following year the person invested the gift money. Can this man spend that money for constructing a masjid? Abu Zahrah issued a fatwa that though the man could not go for hajj, he is still the sole owner of the gift money. He can spend it for any pious purpose he prefers while bearing in mind that his hajj is still due.³⁸

Hibah will serve its objectives if not stipulated with conditions contrary to its nature. The practice of responding to a gift with a gift was because of generosity and mutual love. The practice of the Prophet, upon him peace and blessings, and his companions was in this spirit. The Prophet offered a gift for gift in order to motivate his companions to increase the act of giving gifts to each other. There are incidents where the Prophet, upon him peace and blessings, showed his displeasure when the donor demanded for a reward more in quantity or value than the gift he offered to the Prophet.³⁹ Similarly stipulating hibah with conditions steals away the spirit of mutual help and brotherhood. By setting conditions, people sometimes give hibah not to convey benefit to the recipient, but to gain personal benefit. For instance, when one offers gift to a company/government in order to obtain a contract for himself, or gives a gift to a person in authority to bypass the law. In such instances hibah is utilized to serve purposes which are negative in nature and represent abusive instances of hibah.

A quotation of ‘Umar Ibn ‘Abd al-Azīz by Imām Bukhārī sheds more light on hibah as abused for negative purposes: “The gift in Prophet’s time was gift in its original sense whereas today a gift is meant as a bribe”.⁴⁰ Imām Bukhārī quoted this before reporting a hadith on Ibn al-Utabiyyah who accepted a gift when the Prophet, upon him peace and blessings, sent him to collect zakāt. When Ibn al-Utabiyyah returned, he said, “This (i.e. the zakāt) is for you and this has been given to me as a present.” The Prophet disliked this and said to

38. *Fatāwā al-Shaykh Muḥammad Abū Zahrah*, compiled and edited by Muḥammad ‘Uthmān Shabīr (Damascus: Dar al-Qalam, 2006), p. 361.

39. Zafar Aḥmad ‘Uthmāni, *I’lā’ al-Sunan* (Karachi: Idārat al-Qur’ān wa al-‘Ulūm al-Islāmiyah, 1427 A.H), vol. 16, pp. 114-115.

40. Muḥammad Anwar al-Kashmīrī, *Fayḍ al-Bārī ‘ala Saḥīḥ al-Bukhārī* (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2005), vol. 4, p. 53.

him, “Why hadn’t he stayed in his father’s or mother’s house to see whether he would be given presents or not?...⁴¹ Anwar Shāh al-Kashmīrī (d. 1352/1934) in his commentary of this hadith, states that exchanging gifts with government officials or people in authority all fall under bribery.⁴² These usages of hibah serve negative purposes that compromise the essence of social justice and prevent fair wealth circulation in society which are amongst the essential maqasid of Islamic finance.

The current practices of IFI’s in relation to hibah can serve negative purposes as well. For instance, in *Wadi’ah* arrangement the IFI’s give hibah to the depositors as a token of appreciation. Or, in *qard* contracts the borrower gives hibah at his own discretion to the lender (IFI’s). In such cases the hibah can serve the positive purpose we discussed earlier i.e. conveying benefit to the recipient. While on the contrary, hibah has been used or rather misused as an alternative to interest for the amount deposited or borrowed. When hibah is given on a regular basis such that it is developed into an expected institutionalized practice, its voluntary substance is eroded and it begins to be a substitute to *ribā*³.

The maxim, “In contracts, credibility is attached to the meanings and purposes of the contract rather than its words”, elucidates the significance of meaning and outcome in contracts, not the words. Banks may give return on deposits and call it hibah, but if the meaning is the same as *ribā*³, then this is what it is. It should be abandoned. The legality of hibah contract is based on positive purposes which serve the welfare of people individually and collectively and not on its negative purposes. Given the possibility of both positive and negative purposes, the IFI’s need to develop new terms and conditions which will restrict the usages of hibah to positive purposes only. This is what it means by the statement that hibah should not be stipulated with conditions which violate the very essence of hibah. One of the conditions mentioned in the SAC resolution of Bank Negara is that hibah should not be conditional in *wadi’ah* or *qard* contract. This condition is stated in order to avoid the element of *riba*.⁴³ Another condition can be proposed here is that hibah should not violate the

41. The remaining part of the hadith is as follows: By Him in Whose Hand my life is, whoever takes something from the resources of the zakāt (unlawfully) will be carrying it on his neck on the Day of Resurrection; if it be a camel, it will be grunting; if a cow, it will be mooing; and if a sheep, it will be bleating.” The Prophet then raised his hands till we saw the whiteness of his armpits, and he said thrice, “O Allah! Haven’t I conveyed Your Message (to them)?”

42. Ibid.

43. Bank Negara Malaysia, *Shariah Resolutions in Islamic Finance*, p. 121.

purpose of the contract it is supposed to support. For instance the purpose of *mudarabah* is to promote profit sharing and loss bearing by the capital owner. If *hibah* is used to attract investors for *mudarabah* investments, then a profit is already guaranteed by the *mudarib* for the investor. In this case *hibah* violates the principle of profit sharing.⁴⁴ Similar to this case is when someone gives his entire property to only one of his sons as *hibah*. In this case, *hibah* will violate the purpose of inheritance which is to distribute the estate among the relatives according to their entitlements. Conditions which restrict the freedom of the recipient in terms of how and where to utilize *hibah* should be avoided.

In conclusion, it can be said that there exists a need to develop a comprehensive framework for modern application of *hibah*. This is feasible only if the *sharī'ah* advisors/committees and IFIs recognize the *sharī'ah* objectives of *tabarru'āt*, *hibah*, and contracts combined with *hibah*.

44. *Ibid.*, p. 121.