Gift (Hibah) During the Death Illness in Islamic Jurisprudence and the Algerian Family Law

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Abstract

The contract of gift is considered one of the voluntary sources of obligations. It constitutes a gratuitous contract during the donor's lifetime and is recommended under Islamic law. A gift (hibah) is the transfer of ownership of property by one person to another during their lifetime, without consideration or compensation. Linguistically, *hibah* means a gift granted without consideration or purpose; when such gifts are given abundantly, the giver is described as *Wahhab*, one of the forms denoting intensification.

The Qur'an states: "He grants females to whom He wills and grants males to whom He wills." The Maliki school of jurisprudence also defines a gift as follows: "It is the donation of property during one's lifetime, and it is recommended and concluded by any statement or act that indicates it."

It is well established that gifts (*hibah*), charitable donations (*sadaqah*), and presents (*atiyyah*) differ from one another. The Prophet, peace and blessings be upon him, used to accept gifts but did not accept charity. The term *sadaqah* is used to refer to a gift intended for the sake of Allah Almighty, whereas the term *hadiyyah* (present) refers to a gift intended to draw closer to a person and express affection toward them, as stated by the Prophet, peace and blessings be upon him: "Give gifts to one another, and you will love one another." Thus, the gift constitutes a means of transferring ownership, whereby the gifted property passes from the donor's estate to that of the donee; consequently, the donor's estate is diminished while that of the donee is increased.

The most important point to note is that a gift takes place during the lifetime of both the donor and the donee, which distinguishes it from a will. Among its requirements are both offer and acceptance, as well as the requirement of possession, and its form must be concluded during the lifetime of the parties. In some cases, a person suffering from a terminal illness concludes a gift contract; however, according to the consensus of the jurists of the four schools of Islamic jurisprudence, such a gift is considered a will. With reference to Islamic jurisprudence, the prevailing definition of a terminal illness is: "An illness in which death is highly likely to occur, which renders the person incapable of attending to their affairs, and which is actually followed by death, even if the patient dies for another reason, such as an accident, provided that the death occurs during the course of the illness." The Algerian legislator has likewise followed Islamic Sharia, as

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Article 204 of the Algerian Family Code, as amended by Ordinance No. 05-02, provides as follows: “A gift made during a terminal illness, as well as during serious illnesses and circumstances, shall be considered a will.”

The jurists of the four schools of Islamic jurisprudence, including the Maliki school, restricted the dispositions of a person suffering from a terminal illness in order to protect the rights of the heirs and prevent circumvention. Moreover, the severity of the illness and its impact on the patient may frighten and overwhelm them, thereby impairing their ability to fully comprehend their dispositions. This means that the freedom of the donor becomes restricted from the onset of the terminal illness. The majority of jurists have held that a gift made by a donor suffering from a terminal illness is subject to the legal ruling governing a will and is therefore governed by its provisions, including the prohibition against bequeathing more than one-third of the estate and the prohibition against making a bequest to an heir, while allowing the heirs to approve such dispositions.

This is the approach adopted by the Algerian legislator, who has departed from the position taken by most Arab legal systems by relying on the Maliki view concerning the approval of the heirs, pursuant to Article 189 of the Algerian Family Code, which provides: “There shall be no bequest to an heir unless the heirs approve it.”

In contrast, the Moroccan legislator prohibits a bequest to an heir and renders it absolutely null and void; such a bequest cannot be validated by the heirs’ approval after the death of the testator.

INTRODUCTION

Allah Almighty has distinguished the human being with reason and discernment, which enables them to acquire rights and assume obligations, and to make various dispositions, whether for consideration or gratuitously. However, circumstances do not remain constant, and a person may be subject to any of the impediments to legal capacity, just as they may suffer from a terminal illness that affects them psychologically and socially. Since a human being is vulnerable in the face of illness, they may begin to undertake dispositions that they do not fully comprehend, due to their fear of the illness and apprehension of the approach of their death. For this reason, the jurists of the four schools of Islamic jurisprudence, including the Maliki school, have restricted the dispositions of a person suffering from a terminal illness in order to protect the rights of the heirs and prevent circumvention. At times, a person suffering from a terminal illness concludes a gift contract. The latter is a contract among the gratuitous contracts permitted by Islamic Sharia and recognized by positive laws; however, this contract is subject to the legal ruling governing a will, given that the person is suffering from a terminal illness.

The donor may also be in good health; in this case, the gift constitutes a means of transferring ownership, whereby the gifted property passes from the donor’s estate to that of the donee, thereby diminishing the donor’s estate and increasing that of the donee.

The most important point to note is that a gift takes place during the lifetime of both the donor and the donee, which distinguishes it from a will.

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Accordingly, we raise the following question: **What is a gift contract? What is meant by terminal illness? And what are the effects of a gift contract made during a terminal illness?**
To address these questions, we adopted the analytical method in addition to the descriptive method. Accordingly, we followed the following structure:

First Axis: The Concept of the Gift Contract

First: Definition of the Gift Contract

Second: Characteristics of the Gift Contract and Its Distinction from Similar Contracts

Second Axis: The Disposition of a Person Suffering from a Terminal Illness by Means of a Gift

First: The Concept of Terminal Illness

Second: Effects of a Gift Contract Made During a Terminal Illness

First Axis: The Concept of the Gift Contract

In order to arrive at a concept of the gift contract, it is necessary to determine its legal characterization. In this axis, we will address the definition of the gift contract (first), explain its characteristics and distinguish it from other contracts (second), or similar dispositions, as well as the evidence and rationale underlying its legitimacy (third).

First: Definition of the Gift Contract:

The gift contract is considered one of the gratuitous dispositions. Various definitions of the gift contract have been provided, whether by Islamic jurisprudential scholars or under positive laws. We will address the linguistic definition of the gift, followed by its jurisprudential definition, and then turn to its legal definition.

1. Linguistic Definition of the Gift Contract:

Hibah means a gift granted without consideration or purpose; when such gifts are given abundantly, the giver is called *Wahhab*, which is one of the forms denoting intensification.[1]
The Almighty says in the Qur'an: "Grant me from Yourself an heir."[2] He also says: "He grants females to whom He wills and grants males to whom He wills."[3]

2. Jurisprudential Definition of the Gift Contract:

The Hanafi school defines *hibah* as the transfer of ownership of an object without consideration.[4] This means that any person who owns an object may give it to another person without compensation.
The Shafi'i school likewise defines *hibah* as the transfer of ownership to another person without consideration during one's lifetime, voluntarily. It should be noted that the Shafi'i school added the word "voluntarily" in order to exclude zakat, obligatory duties, vows, and expiations.[5]
The Hanbali school also defined *hibah*, including Ibn Qudamah, as follows: *hibah*, *sadaqah*, *hadiyyah*, and *atiyyah* have closely related meanings, and all constitute the transfer of ownership during one's lifetime without consideration, while the term *atiyyah* encompasses all of them.
Likewise, *hibah*, *sadaqah*, and *atiyyah* differ from one another, for the Prophet, peace and blessings be upon him, used to eat gifts but did not eat charity.
As for the Maliki school, it defines *hibah* as follows: "It is the donation of property during one's lifetime, and it is recommended and concluded by any statement or act that indicates it."[6]

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From the foregoing definitions, it becomes clear that *hibah* is the transfer of ownership of property by one person to another during their lifetime, without consideration or compensation. The term *sadaqah* is used to refer to a gift intended for the sake of Allah Almighty, whereas the term *hadiyyah* is used to refer to a gift intended to draw closer to a person, show affection toward them, and express love for them. This is recommended and encouraged, as the Prophet, peace and blessings be upon him, said: "Give gifts to one another, and you will love one another."

It should also be noted that a gift takes place during the lifetime of both the donor and the donee, which distinguishes it from a will.

3.Legal Definition of the Gift Contract:

The Algerian legislator defined the gift in Article 202 of the Algerian Family Code, as amended and supplemented by Ordinance No. 05/02, as follows: "A gift is the transfer of ownership without consideration, and the donor may stipulate that the donee undertake an obligation contingent upon the fulfillment of the condition."

Article 204 of the Algerian Family Code also provides: "A gift made during a terminal illness, and illnesses and hidden conditions, shall be considered a will."

Article 206 also provides as follows: "The gift is concluded by offer and acceptance, and possession is completed….."

Through our analysis of these provisions, we find, first, that the gift is a means and an instrument of transferring ownership, whereby the gifted property passes from the donor's estate to the donee's estate, thereby diminishing the donor's estate and increasing the donee's estate.[7]

The expression "without consideration" means that the gifted property passes to the donee's estate gratuitously, without compensation and without the latter providing any consideration, together with the donor's intention to make a gratuitous transfer to the donee.

As for the second paragraph of the same article, it provides that the donor may stipulate that the donee undertake an obligation, meaning any specific act, and upon completion of this act, ownership of the gifted property is transferred to the donee. This is referred to as a gift subject to a condition.

With reference to the text of Article 206, it becomes clear that the gift is concluded by offer and acceptance, just like all other contracts.

The Algerian legislator derived this definition from Maliki jurisprudence. The gift contract is a contract between living persons, during the lifetime of both the donor and the donee. However, the Algerian legislator omitted mentioning this and should have mentioned it in order to distinguish between the gift and the will.

The gift must also be subject to an official form; otherwise, it shall be invalid, by expressing the consent of both the donor and the donee in an official form drawn up by a person legally qualified to do so.

Second: Characteristics of the Gift Contract and Its Distinction from Similar Contracts:

In light of the foregoing definitions of the gift contract, we may identify several characteristics of the gift contract. There are also several contracts similar to it, which we will address below:

1. Characteristics of the Gift Contract:

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The gift contract has several characteristics that may be derived from its definitions, namely:[8]

1. The gift is a contract between living persons; therefore, there must be an offer and acceptance: an offer from the donor and acceptance by the donee. The gift is not concluded by the unilateral will of the donor (this is what distinguishes the gift from the will), as the will is concluded by the unilateral will of the testator, and therefore it may be revoked, unlike the gift, which may not be revoked except in certain circumstances.

2. The donor disposes of property belonging to them. The gift contract is a gratuitous disposition whereby the donor undertakes to give something and transfers its ownership without consideration. The donee may have a right of usufruct, residence, or easement.

3. The gift constitutes an obligation undertaken by the donor without consideration.

4. The intention to make a gift is an essential moral element. A person may dispose of their property without consideration without having the intention to make a gift, such as when they pay a debt owed by another person; in such a case, their disposition constitutes performance and not a gift, and they cannot revoke it, as the intention to make a gift is absent.

Therefore, for the contract to be considered a gift, the intention to make a gift must exist, without the donor intending to provide a present or derive a benefit from their act.

2. Distinguishing the Gift Contract from Similar Contracts:

The Algerian legislator has included the gift contract in Book Four of the Family Code under the title "Gratuitous Dispositions," which includes the gift, the will, and the endowment (*waqf*).

A: Distinguishing the Gift Contract from the Will:

A gift is a contract concluded by the offer and acceptance of both the donor and the donee. Thus, a gift is not concluded by unilateral will, as is the case with a will, which is made by the unilateral will of the testator and does not produce its effects until after the death of the testator. The gift therefore differs from the will in that it is a disposition between living persons, and the donor may not conclude their gift and defer the transfer of ownership of the gifted property until after their death, nor may they revoke it except in certain circumstances.

Furthermore, a gift is not restricted to a specific amount of the gifted property, as the donor may give all of their property or part thereof, unless they fall ill with a terminal illness, in which case the gift takes effect within the limit of one-third, whereas the will is restricted to one-third of the estate, and anything exceeding one-third is subject to the approval of the heirs.[9]

B- Distinguishing the Gift Contract from the Endowment (Waqf):

"*Waqf* is the withholding of an asset from acts of ownership while it remains under the ownership of the endower, together with the obligatory donation of its proceeds to one of the charitable purposes." Through this definition provided by the Maliki school, we note that, according to them, the *waqf* allows the endower to retain ownership of the endowed asset.[10]

Article 213 of the Algerian Family Code also defines it as follows:

"*Waqf* is the withholding of property from ownership by any person permanently and as an act of charity."

The legislator has considered it a contract among the gratuitous contracts and regulated it in Chapter Three of Book Four concerning gratuitous dispositions.

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The *waqf* consists of withholding the asset from any disposition that transfers ownership, meaning that it may neither be given as a gift, sold, nor inherited, while donating its usufruct, at the discretion of the endower, for one of the charitable purposes. The gift, on the other hand, constitutes the transfer of ownership of property by the will of the donor and the donee, and the gifted property may consist of a usufruct or a debt.

It is therefore clear to us that the gift constitutes the transfer of ownership without consideration, whereas the *waqf* consists of withholding the asset from ownership. As regards the temporal aspect, the gift differs from the will and the *waqf* in that the gift transfers ownership during the lifetime, whereas the will is a disposition whose effects are deferred until after death, while the *waqf* may take effect during the lifetime and after death. As regards value, the gift is not subject to a specific value, whereas the will is limited to one-third, and any amount exceeding one-third is subject to the approval of the heirs.

As for the *waqf*, it is not subject to a specified limit during the lifetime and does not exceed one-third upon death, by analogy with a disposition whose effects are deferred until after death.

As regards revocation, it is permissible in the case of a gift except in the cases provided for in Article 211 of the Algerian Family Code. As for the will, it may be revoked only during the lifetime, unlike the *waqf*, which may not be revoked.[11]

Third: Evidence for the Gift and the Wisdom Behind Its Legitimacy:

The gift is established by the Qur'an, the Sunnah, and scholarly consensus.

As for the Qur'an, the Almighty says: "My Lord, grant me from You a good offspring; indeed, You are the Hearer of supplication."[12]

And He, the Exalted, says: "But if they, of their own good pleasure, remit to you anything of it, then take it and enjoy it with ease and satisfaction."[13]

As for the Sunnah, the Prophet, peace and blessings be upon him, said: "Give gifts to one another, and you will love one another." ʿA'ishah, may Allah be pleased with her, reported: "I said, 'O Messenger of Allah, I have two neighbors; to which of them should I give a gift?' He said: 'To the one whose door is nearer to you.'"

As for scholarly consensus, the Companions followed the recommendation of giving gifts in all their forms, from the time of the Messenger, peace and blessings be upon him, to the present day, based on the saying of the Almighty: "And cooperate in righteousness and piety."[14]

With regard to the wisdom behind its legitimacy, everything that brings people's hearts closer and instills affection in them is required by Sharia, and this varies according to people's needs. There are individuals among people who are unable to obtain the necessities of sustenance, either due to old age or illness. In such a case, giving a gift is recommended. It is preferable when given to relatives because it maintains the ties of kinship. However, singling out some children with gifts is disliked, as is preferring some of them over others, because this sows enmity and hatred and severs the ties that Allah has commanded to be maintained.

Although the jurists have differed on this matter, Malik and al-Shafi'i held that it is permissible, whereas the Hanbalis and some Maliki jurists held that a person must treat their children equally with regard to gifts. If they single out some of them with a gift or favor some over others, they

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must restore equality through one of two means: either by taking back what was given in excess to some of them or by completing the share of the others.

They based their view on the report narrated by al-Nu‘man ibn Bashir, who said: My father gave some of his property as a charity, and my mother said, “I am not satisfied unless we make the Messenger of Allah, peace and blessings be upon him, a witness to it.” My father then went to the Messenger of Allah, peace and blessings be upon him, to have him witness his charity, and he said: “Have you given all your children the same?” He said: “No.” He said: “Fear Allah and treat your children equally.”

My father therefore returned and took back that charity.

However, the Hanbalis make an exception where there is a reason or circumstance that warrants preferring some of them, such as when one has a particular need, is blind, is engaged in the pursuit of knowledge, or has a large family; or when a gift is withheld from one of his children because of their immorality, innovation in religion, or because they would use what they receive to disobey Allah or spend it on disobedience to Him.

Second Axis: The Disposition by a Person Suffering from a Terminal Illness by Means of a Gift:

Various Arab laws and legislations have followed Islamic Sharia, as the latter provides solutions to legal matters with the aim of achieving justice and equality and giving everyone their due rights. Terminal illness is considered one of the important legal matters, and numerous legislations have adopted it and followed the teachings of Islamic jurisprudence. Accordingly, in this axis, we will address the concept of terminal illness (first), and then examine the effects of a gift contract made during a terminal illness (second).

First: The Concept of Terminal Illness:

Jurists have differed in determining the meaning of terminal illness, and definitions have varied and multiplied. Accordingly, we will clarify and present the definitions provided and adopted by the jurists.

1. Definition of Terminal Illness:

The majority of jurists held that terminal illness is the dreaded illness that is connected with death, even if death does not occur as a result of it.

The Hanafis held that terminal illness is an illness in which the fear of death is predominant and with which the patient becomes unable to attend to their affairs outside their home if male, and to attend to their affairs inside their home if female, and dies in that condition before the lapse of one year, whether or not they are bedridden. This is so unless their illness becomes more severe and their condition changes, in which case the beginning of the year is calculated from the date of the aggravation.

Accordingly, its occurrence requires two characteristics to be present:

The first characteristic: It must be dreaded, meaning that death usually results from it or occurs frequently as a result of it.

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The second characteristic: The illness must be connected with death, whether death occurs because of it or because of another cause external to the illness, such as killing, drowning, fire, collision, or otherwise.

If the patient recovers from this illness, it becomes clear that it is not a terminal illness, and their dispositions during it are considered as the dispositions of a healthy person, without distinction. As long as the patient remains alive, neither their heirs nor their creditors may object to their dispositions, since they may recover from their illness. However, if the dreaded illness ends in death, it becomes clear that the disposition was made during a terminal illness.

1. Cases Analogous to Terminal Illness in Legal Ruling:

The majority of jurists have treated various and numerous cases as equivalent, in legal ruling, to a person suffering from terminal illness, even though they involve no illness or impairment of health whatsoever; rather, they possess the two characteristics required for such classification. These include:

1. When a person is in a war and the battle has commenced, with the two sides engaged in combat.

2. When a person is at sea: if the sea is calm, the situation is not considered dreaded; but if the sea becomes turbulent and agitated, strong winds blow, and drowning is feared, then it is considered dreaded. The same applies if the ship breaks apart, the person remains on a plank, and drowning is feared.

3. When a person is brought forward for combat, whether for *qisas* or otherwise.

4. A captive or prisoner when it is customary for such a person to be killed.

5. A pregnant woman when labor begins.[15]

2. Terminal Illness in Law and Jurisprudence:

With reference to the Algerian legislator, we find that terminal illness has not been defined in the Family Code; rather, it was referred to in Article 204, which provides:

"A gift made during a terminal illness, as well as illnesses and dreaded conditions, shall be considered a will."

The Algerian judiciary has also defined terminal illness in many cases, and several decisions have been issued, including:

"It is established under Islamic law that the terminal illness which invalidates a disposition is the final illness, provided that it is serious, leads to death, and causes the person making the disposition to lose their consciousness and discernment. Accordingly, a judicial ruling contrary to this principle constitutes a violation of the jurisprudential rules derived from the provisions of Islamic Sharia and prevailing judicial precedent."[16]

The Algerian judiciary has therefore not determined terminal illness by a specific period, unlike the scholars of Islamic Sharia, who determined it as a full year. If the illness exceeds one year, it is not considered a terminal illness, and the dispositions made by the person are treated as the dispositions of a healthy person.

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Second: Effects of the Gift Contract During Terminal Illness:

The majority of jurists have agreed that if the donor is suffering from a terminal illness, the gift takes the ruling of a will. Therefore, it is necessary to distinguish between a gift to an heir and a gift to a non-heir as follows:

1. Gift to a Non-Heir:

The gift takes effect if the donor has no heirs, even if the donor gives all of their property to the donee, as no one has the right to object, not even the Public Treasury.

However, if the donor has heirs, and the gift is less than one-third or equal to one-third, it takes effect even if the heirs do not approve it. If it exceeds one-third, the excess over one-third does not take effect except with the approval of the heirs.

2. Gift to an Heir:

If the gift is made to an heir, it does not take effect except with the approval of the heirs, whether it is less than one-third, more than one-third, or equal to one-third, because a gift made during terminal illness is a will.

The approval of the heirs must be obtained after death. If the heirs approve it before the donor's death, such approval is not valid, because the heirs' right is established after death, and an heir is the person who is an heir at the time of death, not at the time of the gift.

3. The Donor's Gift When Indebted or Not Indebted:

If the donor is indebted, the gift does not take effect if the donor's debt exhausts the entirety of their estate, whether the donee is a stranger or an heir, provided that the creditors have not approved it. The approval of the heirs is of no relevance in this case, and the right of the heirs is deferred until the debt has been paid from this estate. If the creditors approve the gift, the approval of the heirs is required with respect to the amount exceeding one-third.[17]

According to the provisions of Islamic Sharia, if a sick person gives a gift to another and the donee does not take possession of it until the donor dies, the gift is void, just as it would be void if the donor had been healthy; it does not become a will because the donor intended to transfer ownership immediately, not after death. This is the view of the Hanafis and Shafi'is.

As for the Maliki view, it considers it equivalent to a will. Accordingly, a gift made during illness is stronger than a gift made during health, as it does not become void upon the death of the sick donor; rather, it becomes a will.[18]

CONCLUSION

In light of the foregoing, we conclude that a gift during terminal illness becomes a will, since when the donor is suffering from terminal illness, they undertake dispositions that they do not fully comprehend due to the severity of the illness and the approach and imminence of their death. For this reason, the jurists of the four schools of Islamic jurisprudence, including the Maliki school, restricted their dispositions in order to protect the rights of the heirs and prevent circumvention.

Our study has reached several results, which are as follows:

• The gift is a contract among gratuitous contracts and an instrument of transferring ownership, whereby the gifted property passes from the donor's estate to the donee's estate, provided that the donor is healthy, meaning that they are not suffering from terminal illness.

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• Terminal illness is that which is generally followed by death, and in which the patient becomes unable to attend to their needs.
• Cases such as a person brought forward for execution, a captive and a prisoner, a pregnant woman, and a person at sea are treated as equivalent to a person suffering from terminal illness.
• The gift of a person suffering from terminal illness to a non-heir is within the limit of one-third.
• The gift of a person who has no heir may comprise all of their property, and no one has the right to object.
• If the donor suffering from terminal illness has one heir, they may give all of their property to them.
• If the donor is indebted by a debt that exhausts all of their property, their gift is not valid because, if it were valid, it would cause harm to the creditors.
• Also, when the donee receives and takes possession of the gift during the lifetime of the donor suffering from terminal illness, the gift is valid by the consensus of the jurists because possession of the gifted thing or property took place during the lifetime.
Finally, we present a number of recommendations, which are as follows:
• Adding a legal provision to the Algerian Family Code containing a comprehensive definition of terminal illness, as we should not rely entirely on jurisprudence.
• Stating the provisions governing the dispositions of a person suffering from terminal illness in the Algerian Family Code.

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