

The Promise in the Contract of Islamic Law: A Special Focus on Promise Contract

Nasrul Hisyam Nor Muhamad

Corresponding Author, Senior Lecturer, Faculty of Islamic Civilization, Universiti Teknologi Malaysia, Johor
Email: nasrul@utm.my

Mohd Fauzi Abu @ Hussin

Senior Lecturer, Faculty of Islamic Civilization, Universiti Teknologi Malaysia, Johor.

Buerah Tunggak

Senior Lecturer, Faculty of Islamic Civilization, Universiti Teknologi Malaysia, Johor.

Abdul Hafiz Abdullah

Senior Lecturer, Faculty of Islamic Civilization, Universiti Teknologi Malaysia, Johor.

Hussin Che Pa

PhD Candidate, Faculty of Islamic Civilization, Universiti Teknologi Malaysia, Johor.

Mohamad Haider Abu Yazid

PhD Candidate, Universiti Teknologi Malaysia, Johor.

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Abstract

Hibah is one of the voluntary contracts in the Islamic law. Transferability through hibah requires the rigid conditions regarding the ownership status of the hibah property. However, these conditions can be avoided by using the principle of the promise of hibah. The main objective of this article is to highlight "promise of hibah" concept as an alternative instrument of estate/property planning existing in Islamic teaching. This article explains about the promise of hibah from the perspective of Islamic law. The discussion began with a review of the status of 'promise' in the matter of the contract. Hence the promise of hibah concept, formation and implementation was discussed by taking into account the views of scholars from various schools of thought in the Islamic law and the current practices in Muslim countries. This research use content analysis approach where data is gathered from several primary sources in Islamic law. In terms of implementation of hibah concept, several law existing in Islamic country that has codify hibah in their law is used as reference.

Keywords: Islamic Contract Law, Promises to Make the Contract, Hibah, Promise in Hibah

1. Introduction

In general, *hibah* (or gift) is a property transaction contracts that applies between the giver of *hibah* and the receiver as a gift. Due to the *hibah* is a contract, its formation is depends on the subject of some elements or pillars that must be met. Pillars of the *hibah* are the giver, the receiver, the *hibah* property and also *sighah* (*ijab* and *qabul*). In addition to these pillars, the element that is necessary to make the *hibah* coming into operation is when there is an ownership transfer of the donated property (or commonly known as *qabd*) (al-Nawawi, 2003; al-Khatib, n.d.; al-Kasani, 2003; al-Jank, 2004; Nasrul Hisyam, 2009; Laluddin, 2012; Fyze, 1974).

Based on the explanation above, the initial conclusion can be made that *hibah*, which do not meet the specific rules and conditions, is not valid in Islamic law. Yet so, how about the position of *hibah* when the property owner had promised to donate his property to other person in a timely manner?

2. Method

The main objective of this article is to highlight “promise of hibah” concept as an alternative instrument of estate/property planning existing in Islamic teaching. In order to achieve this objective, we have conducted a content analysis and systematic review on primary sources in Islamic law and existing codify law implemented in Islamic country. Library research method has been used where the fundamental references in Islamic law is the primary sources of references. These primary resources of references are taken from the four main Islamic jurisprudence (Hanafi, Maliki, Shafi'i and Hanbali). It is known that Islamic law in theory have multiple point of view according to different Islamic jurisprudence. Therefore, references is directly taken from the book that discussed about *hibah* from the four Islamic main jurisprudence. Table 1 shows the references list taken from each of main Islam jurisprudence.

Table 1: References from Islamic main jurisprudence

Main Schools of Sunni Jurisprudence	References List
Hanafi	<i>al-Mabsut</i> by al-Sarakhsi (2001); <i>al-Hidayah Sharh Bidayat al-Mubtadi</i> by al-Marghinani (n.d.), <i>al-Ashbah wa al-Naza'ir 'ala Mazhhab Abi Hanifah al-Nu'man</i> by Ibn Nujaym (1998), and <i>Badai' al-Sana'i'fi Tartib al-Shari'</i> by al-Kasani (2003)
Maliki	<i>al-Mudawwanah al-Kubra</i> by Malik Ibn Anas (2005), <i>Bidayat al-Mujtahid wa Nihayat al-Muqtasid</i> by Ibn Rushd (2003), <i>Hashiyah al-Dusuqi 'ala al-Sharh al-Kabir</i> by al-Dusuqi (2005), <i>al-Bayan wa al-Tahsil</i> by Ibn Rushd (1988), and <i>Kitab al-Furuq</i> by al-Qarafi (1347H)
Shafi'i	<i>al-Umm</i> by al-Shafi'i (1990), <i>Mughni al-Muhtaj</i> by Muhammad al-Sharhini (n.d.), <i>al-Ashbah wa al-Naza'ir</i> by al-Suyuti (n.d.), <i>al-Fiqh al-Manhaji 'ala Madhhab al-Imam al-Shafi'i</i> by Mustafa al-Khin (2003) and <i>Rawdat al-Talibin</i> by al-Nawawi (2003)
Hanbali	<i>al-Mughni</i> by Ibn Qudamah (n.d.), <i>al-Muharrar fi al-Fiqh 'ala Madhhab al-Imam Ahmad Ibn Hanbal</i> by Abi al-Barakat Majd al-Din (1993), <i>al-Turuq al-Hukmiyyah fi al-Siyasah al-Shari'iyah</i> by Ibn Qayyim al-Jawziyyah (1428H), <i>Sharh Muntaha al-Iradat</i> by al-Bahuti (n.d.), and <i>al-Insaf fi Ma'rifat al-Rajih min al-Khilaf 'ala Madhahib al-Imam Ahmad bin Hanbal</i> by al-Mardawi (1997)

Furthermore, additional references from modern Islamic law text, *hadith* and quranic intepertation books as explanation from the two main references in Islam (Quran and *al Sunnah*) is used in this paper. The implementation of hibah in codify law from Islamic country such as Egypt, Kuwait, Lebanon and Syrian is analysed and discussed in this paper.

3. The Promise in the Islamic Law

Promise, as understood in the terms of *fuqaha* is a statement from someone to other person on their act of kindness that will be doing in the future (Muhammad Ahmad 'Alish, n.d.; al-'Ayn, 2001; al-Marghinani, n.d.). According to the definition, it is understood that a promise in the Islamic law is the promise that made in order to do a good thing. While the bad promise that is not recognized and it is not obliged to be fulfilled (Nazih Hammad, 1995). Therefore, the contract to make a promise is different in position from the contract itself because the contract is about to create obligations or commitments at a time when it is made with *ijab* and *qabul*.

The question is, is it the person that makes the promise bound with a commitment to fulfill the obligations that is promised? The *fuqaha* agree on this by saying that it is mandatory to fulfill the promise based on the religious aspect because fulfilling a promise is one of the good moral (Ahmad Farraj, 1986; Malik Ibn Anas, 2005). Islam also taught that promise is one of the sign of achieving a perfect faith as a Muslim. Al-Quran clearly mentions the commands to comply our promise as the word of Allah, “O you who believe! fulfill the obligations” (Surat al-Ma'ida, 5: 1). There is also hadith that narrated about breaking promises as one of the hypocrites characteristics, whom the hadith of Abu Hurairah (which means), “The signs of the hypocrites is three: when he speaks he lies, when he makes a promise he ignores and when given he betrayed the trust” (al-Bukhari, 1400Ha).

Nevertheless, *fuqaha* have different opinion towards the obligation to carry out the promise from the legal perspective, in the other word, is it the court has the authority to decide that the one who make a promise has responsibility to carry out his promise or not?. The opinions from the *fuqaha* can be summarized as follows (Ahmad Farraj, 1986; Muhammad 'Uthman Shabir, 1996):

First: Promises must be fulfilled in all circumstances. This is the opinion of 'Umar bin Abdul Aziz Ibn Shubrumah, Ibn al-Ashwin, al-Hasan al-Basri and Ishaq bin Rahawayh. This is also the view of the Hanbali School given by Ibn

Taymiyyah and also a view of Maliki (Ibn Qudamah, n.d.; Ibn Rushd, 2003; al-Fiqhiyyah Mawsu'ah, 1990; Ibn Hazm, 2001).

In the meantime, the view of Maliki believes that although the promise shall be executed, yet an exception is granted when there is a valid excuse. According to him, when a person makes a promise and intends to fulfill his promise, then in this case it is not an offense if promise cannot be implemented on factors which are not intentional or by external obstacles that cannot be avoided (Ibn al-'Arabi, n.d.; Ibn al-'Arabi, 1996; al-Dusuqi, 2005).

Second: Fulfilling promises is not compulsory and the court cannot force the person who makes the promise to fulfill his promise. However, the action of not fulfilling the promise is an abomination although it is not considered as a sin. This is the view of the majority of *fuqaha* composed of Imam Abu Hanifa, al-Shafi'i, Ahmad bin Hanbal, Zahiri's school and also some Maliki's *fuqaha*. The basis of this second view is that the promise is a *tabarru'* (voluntary) that is similar to *hibah*. *Hibah* as has been agreed by most of *fuqaha*, will not be bounding, unless after the transferability of the ownership. *Hibah* giver may revoke his gift before any action of transferring his *hibah* property is made. Since the voluntary contract like *hibah* is not bounding as long as the transfer of the ownership has not been committed, the position is even more precise in the matter of promise in *hibah* (al-'Ayn, 2001; al-'Asqalani, 2001; al-Nawawi, 2004; al-Nawawi, 2003; al-Bahuti, n.d.; Ibn Hazm, 2001; al-Zuhayli, 1985).

Third: A promise is binding and can be enforce by the court if the promise that has been tied or related to a reason, just if the people promised is really fulfilled the condition stated. For example, someone promised to lend a friend some money to buy a house. The person who had made the promise must fulfil his promise if his friend bought the home he meant. This is one of the famous views within the Maliki School (Ibn Rushd, 1988; al-Qarafi, 1347H).

Fourth: Hanafi believes the promise that enforceable is a promise that is subject to certain conditions. According to this view, a normal promise is the promise without any condition, which is not binding. Ibn Nujaym (1998), a scholar of the Hanafi schools quoted a *fiqh* method which means, "A promise is not binding except for the promise that tied on the conditions." According to this method, the person who makes the promise that follow the original method is not bound to fulfill his promise. However, when a promise is backed to an event, then the promise is binding if the incident is really to happen (Ali Haydar, n.d.; al-Zarqa', 2004; al-Sarakhsi, 2001).

Based on the views above, the views about the promise is binding is acceptable to be applied in the current transaction (*mualamat*) today. This is based on the generality of the verses in the Quran and Hadith in fulfilling promises. In addition, it is appropriate to fulfil promise to show a good manner as being translated into rules by *ijtihad* scholars to enable fulfilling promises can be enforceable by law. Furthermore, by unfulfilling the promise, especially in the matter that related to property will lead to harmful and loss, while in Islam, taking care of the property is one of the five basic needs that need to be preserved (al-Shatibi, n.d.). It also coincided with *fiqh* method that is "Cannot create harm and cannot cause harm to others" (al-Zarqa', 1996; al-Suyuti, n.d.).

A view on enforcing the promise has been accepted by the current scholars. Fiqh Academy (OIC), in its fifth conference, on 10 and 15 December 1988 in Kuwait has decided that the promise made by one party is binding them based on religious perspectives unless there is a valid excuse to perform that promise. Therefore, the promise made by the giver is also bound by law if that promise is associated with some reasons that bounds with the outcome of the agreement. Dr. 'Abd al-Sattar Abu Ghudda (1998) while giving his views on a promise to buy or *al-wa'd bi al-Shira'*, had expressed that it is necessary to adhere to the view that the promise is binding for the rights of the customer or the right of the bank. Based on this fact, either party shall be entitled to claim compensation on the harm caused by the breach of promise.

Sharia Council for Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) has also required the use of promise in some Islamic standards regarding the current Islamic Transaction instruments (al-Shariyyah Ma'ayir, 2007). In Malaysia, promise is accepted as an instrument to establish banking products such as Sale and Buy-Back Agreement, when Issue and Forward Foreign Currency Transaction (Shariah Resolution in Islamic Finance, 2007).

Since the opinion which requires promise has good arguments, in the context of the *hibah* contract the author thinks that the promise to make *hibah* is binding and enforceable because it is not right to use the use of a principle on certain contracts only, while on the other contract the promise is not required. This is based on the *fuqaha* arguments which is not distinguish between the types of contracts, either in the form of voluntary like *hibah* contracts and also other contracts in the form of exchange.

4. The Promise of Hibah

Generally, promise to make *hibah* (here in after expressed as "the promise of *hibah*") can be defined as a promise to

create an obligation by a person who make the promise, by providing a contract of *hibah* and will be signed when the recipient stating his agreement within the period stipulated (al-'Aqil, 1978).

Based on this definition, the promise of *hibah* is considered as a perfect deal or contract involving *ijab* and *qabul* between the person who make the promise and beneficiaries of promise. However, the contract means is not a perfect *hibah* contract, even it is just shows the direction towards it. Therefore, the promise of *hibah* was only 'promise' that does not affect the transfer of the ownership of property that was promised to the recipient at the time the contract is made. Normally, a promise is made when there is no agreement between the giver and the receiver of *hibah* to weld the *hibah* contract at that time, but both sides are looking to implement it later as it has been promised (al-'Aqil, 1978).

In Islamic countries which have a legal provision of *hibah* which is substantive, generally there are provisions about the promise of *hibah*. For example, Article 490, Egyptian Civil Law (No. 31/1948) provides, "*The promise to make hibah is not valid unless it is made using the official document*". A similar provision is found in Article 458, the Syrian Civil Law (No. 84/1949).

These provisions generally allow a person to make a promise of *hibah*, and the promises must be made by written procedure recognized by law in the country. This statement means that the promise of *hibah* that is made verbally will not be recognized by law. If you notice, in the provision, the Egyptian Civil Law requires that all promises of *hibah* must be made formally without distinguishing between movable or immovable property. This is in contrast to the Lebanon Civil Law (No. 9/1932) which only imposes rules for registering the promise with the legal registration based on the land law of the country. As for the movable property, even if the promise is not required to be registered, but the Lebanon law stipulates that, the promise of *hibah* must be written. In this case, Article 511, Lebanon Civil Law (No. 9/1932) provides "*Promise that made hibah is not valid unless it is written, and the promise of hibah of immovable property or rights that related to the property is invalid unless executed in land registration procedures*".

Whatever it is, the rules set by the Islamic countries that have been mentioned earlier are to show that the promise of *hibah* must be made in a document. In the opinion of the author, it is to ensure that, the promise of *hibah* can be administered and enforced properly. On the other hand, if such a rule is not set, then it maybe will create disputes between the party who make the promise and the recipient who receives the gift, and also will involve the beneficiaries of both parties. The law in this context is not only to see someone who can simply make a promise, moreover the promise to dispose the property to someone else will involve really big implications, particularly to whom that make the promise and his family. Therefore, those who wish to make the promise of *hibah* on his certain assets to certain parties, whether individuals or organizations, it should be done officially and must be acknowledged by law. Indirectly, it is to ensure that the giver was really serious about his promise and know the obligations that he has to face by law. Therefore, the rules set by the Islamic countries mentioned is in line with the principle of *Siyasah Shar'iyah* which empowers the government to those countries to establish reasonable regulations to protect the public welfare in one country (Ibn Qayyim, 1428H; al-Mardawi, 1997; Abi al-Barakat, 1993).

Promise for *hibah* occurs when someone promised to another person to donate an item in the future that has been set before. The promise of *hibah* is a way out to the fundamental principles in the *hibah* contract which is the prohibition of granting the property that will exist in the future and the property that not owned by the giver (al-Shafi'i, 1990; al-Khin, 2003).

Restriction of *hibah* on the property that did not exist at the time *hibah* was made, Article 492 of the Civil Law provides for Egypt, "*Hibah to the property that would only exist in the future shall be null.*" This provision is similar to provisions in the Article 526, the Kuwait Civil Law (No. 67/1980). Property restrictions of *hibah* towards the property that exist in the future can be overcome by declaring the transaction as 'a promise to *hibah*' and not '*hibah*' in its original form, as free gift immediately. By simply submitting a promise to donate a house, he does not have to wait until the house is ready, even this promise can already be considered as valid when the beneficiaries accept the offer, even if the house is not yet built. With the acceptance of the undertaking, the party making the promise is bound to keep its promise.

Further restrictions are *hibah* on property that are not owned by the giver. According to the original rules, *hibah* of property that are not owned by the giver, in other words to someone else's property is void (Article 527 of the Civil Law Lebanon, al-Sanhuri, n.d.). This is logic because the restriction is impossible for transferring the ownership of property that is not theirs to others. In addition, the status of ownership of the property can also affect the implementation of *hibah* contract which is immediate effect. In this situation, if the giver is still wants to continue his intention to give the property that he meant to, he should wait until he becomes the true owner of that property. However, with the 'promise of *hibah*' alternatively, the giver is not necessary to do so. In this situation, the giver just has to pledge to donate the property when the property becomes his someday. Such promise shall be binding on the giver if the recipient stating his approval at that moment, without having to wait until the completion of the ownership status of the property. In the next stage, that promise would be a perfect *hibah* if the giver owned the properties and recipients agreed and expressed his desire to

implement the gift. The concept promises to *hibah* is very clear for *hibah* in the replies provided or *hibah* which are accompanied by dependent requirements (al-Sanhuri, n.d.; Badr Jasim, 1986).

In terms of formation, the 'promise of *hibah*' must meet all the basic requirements in the *hibah* contract. The basic requirements are the matters that make *hibah* legally after fulfilling the requirements of the willingness of the *hibah* contract by both parties (al-Sanhuri, n.d.; Mujani, 2011; Laluddin, 2012). To make it clear, the contract must be determined the *hibah* property by including the types of property, whether it is movable or immovable. Moreover, it should be determined the type of gift, whether the *hibah* without any returns, or *hibah* with returns and if the *hibah* needs a return, the type and quantity that must be returned have to be mentioned as one wants. However, it is not required that the property exists at the time the promise was made, even it existences is only required when the recipient wants the implementation of promise is made. If the property is not exist at the time promised, the *hibah* is considered void and the recipient could take any action to make sure the promise is fulfilled. Moreover, it is not required that the property was owned by the giver. Ownership is only required when the *hibah* is to be implemented (al-Sanhuri, n.d.; Badr Jasim, 1986; al-'Aqil, 1978, Mahmud Jamal, n.d.).

The promise of *hibah* which have met the conditions that required will give a legal effect based on the agreement from the recipient to complete the contract within the stipulated time frame (al-Sanhuri, n.d.; Badr Jasim, 1986; al-'Aqil, 1978).

When the receiver shows his agreement to implement *hibah* within the time mentioned in the contract, the *hibah* will be perfect after the one who make the promise knows about the agreement, without requiring a new appointment. In this case, approval and compliance from the giver, is gain from the *hibah* contract itself. It should be emphasized that the *hibah* contract is considered perfect from the time the agreement was disclosed by recipients of *hibah* and not from the time the promise was made. However, if the person who make the promise refuses to carry out the promise of the *hibah*, the recipient can get the order through the court, with condition that the *hibah* was made through the official documents (Article 102 of the Egyptian Civil Law (No. 31/1948).

5. Closure

Islamic law recognizes that the promise of *hibah* as a contract that binds with certain conditions and is made by the method and formalities that have been set earlier. If viewed from the compliance aspect to the tenets in building the *hibah* contract, the mere 'promise' to make the contract does not have any direct impact on the transfer of property to the recipient. Thus, in the relationship perspectives with the *hibah* contract, the promise of *hibah* is considered invalid because it does not meet the necessary foundation to establish the *hibah* contract itself. On the other hand, the promise of *hibah* can be accepted as valid and binding in law if we can see it in a perspective that the promise of *hibah* contract separate and apart from the *hibah* contract.

Thus, it is clear that there is a difference between *hibah* contract and the promise of *hibah* per se in terms of the flexibility of implementation. Thus, it is clear that there is a difference between *hibah* contract and the promise of *hibah* per se in terms of the flexibility of implementation. *Hibah* in its original form requires the rigid condition in terms of the *hibah* property, which the *hibah* property is owned completely by the giver and exists when the *hibah* is made. Both of these conditions are not a requirement to enforce the promise of *hibah*, even a lack of these requirements can be ignored if the giver wants to use the concept of 'promise' within his gift. In short, although *hibah* is invalid on the property owned by others and also the property that is not yet exists during *hibah*, but by implementing the mechanism of promise of *hibah*, the giver (who makes the promise) can still proceeds his intention to make *hibah* before meet two of the conditions earlier.

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