

ARE PARENTS FREE TO BESTOW THEIR WEALTH ONTO THEIR CHILDREN? A JURISTIC DISCOURSE ON EQUALITY AND JUSTICE IN *HIBAH*

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ABSTRACT

This study explores issues related to justice in the bestowal of gifts (hibah) by parents to their children. Hibah, in the current development, is practised freely to the extent of being considered a favourite choice of transferring wealth. However, it is a potentially problematic practice because it opens up to preferential and unjust treatment. This paper aims to respond to some questions related to justice. How far does the principle of justice affect hibah? To which extent is it permissible to distribute property and wealth unequally among one's children? What is the meaning of just distribution between male and female children? Are there special criteria prescribed that justify unequal distribution of hibah among children? These issues are discussed in reference to established views of classical as well as contemporary Muslim jurists.

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INTRODUCTION

In Islam, there are several means of transferring one's material rights to one's own children. Other than *farā'id* that is considered automatic transfer and mode of wealth distribution determined by Allah SWT after the death of the owner, there are means that fall under voluntary will of the owner which are *waqf* (charity endowment) and *hibah* (gift). Compared to *hibah*, *waqf* involves a set of conditions that limits some status ownership and freedom of utilizing the property, in which its perpetuity must be guaranteed. On the contrary, *hibah* transfers the total right of ownership from a father or mother to a specific child. In other words, the child who is bestowed with wealth or property through *hibah* possesses complete transactional rights on the amount of wealth or property involved.

Currently, *hibah* as a means of distribution of wealth can be generally perceived to be a free practice without any rule. The awareness of the existence of *hibah* as an option of distributing wealth other than *farā'id* has become more widespread with promotions by different institutions that are mainly involved in wealth management. For example, Amanah Raya Berhad which promotes *hibah* with its slogan "*Tiada Hibah Hiba*" (There is sadness without *hibah*). It may give the understanding to the Muslims that *hibah* is an open practice. In fact, *hibah* can be the most preferable practice which can prevent conflicts after the passing of parents.

At the institutional level practices, some companies have even recognized *hibah* to be used interchangeably with *farā'id* in the distribution of wealth to the heirs. Takaful Ikhlas for example, gives options to its *takaful* participants to choose *hibah* as the way of benefit distribution. A participant of *takaful* scheme (Islamic insurance) is free to name any close relative(s) namely parents, children, siblings or spouse, to whom the benefit of the certificate will go to in the case of death. With a phrase stating "*Hibah* is only given to the nominee as stated below - as per listed in the *hibah* nominee"³ and without imposing any limits, *hibah* can then function as the sole way of distribution benefits.⁴ Another example is *hibah amanah* which was introduced by Permodalan Nasional Berhad in which an investor is free to transfer his investment to any

³ See Nominee form for *Hibah* proposal (*Borang Cadangan Hibah*), *Bahagian H*, in Proposal Form for Takaful Scheme, Takaful Ikhlas Sdn. Bhd.

⁴ Wan Jemizan Wan Deraman, 'Perlaksanaan Hibah dalam Konteks Operasi Takaful,' *Utusan Malaysia*, 30 September 2009.

of his kin through *hibah* practice.⁵ In this case, *hibah* is practiced freely without any conditions and limit.

However, study shows that the aim of bestowing through *hibah* with the objective of strengthening relationship and nurturing love as confirmed by the saying of the Prophet (p.b.u.h), “Give presents to one another for it increases your mutual love”⁶ should be stressed. As a result, there are some pertinent issues in transferring ownership from parents to children that need to be discussed, especially when the bestowal can lead to the contrary result of what is desired. Here, the issue of justice among children is the most crucial issue to be discussed.

Study on available modern literature shows that numerous writings on ways of distributing wealth in Islam including *hibah* as one of the main topics are available. However, the discussion has been done mainly to introduce *hibah* as a means of wealth distribution permissible in Islam and could be used as the potential solution to Muslims’ problems. However, discussion on the limitation that may occur in the practice of *hibah* has not been stressed accordingly. The practice of *hibah*, therefore, can be potentially problematic especially when a person has the right to freely transfer his wealth to others with no limitation. The very aim of this article hence is to address the issue of *hibah* and its application in the light of justice. In other words, several issues mainly centred on the concept of justice are dealt with in this paper. In order to address pertinent issues related to justice in *hibah* practices, this paper aims to answer some important questions: Is justice important in *hibah*? To what extent can injustice affect the ruling of *hibah* of parents to children? Is bestowing to one child and not the other, or bestowing with unequal value valid? Are special conditions that lead to unequal distribution acceptable? What is the rule on the proportion of distribution of *hibah* between sons and daughters?

In addressing the above issues, this paper will first discuss the meaning and legality of *hibah* to give an overview on the position of *hibah* as compared to other ways of distributing wealth in Islam, with special attention to parents’ bestowing wealth onto their children. A brief discussion on the relationship between equality and justice is also dealt with. Classical as well as modern jurists’ discussions on the issue of justice in *hibah* are specially brought to be the terms of reference in discussion related issues. To be specific, it will answer how far unequal or preferential *hibah* can affect the validity of *hibah*,

⁵ See Amir Bahari, *Islamic Estate, Retirement and Waqf Planning* (Kuala Lumpur: IBFIM, 2014), 173-174.

⁶ Reported by al-Bayhaqī, *Sunan Kubra*, vol. 6 (Beirūt: Dār al-Kutub al-‘Ilmiyyah, 1999), 280.

justice in the distribution of *hibah* between son and daughter as well as special conditions in which unequal *hibah* can be acceptable. Finally some suggestions are made in the conclusion of the paper.

Before examining the juristic views and the existing legal rulings on the bestowal of gifts and related issues, it is necessary to look at the general definition of *hibah* and its legal implications.

HIBAH: MEANING AND LEGALITY

The literal meaning of *hibah* is ‘gift’ or ‘present’. In the legal context, *hibah* is a permissible act of bestowing a gift by way of a contract (*‘aqd*) which needs to be offered by one party and accepted by the other. Definitions of *hibah* by some leading Muslim jurists are given below.

Imam Ibn Qudāmah from Hanbalite School defines *hibah* as “the conveyance of property during one’s lifetime and without expecting any exchange”⁷. With a similar meaning, Imām Al-‘Imrānī from Shāfi‘ite School wrote: “*Hibah* is a conveyance of material without any exchange”⁸; in other words, it means the transfer of ownership or conveyance of property of a person to another with the purpose of doing good and without expecting any form of compensation in return.

Hibah or the giving of gifts is lawful and considered a recommended act by established evidence in the Qur’ān and Hadith. The Qur’ān says:

وَأَقِمْ وَجْهَكَ لِلدِّينِ حَنِيفًا ۚ دِينُ أَبِي بَكْرٍ وَدِينُ أَبِي طَالِبٍ
وَدِينُ مُحَمَّدٍ ۖ وَدِينُ إِبْرَاهِيمَ ۚ حَنِيفًا ۚ وَكَانَ آبَاءُ بَنِي إِسْرَائِيلَ
كُفَّارًا ۚ وَذُرِّيَّةَ مَنْ حَمَلْنَا لَمَّا وَكَّلْنَا بِهَذَا الشَّعْبِ الْهَاتِلِينَ ۗ أَلَمْ يَكُنْ لَهُ
بِالْبَيْتِ كِبَارًا ۚ وَكَانَ فِي الْقُرْآنِ الْحَكِيمِ ۚ

“And gives his wealth, in spite of love for it, to the kinsfolk, to the orphans, and to the poor; and to the wayfarer, and to those who ask, and to manumit slaves.”

(Surah al-Baqarah, 2: 177)

Another encouragement is the verse:

⁷ Ibn Qudāmah, *al-Mughnī*, vol. 8 (Saudi Arabia: Dār al-‘Ālam al-Kutub, 1999) 239.

⁸ Al-‘Imrānī, *al-Bayān fi Madhhab al-Imām al-Shāfi‘ī*, vol. 8 (n.p.: Dār al-Minhāj, 2000), 107.

وَتَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَىٰ وَلَا نَعَاوَنُوا عَلَى الْإِثْمِ وَالْعُدْوَانِ

“Help you one another in virtuousness (*birr*) and piety (*taqwa*).”

(Surah al-Mā‘idah, 5: 2)

There are numerous prophetic traditions that show the encouragement of giving. In one *hadīth*, it is narrated by Abū Hurayrah (r.a.) that the Prophet (p.b.u.h.) said:

لو دعيت إلى كراع لأجبت ولو أهدي إلي ذراع لقبلت

“I shall accept an invitation even if I were invited to a meal of a sheep’s trotter; and I shall accept a gift even if it were an arm or a trotter of a sheep.”⁹

On the permissibility of *hibah*, al-Zuḥaylī asserts that there is perfect agreement amongst all Muslim jurists that *hibah* constitutes a valid legal transaction.¹⁰ Al-Zuḥaylī’s statement is similar with others, in which Imām al-Sarakhsī al-Hanafī for example, said, *hibah* is “a permissible transaction based on sound evidence which supports its legitimacy.”¹¹

ISSUES RELATED TO *HIBAH* FOR THE OFFSPRING

Before indulging further into the issues involved, the most pertinent problem that needs to be clarified is whether transferring of wealth through *hibah* can be practised between parents and their offspring. As *hibah* may disrupt the rule of distribution of wealth through *farā’id*, is it allowed between parents and children?

According to jurists, *hibah* from parents to their children does not only constitute a valid and recommended act, but it is also the most preferred since bestowing wealth to close relatives is regarded to be more meaningful, uniting their hearts and strengthening social bonds. Al-Māwardī for example, really

⁹ Reported by al-Bukhārī, quoted from Khan, Muhammad Muhsin, *The Translation of the Meanings of Sahīh al-Bukhārī, Arabic-English*, vol. III, 448 (Riyadh: Darussalam, 1997).

¹⁰ Wahbah al-Zuḥaylī, *al-Fiqh al-Islāmī Wa Adillatuhu*, vol. 5 (Damshiq: Dār al-Fikr, 1989), 26.

¹¹ Sarakhsī, Abū Bakr Ibn Aḥmad Ibn Abū Sahl, *al-Mabsūt*, vol. 12 (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2001), 56.

encourages it by saying that the most preferred giving is to close relatives and the closest people to parents are their own children.¹²

However, some problems may arise. Given the different character and personality of each child, a parent may feel closer to one in preference over another. The fact that one has no control over the affairs of one's heart makes it very difficult for a parent to be absolutely just in the affections felt for his or her children. This is supported by the saying of the Prophet (p.b.u.h.):

اللهم هذا قسمي فيما أملك فلا تلمني فيما تملك ولا أملك

*“Oh Allah, I have done the division with regards to love within my means, thus do not curse me for what You possess (of more) which I do not possess.”*¹³

Hence, the understanding is that *hibah* is greatly encouraged with all good benefits. However, some questions that arise are: Can *hibah* be considered if it does not meet those ends? What is the position of *hibah* if it does not serve such a noble purpose? Does it affect its very ruling?

A BRIEF OVERVIEW ON JUSTICE, EQUALITY AND PREFERENTIAL HIBAH

Justice with the meaning of ‘placing things at the right place, has received special treatment in Islamic literature since it is found to be a vital message of al-Qur’ān for human practices¹⁴ and being the main objective of Islam in its Shariah as well as moral virtues. However, it is rather a complex discussion to shed light on clear understanding of the meaning of justice and how it is related to equality and preferential *hibah*. Justice and equality are close to each other but not identical.

It is a general understanding that equality is itself justice in Islam, and at the same time justice is the very end and objective of equality in all kinds of treatments. Only in the case when there is a special guideline from an Islamic point of view that over rules certain equal distribution, then equality is different from justice, and the general rule on the basis of equality is void. For example the distribution of wealth in accordance to portions decided by *farā'id*. In

¹² Al-Māwardī, *al-Ḥāwī al-Kabīr*, vol. 9 (Beirut: Dār al-Fikr, 1994), 412.

¹³ Reported by Abū Dāwūd, *Sunan Abī Dāwūd*, vol. 2 (Beirut: Dār Ibn Ḥazm, 1997), 149.

¹⁴ For example al-Nisā’: 58, al-Naḥl: 90.

this context, Ibn Kathīr says that it is observing justice among children even though the portion for the male is twice as much as that for the female.¹⁵

It seems that in the issue of *hibah*, only equality is important since there is no specific rule in the bestowing. However, since the spirit of bestowing is very important in Islam with the purpose of strengthening relationship, then, the issue of justice comes in. This is because equality is more to describe the act of distributing without concerning the reason of doing so. Whereas, justice carries mainly an inner value that is by itself recommended by Islam, which will finally gives its effect in equality in *hibah*. It is with this spirit, that the concept of justice is introduced in this paper to relate the act of giving with the feeling involved especially between two groups of people with the closest kind of relationship that is between parents and their own children. It is with this spirit, that the issue of preferential *hibah* comes to the picture which connotes a deeper understanding than unequal, and is seen to be a better alternative as compared to the word injustice. In this context, then, preferential is similar to unequal *hibah*.

RULING ON PREFERENTIAL OR UNEQUAL *HIBAH*

The issue of preferring a child over his or her other siblings in dedicating gifts seems to be clearly prohibitive based on the Prophet's saying:

اعدلوا في أولادكم

“Be just towards your children.”¹⁶

However, this issue needs to be further examined when the jurists have different opinions about it, which are based on several grounds. The root of the problem is on these related questions: Is the command in the saying obligatory or commendable? Is unequal *hibah* among children valid?

The basis for the jurists' opinion on this matter centres on a *ḥadīth* narrated by Nu'mān Ibn Bashīr (r.a.) which has different interpretations. He reported that he accompanied his father visiting the Prophet (p.b.u.h.) and his father said:

¹⁵ Ibn Kathīr, 'Imād al-Dīn Abī al-Fidā' Ismā'īl, *Tafsīr al-Qur'ān al-'Azīm*, vol. 2 (Beirūt: Maktabah Dār al-Salām, 1992), 225.

¹⁶ Reported by Muslim, *Ṣaḥīḥ Muslim*, vol. 3 (Beirūt: Dār al-Kutub al-'Ilmiyyah, 1998), 75 ; Reported by al-Bayhaqī, *Sunan Kubra*, vol. 6 (Beirūt: Dār al-Kutub al-'Ilmiyyah, 1999), 292.

إني نخلت ابني هذا غلاما، فقال النبي صلى الله عليه وسلم: أكل ولدك نخلت مثله؟ قال: لا. قال: فارجه.

"I have given a slave to this son of mine." The Prophet (p.b.u.h.) enquired, "Have you given to every child of yours a gift like this?" "No", replied the father. The Prophet (p.b.u.h.) then said, "Revoke it."¹⁷

In another narration, the Prophet (p.b.u.h.) said:

أيسرك أن يكونوا إليك في البر سواء؟ قال: بلى قال: فلا، إذا.

"Should it not please you that they should be equal in obedience towards you?" "Yes", the father said. The Prophet (p.b.u.h.) then said: "Never (then) do it."¹⁸

In another narration, the Prophet (p.b.u.h.) said:

أعطيت سائر ولدك مثل هذا؟ قال: لا، قال: فاتقوا الله واعدلوا في أولادكم. فرجع بشير فرد عطيته. وفي رواية: لا أشهد إلا على حق.

"Have you given to the remaining of your children, a gift like this?" He replied "No". Then the Prophet (p.b.u.h.) said, "Fear Allah and do justice to your children." Bashīr then went back and revoked the gift. In another narration, the Prophet (p.b.u.h.) said, "I shall not be a witness to injustice."¹⁹

Islamic tradition also provides numerous examples of preferential *hibah* from the practice of the Companions (r.a.). It is for instance reported by Mālik from Ibn Shihāb from ‘Urwa Ibn al-Zubayr that the Mother of the Believers, ‘Ā’ishah had said, “Abū Bakr al-Ṣiddīq gave me palm trees whose produce amounted to twenty *awsuq* from his property at al-Ghābah. When he was dying he said, ‘By Allah, little daughter, there is no one I would prefer to be wealthy after I die than you. There is no one it is more difficult for me to see poor after I die than you. I give you palm trees whose produce is twenty *awsuq*. Had you cut them and taken possession of them [during my lifetime], they would have

¹⁷ Reported by al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, vol. 2 (Beirūt: Dār al-Kutub al-‘Ilmiyyah, 2002), 152.

¹⁸ Reported by Muslim, *Ṣaḥīḥ Muslim*, vol. 3, 76.

¹⁹ Reported by al-Bukhārī, quoted from Ibn Ḥajar al-‘Asqalānī, *Fath al-Bārī fī Sharḥ Ṣaḥīḥ al-Bukhārī*, Kitāb al-Hibah wa Faḍluhā wa al-Taḥrīd ‘alayha, vol. 5 (n.p., n.d.), 263.

been yours, but today they are the property of the heirs, and they are your two brothers and your two sisters, so divide it according to the Book of Allah.”²⁰

It is also reported that ‘Umar had given gifts to his son ‘Āṣim and not to the rest of his children ‘Abd Allāh, Ubayd Allāh and Zayd. ‘Abd Allāh ibn Umar had given his son Wāqid, who was known to be poor, three or four parcels of land yet he did not give the same portion of gift to the rest of his children.²¹ ‘Abd al-Rahmān bin ‘Awf also exercised some form of preferential *hibah*.²² At the same time, ‘Uthmān Ibn ‘Affān voiced out his opinion, “if a man has a number of children and he gave one of them a gift, it is obligatory for him to do the same to all of his children and give them the equal amount of gifts.”²³

Based on the above evidence, Muslim jurists have drawn different conclusions with regard to the permissibility of favouring some children over others when distributing gifts. Although all jurists acknowledge and accept the Prophet’s advice, “Be just towards your children”, their opinions differ in regard to *hibah*, i.e. whether it is to be considered obligatory or recommendable. Some jurists decide that it is not permissible for Muslims to give any of their children preferential treatment; therefore, the transaction is not valid. A number of other jurists, however, rule that although Muslims are not encouraged to do so, such a transaction can still be considered as valid.

Jurists’ opinion on preferential *hibah* can be divided into two groups: it is a prohibited and invalid act and it is a discouraged and valid act.

1. Preferential *Hibah* is Prohibited and Invalid

Those who hold to the opinion that preferential *hibah* is prohibited and invalid are generally from Hanbalite school, including Aḥmad Ibn Ḥanbal and Ibn Taymiyyah. Ṭāwūs,²⁴ Sufyān al-Thawrī and some Malikite jurists are named in this group.

²⁰ Mālik, *al-Muwaṭṭa’*, (n.p.: Diwan Press Book of Judgements, 1982), 33.

²¹ Reported by al-Bayhaqī, *Sunan Kubrā*, vol. 6, 296.

²² Al-‘Imrānī, *al-Bayān fi Madhhab al-Imām al-Shāfi’ī*, vol. 8, 107.

²³ Muḥammad Rawwās Qal‘ah Ji, *Mawsū‘ah Fiqh Ibn Taymiyyah*, vol. 1 (Beirut: Dār al-Nafā’is, 1998), 402.

²⁴ Ibn Qudāmah, *al-Mughnī*, vol. 8, 256.

Hanbalite School

Aḥmad Ibn Ḥanbal ruled that the bestowal of gifts to some children but not to others is not permissible (*ḥarām*). In his esteemed view, the text of the *ḥadīth* itself points clearly and unmistakably to the fact that the Prophet (p.b.u.h.) indeed prohibited any preferential treatment of siblings.

The textual basis for their opinion is found in numerous parts of the *ḥadīth*, such as the Prophet's sayings :

لا أشهد إلا على حق.

"I do not attest to oppression.."

فارجعه.

"Take it back.." ²⁵

فاتقوا الله واعدلوها في أولادكم

"Fear Allah and be just towards your children.." ²⁶

فاني لا أشهد

"Then, I will not acknowledge it" ²⁷

فليس يصلح هذا. وإني لا أشهد إلا على حق

"Then, this is not appropriate and I will not acknowledge it and I will only attest to what is right." ²⁸

These statements clearly justify the conclusion that any act of preferring some children over the others is not permissible (*ḥarām*) and that it is obligatory (*wājib*) for a parent to treat all children equally, including in the distribution of gifts.

Ibn Qudāmah justified it by saying that the above stated instances support the prohibition of preferential distribution of gifts which the Prophet (p.b.u.h.) had called an act of oppression. The Prophet (p.b.u.h.) had indeed ordered Bashir to take back the gift he had given his son and he had refused to testify to the transaction. Oppression is a prohibited act in Islam and any act which is unjust is considered an act of oppression because it denies a party their lawful right. Openly preferring some of one's children over the others will

²⁵ Reported by al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, vol. 2, 152.

²⁶ Reported by Muslim, *Ṣaḥīḥ Muslim*, vol. 3, 76.

²⁷ Reported by Muslim, *Ṣaḥīḥ Muslim*, vol. 3, 74.

²⁸ Reported by Muslim, *Ṣaḥīḥ Muslim*, vol. 3, 76.

only breed enmity. Ibn Qudāmah also recorded that this opinion is also viewed by Mujāhid and ‘Urwah but not by Tāwūs and Ibnu al-Mubārak.²⁹

The argument also includes that severing family ties is in itself condemnable and prohibited in Islam. Thus, whatever leads to severing such ties can also be considered a prohibited act. In short, the bestowal of gifts to some of the children but not to the others is not permitted in Islam as it is very likely to cause the severance of kinship bonds.³⁰

2. Preferential *Hibah* is not Recommended and Valid

Jurists in support of the ruling that preferential *hibah* is valid contend that preferential treatment of a child can only be limited to it being tolerable (*makrūh*) but not prohibited (*ḥarām*). Although the literal meaning of the respective traditions of the Prophet (p.b.u.h.) makes it obligatory for parents to treat their children equally and prohibits any act of favouritism, a number of jurists feel justified to assert that justice and fairness towards one’s children cannot be considered obligatory (*wājib*) and it is only recommendable (*mandūb*). They explain the Prophet’s advice to Bashīr as a way of showing that he would prefer parents to refrain from any acts of favouritism to discourage it from becoming common practice.

Those jurists further substantiate their view by interpreting the Prophet’s reply:

فارجهه .

“Take it back”³¹

As meaning that indeed Bashīr’s act of giving his son a slave had been a valid act because if it had not been valid, the Prophet (p.b.u.h.) would not have asked Bashīr to retract it later on.

Further explanations from those jurists are discussed next.

Abū Ḥanīfah

Abū Hanīfah, as reported by Sarakhsī, ruled that when someone is healthy, then it is permissible for him to favour some children over others. He based his opinion on the act of Abū Bakr who had allocated some gifts to his daughter

²⁹ Ibn Qudāmah, *al-Mughnī*, vol. 8, 256.

³⁰ Ibn Qudāmah, *al-Mughnī*, vol. 8, 257.

³¹ Reported by al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, vol. 2, 152.

‘Ā’ishah when he was healthy. It was also his opinion, if one wants to present gifts to his children, it is preferable but not an obligation for him to distribute these gifts equally, and to be just in distribution between sons and daughters.³²

Mālik Ibn Ānas

As recorded by Ibn Rushd, Imam Mālik ruled that it is permissible to show preference but not permissible if one gives all wealth to some of his children while excluding the rest. Imam Mālik was very concerned if the distribution involves the whole amount of wealth and property as it will deny others’ rights onto them.³³

Muḥammad Ibn Idrīs al-Shāfi‘ī

According to al-Shāfi‘ī, preferential *hibah* is a valid transaction if a parent favours a specific child over the others. He based his opinion on the practice of some of the Companions (r.a.), such as Abū Bakr in giving 20 *wusqan* of dates to ‘Ā’ishah or ‘Umar favouring his son ‘Āṣim, or ‘Abd al-Raḥmān ibn ‘Awf and his gifts to the son of Umm Kalthum. He also argued that if it is permissible for some children to give gifts to only one of their parents, then it is equally permissible for parents to give gifts to only one child and not to the others.³⁴ This is also supported by another saying reported of the Prophet (p.b.u.h.) in this regard:

فاشهد على هذا غيري

“Attest to this transaction others rather than me.”³⁵

It is argued that his unwillingness to attest a preferential bestowal of a gift but his approval of a third party to do so can be interpreted that such an act cannot be considered an unlawful (*ḥarām*) act, albeit one that can only be disdainfully tolerated (*makrūh*). Thus from this saying, the ruling of presenting some of the children with gifts but not the others is considered as a non-recommendable yet valid disposition.³⁶

³² Sarakhsī, Abū Bakr Ibn Aḥmad Ibn Abū Sahl, *al-Mabsūṭ*, vol. 12, 66.

³³ Ibn Rushd, *Bidāyah al-Mujtahid Nihāyah al-Muqtaṣid*, vol. 1-2 (Beirūt: Dār al-Kutub al-‘Ilmiyyah, 2004), 709.

³⁴ Al-‘Imrānī, *al-Bayān fī Madhhab al-Imām al-Shāfi‘ī*, vol. 8, 111.

³⁵ Reported by Muslim, *Ṣaḥīḥ Muslim*, vol. 3, 76.

³⁶ Al-Nawawī, *Ṣaḥīḥ Muslim bi Sharḥ al-Nawawī*, vol. 11 (Beirūt: Dār al-Kutub al-‘Ilmiyyah, 2003), 56.

RULING OF PREFERENTIAL *HIBAH* AMONG CONTEMPORARY SCHOLARS

As for the contemporary Muslim scholars, many of them view that preferential distribution of wealth to own children is prohibited. Specifically, this is the view of Ṣāliḥ al-Fawzān,³⁷ ‘Abd al-Karīm Zaydān, ‘Abd Allāh Ibn ‘Abd al-Raḥmān ‘Alī Bassām³⁸ and Wahbah Zuḥaylī.³⁹ This is also supported by Board of Senior Scholars for Fatwa and Research (Hay’ah Kibār ‘Ulamā’ al-Sa’udiyyah),⁴⁰ Council of Fatwa in Egypt (Dār al-Iftā’ al-Miṣriyyah)⁴¹ and Committee for Legal Ruling of al-Azhar (Lajnah al-Fatwa bi al-Azhar).⁴² It is a kind of agreement among them even though they make use of different wordings in the ruling, ‘Abd al-Karīm Zaydān, Dār al-Iftā’ al-Miṣriyyah, Lajnah al-Fatwa bi al-Azhar and Hay’ah Kibār ‘Ulamā’ insist for the obligatory duty of parents to be fair in *hibah*, whereas Wahbah al-Zuḥaylī goes for prohibition in unequal distribution of wealth among children and considers unequal distribution of wealth as being cruel (*jur*). ‘Alī Bassām, on the other hand, uses the term of impermissibility for the purpose.

DISCUSSION ON JURISTS’ OPINIONS ON THE ISSUE OF JUSTICE

It is important to note at this point that Muslim jurists entertain different views on the exact way of how to treat one’s children equally. Although all jurists acknowledge and accept the Prophet’s advice:

اعدلوا في أولادكم

“Be just towards your children.”⁴³

³⁷ Ṣāliḥ al-Fawzān, *al-Mulakkhaṣ al-Fiqhī*, vol. 2, 8th ed. (Jeddah: Dār Ibnī Ḥazm, 1998), 164.

³⁸ ‘Alī Bassām, ‘Abd Allāh Ibn ‘Abd al-Raḥmān, *Taysīr al-‘Ulām Sharḥ ‘Umdat al-Aḥkām*, vol. 2 (2nd ed.) (Riyāḍ: Dār al-Mīmān, 2005), 282.

³⁹ Wahbah al-Zuḥaylī, *Fatāwā Mu‘āṣirah* (Damshiq: Dār al-Fikr, 2003), 205.

⁴⁰ *Fatāwā al-Lajnah al-Dā’imah lil-Buḥūth al-‘Ilmiyyah wa al-Iftā’*, vol. 16 (Riyāḍ: Maktabah al-Mālik Fahd al-Waṭaniyyah, 2003), 192.

⁴¹ *Al-Fatāwā al-Islāmiyyah min Dār al-Iftā’ al-Miṣriyyah*, vol. 9 (Cairo: Wizārah al-Awqāf, 1993), 3373.

⁴² Wahbah al-Zuḥaylī, *al-Fiqh al-Islāmī wa Adillatuhu*, vol. 5 (Damshiq: Dār al-Fikr, 1997), 4014.

⁴³ Reported by Muslim, *Ṣaḥīḥ Muslim*, vol. 3, 75; Reported by al-Bayhaqī, *Sunan Kubra*, vol. 6, 292.

Their opinions differ in regard to *hibah*, i.e. whether equality cum justice⁴⁴ is to be considered obligatory or recommended.

Both parties, on the ruling of valid and invalid preferential *hibah*, are able to produce textual evidence to support their arguments. Nevertheless, the fact that the Prophet's Companions (r.a.) themselves favoured some of their children over the others when it came to gift giving remains a strong argument for those who see the practice of preferential *hibah* to be valid. The documented practice of Abū Bakr and 'Umār who were prominent authorities in the Prophetic traditions, suggests its permissibility.

It is important to note, despite the disagreement of ruling, all jurists agree on the legitimacy of ensuring equality among children in the distribution of gifts as it is part of acting justly, with the intention of making all of them feel equally appreciated, purifying their hearts and dispelling any hatred, animosity and enmity between them. They differ in their opinions regarding the necessity (*wujūb*) of the equal distribution of gifts but agree with the spirit of justice.

They also agree that *hibah* with bad intention is sinful. In relation to that, according to Abū Yūsuf, acting justly has to be considered a requirement and an obligation if the intention of favouring some over the others is to inflict harm.⁴⁵

It is worth highlighting that, both groups who view that acting justly is a condition for a valid *hibah* and those who go for the validity of unequal *hibah* among children, firmly hold that severing family ties is in itself condemnable and prohibited in Islam. Thus, whatever leads to severing such ties has also to be considered a prohibited act. In short, the bestowal of gifts to some of the children but not to the others is not permitted in Islam as it is very likely to cause the severance of kinship bonds. Therefore, special attention should be given to bestowing the whole amount of wealth and property to one child or some children and excluding the rest. This is indeed very severe injustice and needs to be prohibited as highlighted by Imam Mālik.

⁴⁴ Equality in this context is itself justice since there is not specific ruling that is imposed on the distribution among children.

⁴⁵ 'Abd al-Karīm Zaydān, *al-Mufaṣṣal fī Ahkām al-Mar'ah wa al-Bayt al-Muslim fī al-Sharī'ah al-Islāmiyyah* (Beirūt: Mu'assasah al-Risālah, 1997), 149.

CONDITIONS THAT CAUSE UNEQUAL *HIBAH* TO BE ACCEPTABLE

Besides the strict stand of Hanbalite scholars' on invalid *hibah* if it involves preference in giving to one child and not to the other children, they agree that it is permissible to favour a child over the others in the bestowal of gifts if there is valid reason for doing so. Aḥmad ibn Ḥanbal mentions the case of a favoured child who had a particular need of the money to settle his or her debts or to cover medical expenses because of a chronic illness.⁴⁶ With the same concern, Ibn Taymiyyah asserts that it is permissible to favour one child over the others if the favoured child is pious but poor and in greater need of material support for the cause of good, compared to his siblings who are richer but less pious who would only squander their gifts in unlawful ways.⁴⁷

Some other situations that can lead to permissible preferential *hibah* is if the favoured child is sick or suffers from permanent physical disability such as blindness and is in need of a lot of money for treatment to recover from the illness.⁴⁸ It is also a considerably justified decision to have preferential *hibah* rendered to a disabled child so that he or she has the opportunity to make use of numerous modern facilities and applications which can enable him or her to develop their skills and lead a purposeful and fulfilled life even if the treatment is often expensive.

Situations in which a child is responsible for the upkeep of a large family or being younger and busy in seeking knowledge can also be considered for receiving more *hibah* than the rest of the children.⁴⁹ The logical justification is that after the parents' death, the younger children or children who are still studying are in need of money as they are not financially independent yet.

In the light of the above discourse, it is important to assert that all Muslim jurists agree that if certain conditions are met, unequal *hibah* are rendered permissible. In the current scenario, parents are allowed to extend additional material support to their widowed daughter who has become solely responsible for the upbringing of her children. The same can be applied to the numerous cases where wives have been abandoned by their husbands and who depend on the support of their own blood relatives, foremost their own parents. Another

⁴⁶ Ibn Qudāmah, *al-Mughnī*, vol. 8, 256.

⁴⁷ Ibn Taymiyyah, *Majmū'ah al-Fatāwā li al-Shaykh al-Islām Taqiyuddīn Aḥmad Ibn Taymiyyah*, vol. 16 (al-Qāhirah: Dār al-Ḥadīth, 2006), 159.

⁴⁸ Hishām Qablan, *al-Waṣīyah al-Wājibah fī al-Islām* (Beirut: Manshūrāt Baḥr al-Mutawassiṭ, 1985), 11.

⁴⁹ Ibn Qudāmah, *al-Mughnī*, vol. 8, 258.

case is son or daughter who has children for whom special attention should be given.

MEANING OF JUSTICE BETWEEN SONS AND DAUGHTERS

However, in the case of endowing *hibah* to all children, should it adhere to the designated portions as applied in the inheritance law?

The general view of the jurists is that favouring some children over the others because of gender difference is not allowed. If parents show preferential treatment to such an extent that they do not hesitate to fulfil every one of their son's desires but ignore their daughter's financial needs, their preferential *hibah* has to be regarded as not permissible because it is based on gender bias. Islam demands just and equal treatment of one's children. The Prophet (p.b.u.h.) had even gone as far as to suggest that if he had decided to prefer any of his children based on gender, he would have preferred his daughters over his sons when he said:

سوا بين أولادكم في العطية فلو كنت مفضلا أحدا لفضلت النساء

*“Be just to your children in giving out gifts. If I were given a chance [to act unjustly] I would definitely favour the females over the males.”*⁵⁰

But jurists differ in opinions when it comes to proportions given to sons as compared to daughters. Aḥmad Ibn Ḥanbāl views that the portion of inheritance between sons and daughters should be preserved to respect the spirit of justice⁵¹. In other words, justice (*‘adl*) means giving the male two parts as it is the practice in the distribution of inheritance. Imam Aḥmad further argues that the sons are generally in greater need of gifts than their female siblings because the responsibility of paying dowry to their brides and maintaining their wives and future children would be shouldered by them. This is also agreed by Ibn Taymiyyah.⁵²

On the other hand, Abū Ḥanīfah, Mālik and al-Shāfi‘ī are of the opinion that equality in this context means treating sons and daughters equally by giving them the same amount of gifts. Mālik and Abū Ḥanīfah justify that since *hibah* is bestowed when both the giver and recipient are still alive, the argument that the same principles should apply as in the laws of inheritance

⁵⁰ Reported by al-Bayhaqī, *Sunan Kubra*, vol. 6, 294.

⁵¹ Ibn Qudāmah, *al-Mughnī*, vol. 8, 258.

⁵² Ibn Taymiyyah, *Majmū’ Fatāwā*, vol. 3 (Cairo: Dār al-Wafā’, 1998), 297.

seems unjustified.⁵³ Sons and daughters deserve equal share of gifts as they do in the allocation of money for their upbringing.⁵⁴ Equal treatment is also evident based on the saying of the Prophet (p.b.u.h.):

سوا بين أولادكم في العطية فلو كنت مفضلا أحدا لفضلت النساء

“Be just towards your children, if I have to favour one, I will definitely favour the females.”⁵⁵

There ought to be no difference in the treatment of one’s sons or daughters, as the *hadīth* emphasizes its obligatory nature. The Prophet’s question was:

أعطيت سائر ولدك مثل هذا؟

“Did you give to them equally?”

And the suggested solution:

سوا بين أولادكم

“Treat them equally.”⁵⁶

Māwardī also dictates that male and female children have the right to be treated equally and opposes the legal opinion of giving the sons a greater amount of gifts as they do in the context of inheritance.⁵⁷ This is also supported by the above mentioned *hadīth* narrated by ‘Ikrimah from ‘Abbās (r.a.) which clearly states that if any children were to be preferred it would be the daughters, not the sons which shows that it is not necessary to follow the rule of inheritance in transferring ownership from parents to children.

CONCLUSION

In Islam, other than inheritance (*farā’id*), *hibah* is recognized as an established way of transferring wealth from parents to their own children. The Islamic legal tradition, in the past and present, acknowledges the central issue of justice that needs to be respected. This is to ensure that any act of *hibah* falls within the confines of legality and is considered a permissible act worthy of earning a parent the pleasure and benevolence of Allah SWT.

⁵³ Ibn Qudāmah, *al-Mughnī*, 259.

⁵⁴ Al-Ḥafnawī, *Mawqif al-Islām min Tafdīl Ba’d al-Awlad ‘alā Ba’d fi al-Hibah* (Egypt: Dār Ṣaḥābah Turāth, 1987), 37.

⁵⁵ Reported by al-Bayhaqī, *Sunan Kubra*, 294.

⁵⁶ Ibn Ḥibbān, *Ṣaḥīḥ Ibn Ḥibbān* (Beirut: Dār al-Ma’rifah, 2004), 1380.

⁵⁷ Al-Māwardī, *al-Ḥāwī al-Kabīr*, vol. 9, 412.

The positions of jurists across schools of thought are mainly of two groups: those who are of the opinion that preferential treatment in distributing gifts among children is not permissible and invalid and those who are of the opinion that it constitutes a reprehensible yet valid transaction.

At the same time, all jurists unanimously support the principle that parents should certainly, as far as they could, treat their children justly and equally. Any act of bestowal that clearly goes against the spirit of justice is sinful and, for some jurists, can even lead to the invalidity of the action. Therefore, it is important to educate Muslims to uphold the spirit of justice in the way they distribute wealth among their offspring.

However, jurists generally regard that preferential *hibah* is rendered to be justifiable with valid and genuine reasons. These include sickness, disability, poverty, etc. Those reasons are under the scope of justice in Islam, since justice does not only mean being fair and square but to place things in their proper place.

It is very important not only to make known to all Muslims that *hibah* is an open practice for each and every body, but proper procedures also must be set to ensure that *hibah* should be in respect to the concept of justice in Islam. This is to consider that the spirit of justice has been consistently and persistently stressed by all jurists and scholars either classical or contemporary ones, and can even cause any act of giving to be null and void to some jurists. Therefore, justice in bestowing *hibah* for parents to the children is vital. Special attention should be given to prevent the bestowing of the whole amount of wealth and property to one child or some children and excluding the rest. This is indeed very severe injustice and needs to be prohibited. Only in the cases where they found special reasons, can they give more to one child compared to another. Some examples suggested in this paper, include those recipients who are handicapped, poor, having extra responsibilities, studying or widows. In such cases, the prevalent intention is to render help and not to discriminate.

It is also important to note that the meaning of justice and equality in the case of *hibah* has not much difference. The issue that arose between those two concepts is only on the bestowing to male and female child. With the strict meaning of justice, to some jurists, it should fulfil the portions prescribed by *farā'id* i.e. male should receive two portions as compared to female. Whereas, to some other, both genders should receive the same amount under the concept of equality. It is our opinion that equality by having equal distribution in *hibah* does not violate the concept of justice because *hibah* is a different way of distribution from *farā'id*.

Since there have been related *fatwa* on justice in *hibah* endorsed by various Fatwa institutions in the Muslim countries such as Senior Scholars for Fatwa and Research (Hay'ah Kibār 'Ulamā' al-Sa'ūdiyyah), Council of Fatwa in Egypt (Dār al-Iftā' al-Miṣriyyah) and Committee for Legal Ruling of al-Azhar (Lajnah al-Fatwa bi al-Azhar), it is a humble recommendation that clear rulings and proper guidelines be endorsed in accordance to the issue of justice in bestowing *hibah* at the institutional levels in Malaysia. The attention must go to the highest authority in endorsing Shariah rules, i.e. the National Council of Fatwa and Shari'ah Advisory Board of Bank Negara Malaysia.

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