AN APPRAISAL OF THE PRINCIPLES OF GIFT (HIBAH) IN ISLAMIC LAW AND ITS APPLICATION IN KADUNA, KANO AND KEBBI STATES

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JULY, 2015

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A THESIS SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES, AHMADU BELLO UNIVERSITY, ZARIA, IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF MASTER OF LAWS DEGREE - LLM

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DECLARATION

I declare that the work in this thesis entitled "An Appraisal of the Principles of Gift (Hibah) in Islamic Law and its Application in Kaduna, Kano and Kebbi States'' has been carried out by me in the Department of Islamic Law. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this thesis was previously presented for another degree or diploma in this or any other institution.

	_____	_____
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CERTIFICATION

This thesis entitled AN APPRAISAL OF THE PRINCIPLES OF GIFT (HIBAH) IN ISLAMIC LAW AND ITS APPLICATION IN KADUNA, KANO AND KEBBI STATES by Asma'u Sani AMINU meets the regulations governing the award of the degree of Master of Laws - LL.M of the Ahmadu Bello University, and is approved for its contribution to knowledge and literary presentation.

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LIST OF CASES

Alhaji Amadu Rufai v. Alhaji Abdurrahman (unreported) CA\K\120\S\97

Hadiza Ado and Anor v. Buba Ya'u (unreported) AC/K/13/87

Hafizu Ado v. Dauda & Ors (unreported) UAC/K/6/1992

Kaka v. Magwanja (2004) 9 NWLR pt.717 p.124

Magaji v. Matari (2000) 5 SCNJ 140

Maikano Hari v Tsoho Da'ado (1987) 1 SLR p.164

Muhammadu v. Mohammed (2001) 6 NWLR pt708 p.105

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Rabi'u Salihu v. Fatima Gogo (1990)1 Sh.L.R.N p.11

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Maida v Modu (2000) 4 NWLR pt 659 p.99

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Constitution of the Federal Republic of Nigeria, 1999

Kaduna State Shari'a Court (Civil Procedure) Rules, 2001

Kaduna State Shari'a Court Establishment Laws, 2001

Kano State Shari'a Court (Civil Procedure) Rules, 2001

Kano State Shari'a Court Establishment Laws, 2000

Kebbi State Shari'a Court Establishment Laws, 2000

Land Use Act, LFN, 2004

Shari'a court (Establishment and Territorial Jurisdiction) Order 2000 of Kano state

Shari'a Court of Appeal Laws

Shari'a Court of Appeal Rules

LIST OF ABBREVIATIONS

CA	-	Court of Appeal
CFRN	-	Constitution of the Federal Republic of Nigeria
LFN	-	Laws of the Federation of Nigeria
NWLR	-	Nigerian Weekly Law Report
R.A	-	Radhiyallahu Anhu
SAW	-	Sallallahu Alaihi Wasallam
SCA	-	Shari'a Court of Appeal
SCNJ	-	Supreme Court Judgment of Nigeria
SLR	-	Sarauniya Law Report
Sh.L.R.N	-	Sharia Law Report of Nigeria
SWT	-	Subhanahu wa Ta'ala

GLOSSARY

Aqidan	-	Contracting parties
Ad-Darurat Tubihul ma'athurat	-	Necessity makes lawful that which is unlawful
Ahliyyah	-	legal capacity
Al-Mauhub bihi	-	The subject matter of gift
Al-Wahib	-	The donor of the gift
Al- mal	-	Property
Al-wakil	-	An agent
Aqd	-	Contract
Aqil	-	Capability to reason
Arkan	-	Pillars
At-taflis	-	Insolvency
At-tasarruf	-	Dispositions
Ayn	-	Corpus of a property
Birr	-	Righteousness
Dayn	-	Debt
Gharar	-	Uncertainty
Hadiyyah	-	Gift to strengthen mutual affinity
Hauz or Hiyazah	-	Taking possession
Hibah	-	Gift
Hibah bi shart-al Iwadh	-	Gift with condition for reward
Hibah Muqabilu Iwadh	-	Gift in anticipation of reward
Hibba-tul-Musha	-	Gift of undivided share in property
Huquq	-	Rights
Ihsan	-	Good conduct

Ijab	-	Offer
Ijma	-	Consensus of the Muslim Jurists
Jamhur	-	Majority of the Muslim Jurists
Junun	-	Insanity
Ma'aruf	-	Excellent virtues
Majhul	-	Unknown
Mal-mutaqawwam	-	Inviolable property
Mandub	-	Recommendable
Manfa'ah	-	Usufruct
Manqul	-	Movable property
Mardul maut	-	Death sickness
Mazhab	-	School of jurisprudence
Muflis	-	A bankrupt
Mukallaf	-	A person who possesses legal capacity
Mumayyiz	-	A person who possesses intellect
Najasat	-	Impure substances
Qabd	-	To be in full control
Qabul	-	Acceptance
Qawl or Lafz	-	Verbal expression or spoken words
Rushd	-	Sound judgment of the mind
Sabiyy mumayyiz	-	A minor
Shahadatal-hal	-	Circumstantial evidence
Sighah	-	Formula
Sinnul-Bulugh	-	Attainment of the age of maturity

Tafsir	-	Translation and commentaries of the holy Quran
Tamyiz	-	Discernment
Atahah	-	Imbecility
Waqf	-	Endowment
Yamin al-Qadai	-	Oath of judgment
Yamin At-tuhmah	-	Oath of exoneration
Zhimmi	-	An unbeliever living under the protection of an Islamic State

ABSTRACT

Gift is a concept which every individual is engaged in willingly or unwillingly, either as a donor or recipient which has become part of the daily transactions of the society. The nature of gift has been conceived by scholars from different perspective creating divergence of opinion and application of these principles. The work is aimed at examining the comprehensiveness of the principles of Islamic Law relating to gift vis-à-vis the opinion of the four schools of thought and the application of these principles based on Maliki School in Northern Nigeria. This research was conducted by consulting classical literature(s) to deduce the principles relating to this concept. While court cases were used to showcase the legal application of the concept. Similarly, the *Shari'a* Court Establishment Laws of the chosen states conferred on the *Shari'a* Courts and the *Shari'a* Court of Appeal jurisdiction to entertain matters pertaining to gift. However the extent of the jurisdiction of the Shari'a Court of Appeal comes into limelight when the subject matter of the gift is land or property attached to land. Therefore it could be said that although exclusive jurisdiction in all matters involving gift is conferred on the Courts, it is with limitation. Hence, there is the need for the amendment of the Constitutional provisions conferring jurisdiction on these Courts.

Chapter one focuses on the general background of the study. It also examines the research problem, aims and objectives of the research, justification, scope, methodology, literature review and organizational layout. Chapter two analyzes the various definitions of a gift, nature and kinds of gift. Chapter three discusses the essentials of a gift, the concept delivery and revocation of a gift. Chapter four examines the Laws conferring jurisdiction on *Shari'a* Courts and *Shari'a* Court of Appeal to entertain matters involving gift. It also analyzes the applicable principles in court proceedings.

Chapter five concludes the research by showcasing the limitation of the jurisdiction of the courts and the recommended ways of enhancing it.

TABLE OF CONTENTS

Title Page -- -- -- -- -- -- -- -- -- i

Declaration -- -- -- -- -- -- -- -- -- ii

Certification -- -- -- -- -- -- -- -- -- iii

Acknowledgement -- -- -- -- -- -- -- -- iv

List of Cases -- -- -- -- -- -- -- -- -- v

List of Statutes -- -- -- -- -- -- -- -- vi

List of Abbreviation -- -- -- -- -- -- -- -- vii

Glossary -- -- -- -- -- -- -- -- -- viii

Abstract -- -- -- -- -- -- -- -- -- xi

Table of contents -- -- -- -- -- -- -- -- xii

CHAPTER ONE: GENERAL INTRODUCTION

1.1 Introduction -- -- -- -- -- -- -- -- 1

1.2 Statement of Problem -- -- -- -- -- -- -- -- 2

1.3 Aims and Objectives -- -- -- -- -- -- -- 3

1.4 Justification -- -- -- -- -- -- -- -- 4

1.5 Scope of the Research -- -- -- -- -- -- -- -- 4

1.6 Methodology -- -- -- -- -- -- -- -- 5

1.7 Literature Review -- -- -- -- -- -- -- 5

1.8 Organizational Layout -- -- -- -- -- -- 8

CHAPTER TWO: NATURE AND LEGALITY OF GIFT UNDER ISLAMIC LAW

2.1 Introduction -- -- -- -- -- -- -- -- 10

2.2 Definition of Gift -- -- -- -- -- -- -- 10

2.3 Nature of Gift -- -- -- -- -- -- -- -- 11

2.4 Legality of Gift -- -- -- -- -- -- -- 13

2.5 Classification of Gift -- -- -- -- -- -- 15

2.5.1 Gift to strengthen Affinity- *Hadiyyah*-- -- -- -- -- 16

2.5.2 Gift in anticipation of reward- *Hibah Muqabilu Iwadh* -- -- 16

2.5.3 Gift with condition for consideration- *Hibah bi-Shartil Iwadh* -- 17

2.5.4 Gift of undivided share- *Hibbatul Musha* -- -- -- -- 21

CHAPTER THREE: ESSENTIALS OF GIFT

3.1 Introduction -- -- -- -- -- -- -- -- 23

3.2 Offer- *Al-Ijab* -- -- -- -- -- -- -- -- 24

3.2.1 The Donor-*Al-Wahib* -- -- -- -- -- -- -- 25

3.3 Acceptance-*Al-Qabul*-- -- -- -- -- -- -- 30

3.3.1 The Recipient-*Al-Mauhub Lahu* -- -- -- -- -- 31

3.4 Conditions for the validity of Offer and Acceptance -- -- -- 33

3.5 Modes of signifying Offer and Acceptance -- -- -- -- 35

3.6 The Subject Matter of Gift- *Al-Mauhub* -- -- -- -- 38

3.7 Delivery or Taking Possession-*Hauz* or *Hiyazah* -- -- -- 44

3.7.1 What Constitutes Delivery -- -- -- -- -- -- 47

3.8 Revocation of Gift -- -- -- -- -- -- -- 50

3.8.1 Factors that Prevent Revocation of a gift by the parents -- -- 55

3.9 Factors that Invalidate Gift -- -- -- -- -- -- 57

CHAPTER FOUR: THE LAW PERTAINING TO GIFT UNDER THE STATES OF KADUNA, KANO AND KEBBI

4.1 Introduction -- -- -- -- -- -- -- -- 60

4.2 The Kaduna State *Shari'a* Court Establishment Laws, 2001 -- -- 61

4.3 The Kano State *Shari'a* Court Establishment Laws, 2000 -- -- 63

4.4 The Kebbi State *Shari'a* Court Establishment Laws, 2000 -- -- 65

4.5 Jurisdiction of the Courts to Entertain Matters Pertaining to Gift -- 66

4.5.1 Jurisdiction of the Court to Entertain Matters Pertaining to Gift under the Kaduna State *Shari'a* Courts Establishment Laws, 2001 -- -- 67

4.5.2 Jurisdiction of the Court to Entertain Matters Pertaining to Gift under the Kano State *Shari'a* Courts Establishment Laws, 2000 -- -- 68

4.5.3 Jurisdiction of the Court to Entertain Matters Pertaining to Gift under the Kebbi State *Shari'a* Courts Establishment Laws, 2000 -- -- 69

4.6 Practice and Procedure in Cases Pertaining to Gift -- -- -- 70

4.7 The *Shari'a* Court of Appeal -- -- -- -- -- -- 81

CHAPTER FIVE: CONCLUSION

5.1 Summary -- -- -- -- -- -- -- -- 86

5.2 Findings -- -- -- -- -- -- -- -- 87

5.3 Recommendations -- -- -- -- -- -- -- 88

Bibliography -- -- -- -- -- -- -- -- 90

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Introduction

Shari'a as envisaged in the *Qur'anic* verse "Then we put thee on the (right) way of religion, so follow thou that (way) and follow not the desires of those who know not"[1] literally means the way to be followed. *Shari'a* is an all encompassing word connoting a complete code of faith and practice of a Muslim in all aspect of his life, bordering on his faith and practices based on the principle of the science of unity and attributes of God, internal manifestations and the science of self's knowledge. While the science of unity and internal manifestations deal with the relationship of the Creator Allah (SWT) in the practice of belief in him by the Muslim, the concept of *fiqh* is a vast area that relates to concept of worshipping the Creator Allah (SWT), mutual transactions, justice and other relations in law.[2]

Thus Islamic law is a set of divine laws which is considered to be complete and comprehensive code of conduct considered as perfect, just and fair for all times to come which treats all human conduct with equality and justice. The concept of gift is based on the principles of *Shari'a* and it works on such framework that follows rules fixed by the law and flexible regulations or doctrines determined by scholars in compliance with provisions of the law.

The provisions of Islamic Law on Gift *Hiba* is an all comprehensive set of

[1] Q 45:4

[2] Qadri A.A. (1923) *Islamic Jurisprudence in the Modern World* ,Muhammad Ashraf Publishers Lahore, Pakistan p.16

principles that covers the realms of the contractual aspect of an individual with the sole motive of securing ties amongst members of the community. The bedrock upon which it is based is upon the concept of strengthening of ties. This is emphasized by Prophetic *ahadith* narrated by Bukhari, encouraging the exchange of gift because of its benefit in generating mutual relationship and taking away rancor. The Prophet was reported to have said. "Exchange gifts among yourselves and thus strengthen mutual love with each other."[3] In another *hadith* the Prophet (SAW) was reported to have said, "Give presents among each other that the gift takes away the grudge of the breast."[4]

Despite the importance of this concept of its being encouraged by the Prophet (SAW) in strengthening mutual ties, it is sometimes creating misunderstanding among individuals in our society. This could be due to failure to adhere to the principles which the law tries to encourage. Thus, sometimes issues involving gift usually end up in litigation thereby suppressing the ideal behind its motive.

1.2 Statement of Problem

The institution of gift has become part of the daily transactions of the Muslim society that it has affected the manner we are making it. Thus the problem of unclear offer and acceptance; continued occupation of the gift by the donor; failure to take delivery; revocation of gift especially in marriage transactions; and the expectation of consideration are common practices in gift. Sometimes instead of the gift to achieve its desired objective of strengthening mutual relationships, it creates enmity. This could be due to misapplication of the principles of the Law. There is also the problem of the

[3] Quoted by Sabiq S., (1996) *Fiqh-us Sunnah*, Dar-al-Fikr Publishers, Beirut vol. 4 p.428
[4] Ibid

limitation on jurisdiction of the Shari'a Courts and the Shari'a Court of Appeal to entertain matters involving gift where the subject matter is land or property attached to land; creating an impression on whether these Courts possess the requisite jurisdiction to entertain such matters or not.

1.3 Aim and Objectives

The main aim of this work is to review the provisions of Islamic Law relating to gift from the perspective of Maliki, Shafi'i, Hanafi and Hambali Schools with a view to find out their agreement on the principles of the Law and where they have divergence of opinion. In essence, it will examine the application of the principles of gift as provided by Maliki School in decided cases of the Shari'a Courts of Kaduna, Kano and Kebbi States.

This thesis will also analyze the Shari'a Courts Establishment Laws of these States with a view to showing whether the Laws have adequately provided for the jurisdiction of the Shari'a Courts to entertain matters involving gift. That is whether the exclusive jurisdiction conferred on these Courts is enough to give it jurisdiction on all matters pertaining to gift.

As to the right of the Shari'a Court of Appeal to have appellate and supervisory jurisdiction over the Shari'a Courts, this thesis will show whether the jurisdiction of the Court to entertain matters pertaining to gift is absolute or limited by other laws or statutes. The thesis will also show whether the effort of the States Houses of Assembly in extending the jurisdiction of the Courts is viable on conferring additional jurisdiction on it.

1.4 Justification

Gift is one of the contractual transactions in Islamic Law which every individual engages in either as a donor or a recipient. It has become part of the daily dealings of the society which makes it a common practice among individuals and thus in many cases lead to neglect on the principles of Islamic Law governing the conduct of making it. Like other concepts in Islamic Law, the principles of gift have enjoyed divergence of opinion among the Muslim jurists even though the application of these principles by the *Shari'a* Courts is based on Maliki School of jurisprudence. Therefore, the need to make a comparative analysis of Maliki School views with other schools of jurisprudence cannot be overemphasized. While inheritance and bequests have been given greater preference in the sense that most of the principles enunciated by the classical Arabic literature(s) have been comprehensively authored in English language, gift on the other hand has not gained such preference, as most of the English writings on this concept deal with the basic principles of the law, while there are lots of Arabic literature(s) on gift which are yet to be comprehensively translated for proper appreciation and application of the concept.

1.5 Scope of the Research

This thesis will be limited to the principles of Islamic Law on gift. Thus recourse will be made to the four major schools of jurisprudence for a comparative study.

The research further analyzed the applicable laws in respect of cases pertaining to gift in Kaduna, Kano and Kebbi States.

1.6 Methodology

Doctrinal method is adopted in conducting this research as materials for the research are available in the classical Arabic literatures, English textbooks written on Islamic Jurisprudence and the Laws enacted to guide the Courts in conducting their proceedings. Although the practical application of these principles was made through case law, empirical method is not used.

1.7 Literature Review

The research topic enjoys lots of literature even though most of the books that dealt with this concept extensively are written in Arabic language ranging from the fairly concise to the more elaborate and advanced. Furthermore, recent textbooks on gift treated the subject matter in a more consolidated and simplified form than the earlier authorities in more or less a summarized form without detailed discussion. As they mostly dedicated a chapter on the topic which normally forms part(s) of a book, none has been written to deal exclusively with the concept.

Al-Qairawani[6] in his discussion on gift in one of the notable books of Maliki School of jurisprudence summarized the concept briefly, limiting his discussion on the principle of revocation and delivery from the Maliki School point of view. Hence, the need to elaborate on the principles given by him, and comparing them with the opinion of other schools.

In another popular book of Maliki School written by Askari,[7] the author discussed gift under the book of confession. The style of writing adopted by the author in discussing the concept is concise, as he was able to highlight the basic principles even though in phrases, limiting it to a single paragraph. He discussed gift in anticipation of reward, the

[6] Al-Qairawani, M.(n.d) *Ar-Risala*, Alhudahuda Publishers, Zaria pp.92-95
[7] Askari, M. (n.d) *Irshadus-Salik ila Ashrafil Masalik,* Mustapha Albabi Publishers, Cairo, pp.105-106

salient features of almsgiving, and gift of a lifetime. Thus an elaborate discussion of the principles highlighted by him is required.

Malik [8]used a different style in his discussion using the practical application of the principles rather than the theoretical method. Thus he explained the principles by answering questions deduced from the common practices of people like gift of slaves. He also extensively discussed revocation by the parents and the validity of gift of debt to the debtor or to a third party.

Muhammad [9] adopted the poetic approach highlighting the basic principles of gift in phrases. In the opinion of this author a gift is like a contract of sale holding the view that it is only what is valid in sale is capable of being the subject matter of gift. Being a prose, there is the need to elucidate more on the principles highlighted.

Unlike the other authors, Ibn Rushd [10] dealt with the concept differently as he compared the views of Maliki, Shafi'i, Hambali and Hanafi Schools in discussing the principles even though it is in a summarized form.

In his commentary of the most revered book of Maliki School Al-Azhari[11] has virtually discussed all the principles of gift in a concise manner with a style, language and the approach that is a bit technical. All these mentioned books explained the concept of gift from the Maliki school perspective while dealing mostly with the substantive aspect of the principles on gift rather than the procedural aspect.

Other books of Maliki Jurisprudence made contributions on the procedural aspect of the law among which is *Tuhfatul Hukkam* which discussed the principles of taking delivery as a means of proof of ownership. He also dedicated a whole chapter on revocation of gift. However, its poetic nature necessitated a commentary and further

[8] Malik, A. (n.d) *Al-Mudawwana Al- Kubra,* Dar- al- Fikr, Cairo, pp.118-143
[9] Muhammad, A (n.d) *Misbahus-Salik;Sharh Nazmu Ashalil Masalik, pp.72-73*
[10] Ibn Rushd, (n.d) *Bidayatul Mujtahid Wa Nihayatul Muqtasid,* Dar- al- Fikr Publishers, Beirut. pp.345-350
[11] Al-Azhari, S. (n.d) *Jawahirul Iklil; Sharh Mukhtasar Khalil*, Dar-al-Fikr, Beirut, Vol. II pp.211-217

clarification of the book which was later rendered into Hausa language by Daura.[12] This book discussed the method of proving taking possession and the revocation of gift.

Other books that have made contributions in this area are Al-Juzairi's *Fiqh-ala. Mazahibul Arba'*[13] this author unlike the previous authors discussed the principles of Islamic law of gift extensively, analyzing the principles exhaustively from the perspective of the four *Mazahibs* of Maliki, Shafi Hambali and Hanafi. However the author discussed the principles from the perspective of each *Mazhab* independently not making comparison of the principles on where they agreed and where they differ.

Contemporary writers have contributed to this area of research; notable among them is the book of Qadri on Islamic Jurisprudence[14] which explained the objectives of gift including its legality. In explaining the principles, he cited illustrations for better understanding. The author relied mostly on the opinion of Hanafi School, sometimes making comparison with the views of other schools.

Another contemporary writer is Athar Hussayn in his book *Muslim Personal Law: An Exposition.*[15] The author tried to apply the principles of Islamic law on gift vis-à-vis contemporary issues like copyrights and patent. The author mainly adopted the view of Hanafi School in discussing the whole concept. These two books mentioned above did not give an in-depth analysis of the principles of Islamic Law of gift; rather they briefly discuss the concept.

[12] Daura, M.U. (n.d) *Tarjamar Tuhfatul Hukkam: Jagorar Masu Hukunci*, Alhudahuda Publishing Co, Zaria pp.448-452
[13] Al Juzairi, A. (1969) *Al- Fiqh-ala Mazahibul Arba'*, Cairo, Vol III, pp.289-313
[14] Qadri op cit pp.444-455
[15] Hussayn, A. (1998) *Muslim Personal Law; An Exposition*. Retrieved July 19, 2013,from NetLibrary database

Orire[16] in his book discussed gift from the perspective of Maliki School citing examples of common practices of people in making gifts and there implications. He extensively discussed the concept of revocation of a gift and gift of a lifetime citing decided cases to buttress the application of Maliki principles.

Therefore, with the great contributions of these authors on the topic, the research intends to elaborately discuss the principles. At the same time examine the application of the principles by the courts.

1.8 Organizational Layout

Chapter One: General Introduction. This chapter contains the general introduction to the thesis. It introduces the contents of the whole research work. It also states the statement of research problem, aims and objectives, scope of the research, justification for undertaking the research, literature review and the organizational layout.

Chapter Two: Nature and Legality of gift under Islamic Law. This chapter contains the definition of gift in the opinion of the Muslim jurists, its legality from the *Qur'an*, *Sunnah* of the Prophet (SAW) and the consensus of the Muslim jurists. The various kinds of gift were also discussed.

Chapter Three: Essentials of a Gift. Under this chapter the essential elements of a valid gift in the view of the Muslim jurists were discussed. Thus, the chapter discusses the principles of Islamic Law regarding the donor, the recipient and the subject matter of gift; conditions a valid gift that is offer, acceptance and delivery and the principle of revocation.

Chapter Four: The Law Pertaining to Gift in the States of Kaduna, Kano and Kebbi. This chapter examines the Laws establishing *Shari'a* Courts and vesting it with

[16] Orire, A. (2007) *Shari'a: A Misunderstood Legal System*, Sankore Publishers, Zaria. pp.126-167

the jurisdiction to entertain matters pertaining to gift; the *Shari'a* Court of Appeal vis-à-vis its jurisdiction as conferred on it by the Constitution. It also discusses the application of the principles of Islamic Law by the courts in conducting proceedings involving gifts. It further gives analysis of relevant cases involving gift in courts.

Chapter Five: Conclusion. This chapter contains summary of the work, findings and recommendation.

CHAPTER TWO

NATURE AND LEGALITY OF GIFT UNDER ISLAMIC LAW

2.1 Introduction

The significance of gift and how it has impacted so much in the life of every individual Muslim cannot be overemphasized as it has classically been encouraged by the Holy Prophet (SAW) in many of his sayings and actions. Thus giving it the status of a highly recommendable act *Mandub*.

2.2 Definition of Gift

Gift has been literally defined as a gratuitous transfer of property from one person to another.[1] Technically, Muslim Jurists have ascribed various definitions to gift. In the view of Maliki School gift means "the transfer of ownership to another without consideration".[2] In the view of Hanafi School it is the immediate and unqualified transfer of ownership of the *Ayn* i.e. corpus of a property without condition for reward.[3] Thus it means the donor transfers ownership without expecting any consideration or reward from the recipient. While according to Hambali School, gift is the transfer of ownership of property which is in existence, or presumed to exist, known and determinable capable of being delivered without anticipating any consideration or reward in return. Where a person signifies his willingness to make to another an immediate and unconditional transfer of ownership of an existing and specified property, he is said to make a valid and enforceable gift.[4]

In the view of Shafi'i, a gift is perceived as a contract whereby the donor willingly

[1] Ruxton, F. (2004) *Maliki Law*, El Nahr Publishers, Cairo, p.263
[2] Al Juzairi, A. (1969) *Al- Fiqh-ala Mazahibul Arba'*, Cairo, vol III, p.290
[3] Ibid p.290
[4] Ibid

agrees to transfer ownership of a property to the recipient without anticipating any consideration or reward.[5]

In defining gift, the author of *Sharia: The Islamic Law* defines *Hibah* as a gift from one living person to another without usurping, or neglecting the rights of his descendants and near relatives of which there must be an immediate and unqualified transfer of the corpus of the property without return i.e *Iwad.*[6] From the foregoing definitions it is clear that a person who validly owns something has the right to transfer its possession to another without receiving consideration from him for such transfer.

2.3 Nature of Gift

The nature of gift has been perceived by scholars from different perspective creating divergence of opinion among them as to what the exact nature of gift is under Islamic Law. While scholars like Shafi'i regarded gift as a contract having all the effects of a valid and enforceable contract, which has been defined as "the connection that exist between two statements, or whatever replaces the two statements from which consequences a legal obligation emerges."[7] To further explain the definition of contract, three important elements in every contractual transaction emerge which are; offer, acceptance and the legal obligation that binds the agreement capable of making it enforceable in a court of law. To a large extent this definition suggests that a contract refers only to bilateral agreements like contract of sale excluding unilateral agreements like gifts and endowments. In another opinion contract is an agreement by which a person or several persons oblige themselves in favor of another or other persons to give, to do or

[5] Ibid p. 292
[6] Doi, A,(2007) *Shari'a : The Islamic Law,* Al-Yassar Publishers, Kano, 7th Ed p. 334
[7] Zubair, A.(1991*) Principles of Islamic Law of Contract*, Islamic International Contract, Lagos, p.9

not to do something implying it to cover both bilateral and unilateral agreements.[8] In the light of this, contract could possibly embrace transactions entered unilaterally by the offer of one party only for example gifts.

On the other hand some modern writers considered gift as a disposition *At-Tasarruf*, which has been technically defined as "Anything that comes up from a person of his own volition upon which the Law- Giver has regulated certain consequences."[9] This definition denotes that disposition is an act which a person voluntarily does upon which some legal rights can be established as a consequence. They further asserted that all unilateral agreements like gifts and endowments are regarded as dispositions but consider it non-satisfactory in trying to connote these contractual transactions. In their view, disposition is a generic term signifying most if not all forms of obligations or transactions whether unilateral or bilateral contract inclusive. Affirming the statement that every contractual transaction is a disposition but not every disposition is a contract.[10]

Strictly speaking, it is difficult to assert whether gift under Islamic law is a contract having all the legal effects of contract or it is a disposition. Thus as discerned from the observations of the scholars in their attempt to summarize the relationship between contract and dispositions observed that contract is a branch of disposition in the classical definition of Muslim Jurists.[11] Hence, it is proper to establish that disposition is the bedrock of contract and the only difference between the two is that disposition is general, while contract is absolute.

Therefore, from the above explanations canvassed by the jurists, it is proper to

[8] Ibid.
[9] Rayner, S.E. (1991*) The Theory of Contracts in Islamic Law,* Graham & Tradition, London p.100
[10] Az- Zarqa, M.A. (1957*) Al-Madkhal al fiqh al-Amm ila Huquq al-Madaniyya,* Damascus p. 194-195 quoted by Zubair A op.cit. p.12
[11] Rayner, op.cit p. 89

opine that gift can fall under both categories of either being a contract or its being a disposition.

2.4 Legality of Gift

In Islamic Law, contractual transactions are allowed and made lawful by Allah (S.W.T). This is by reason of making mankind acquire wealth, earn living and facilitate the acquisition and ownership of property from one person to another. As rightly put, it is one of the means of acquiring and transfer of ownership.[12]

Thus, the legality and fundamental principles that govern contractual transactions and dispositions can be seen in the Holy *Qur'an*, *Sunnah* of the Prophet (SAW), practices of the Companions (R.A) and the consensus of the Muslim jurists. There are several provisions in the Holy Qur'an that enjoin Muslims to engage in acts of righteousness, gift being one of them. In this regard Allah (SWT) says

> It is not righteousness that ye turn your face towards East or West; but it is righteousness to believe in God, and the Last day, and the Angels and the Book, and the messengers, to spend of your substance out of love for him, for your kin for orphans, for the needy, for the war farer for those who ask…[13]

In another verse of the Holy Qur'an Allah (SWT) says, "Those who (in charity) spend of their goods by night and by day, in secret and in public, have their reward with their Lord; on them shall be no fear, nor shall they grieve."[14]

Also, while encouraging a person to give out freely out of what he loves as righteousness, the Holy Qur'an says "By no means shall ye attain righteousness unless ye

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[12] Bambale,Y.(1992) *The Mode of Acquisition and Transferring of Private Ownership under Islamic Law* . Unpublished LLM Thesis, Faculty of Law, Ahmadu Bello University, Zaria, Nigeria p.89

[13] Q 2:177

[14] Q 2:274

give (freely) of that which ye love….."[15] Another verse envisages the Muslims to help one another in acts of righteousness and piety.[16]

Commenting on the above verses in his commentary of the Holy *Qur'an* a Qur'anic exegete Yusuf Ali recapitulates the beauty of charity and giving to others out of one's wealth as acts of righteousness enjoined by the Holy *Qur'an*. Thus, the Qur'anic injunctions encourage Muslims to offer gifts.[17]

From the *Sunnah* of the Prophet (SAW) there are numerous traditions reported from him encouraging Muslims to make gift and receive gift made to them. There are various scenari reported from the Prophet where he was shown to have received gifts and encouraged Muslims to do so even if it is the least of value of things. In one of the instances he was reported to have" I shall accept the invitation even if I were invited to a meal of sheep trotter, and I shall accept the gift even if it were an arm or a brothel of a sheep".[18]

Also, another *Hadith* of the Prophet (S.A.W) emphasizes on making it a habit of exchanging gifts for its benefit in generating mutual relationship, strengthening love and affinity and taking away rancor. It says 'Exchange gifts among yourselves and thus strengthen mutual love with each other."[19] In another saying narrated from the Prophet (S.A.W) "Give presents to one another for a present removes grudges from the heart."[20] The above *Ahadith* of the Prophet (SAW) emphasized on making it a habit of exchanging gifts because of its benefit in generating mutual relationship and bringing endearment to the heart and taking away rancor.

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[15] Q3:92
[16] Q 5:3
[17] Yusuf, A. (1934) *Commentaries of the Holy Qur'an*
[18] Bukhari, M. (2004) *Sahih Bukhari* Mu'assasatul Mukhtar Publishers, Cairo, Vol.III p.129
[19] Ibid p.132
[20] Malik, A. (n.d) *Muwatta Malik,* Dar-al-Fikr Publishers, p.907

Muslim jurists have conceded on the recommendation of making gifts either for seekings Allah's pleasure or seeking affection of the recipient through which mutual love will be promoted. Scholars like Ibn Rushd of Maliki School stress its recommendation to relations and neighbors out of what is valuable and precious of the property.[21]

The legal position of gift in *Shari'a* is *Mandub* i.e something which is strongly recommended to the Muslims being one of the chains of righteousness *Birr*, excellent virtues *Ma'aruf* and *Ihsan* that has been in accord with the *Qur'an* and *Sunnah* of the Prophet (SAW).[22]

In his commentary of one of the notable books of Maliki School,[23] quoting the statement of An-Nafrawi in his book *Fawakihud-Dawani* Vol. 2 p. 217 with approval stated that the legal position of gift is *Mandub* i.e what is recommended. These jurists relied on the aforementioned verses and *Ahadith* to stress the legality of gift.

2.5 Classification of Gift

Generally speaking, gifts are classified into 2 based on the nature of the matter; Gift of corpus of the property- *Hibbat ul- Ayn* and Gift of usufruct or beneficial rights- *Hibbat- ul-Manfa'ah*.

Gift of corpus of property is where the donor gives a determinate or specific thing either movable or immovable as a gift to the recipient. Therefore there has to be transfer of ownership in the property from the donor to the recipient. In the view of majority of the scholars, gift of corpus is valid in anything that is capable of being delivered from the donor to the recipient. Thus, the gift is valid even where the subject matter is unknown

[21] Ibn Rushd,(1966) *Bidayatul Mujtahid wa Nihayatul Muqtasid*, Dar- al- Fikr, Cairo, Vol.II p.245
[22] An Nafrawi (1995) *Al Fawakihud Dawani*, , Mustapha Al-Babi Al Halabi and Sons Press, Cairo, 3rd Edition p.216
[23] Al Kashnawi, A.H. (n.d) *Ashalul Madarik; Sharh Irshadis Salik*, Dar al Fikr, Cairo, vol III, p.88

majhul, undeterminable *gharar* and anything of which benefit can be accrued from.[24]Whereas gift of usufructry rights is where the donor transfer his rights of enjoyment in a property to the recipient. Hence the recipient derives benefits from the rights attached to the transferred property.

2.5.1 Gift to strengthen mutual relationship- *Hadiyyah*

This is the kind of gift that is valid upon declaration by the donor to give out the property to the recipient which is complete upon delivery. In this kind of gift, the donor is obliged to transfer the gift to the recipient. The gift is made solely for the purpose of affection and love. Thus the sole motive of the donor in making this gift is to strengthen his ties with the recipient.[25]

2.5.2 Gift in anticipation of reward - *Hibah Muqabilu Iwadh*

This is the kind of gift by the donor whereby he makes a gift anticipating reward from the recipient. The reward is anticipated because the donor has not out rightly stated it as a condition that he is to be rewarded.

Jurists share divergent opinion where the condition of reward is not stated or communicated to the recipient and the donor claims anticipating reward in lieu of the gift he had made. In view of some of the Jurists, the claim of the donor is ignored even where there is proof that the custom tilts towards his claim.[26] However, in another opinion where the donor claims consideration or reward for his gift after the recipient has taken possession of the subject matter, the claim of the donor is considered as valid provided there is no proof of the customary practice of the people to the contrary. Thus it depends

[24] Al-Azhari (n.d) *Jawahirul- Iklil; Sharh Mukhtasar Khalil,* Dar-al-Fikr, Beirut pp. 211-212
[25] Al-Juzairi, op cit p.296
[26] Ibid p. 311

on the recipient either to return back the gift or recompense the donor with its value. [27]

2.5.3 Gift with condition for consideration- *Hibah Bi Shartil Iwadh*

According to the majority of jurists, where a donor state consideration for his gift, it must be in clear terms signifying that he intends to receive consideration for the gift. But it is not proper for the donor to clearly state what he wants as consideration or the value of the consideration. In a situation where the donor has not stated the consideration or its value but merely states that the gift is with consideration, if the recipient accepts the gift, the contract becomes enforceable when he has taken possession of the subject matter of the gift.[28] Where the recipient has not taken possession of the gift, the donor has the right to revoke the gift. But where the recipient has taken possession of the subject matter of the gift it becomes binding on him to pay the consideration, return the gift to the donor or pay its value. Hence it is the discretion of the donor to accept the gift or its value. In a situation where the recipient has not taken possession, the donor is prevented from accepting its value. This principle applies only where the recipient has not dealt with the property in any way that will make its value to appreciate or to depreciate. Where the value of the property has appreciated for example the animal given to the recipient grows or where it depreciates for instance it become sick, the consideration become binding on the recipient, and has to pay the value of the property as at the day he took delivery of the property. [29] Thus, what is obtainable here is that the donor is given the option of either taking back the gift or receiving its value where delivery has not been effected. But where the delivery has taken place, the donor is compelled to execute the gift, and the only option available to the recipient is to either

[27] Ibid
[28] Ibid
[29] Ibid

return the gift or pay its value to the donor.

In a situation where consideration for the gift has been clearly stated as a condition for its accomplishment, for example, the donor says to the recipient "I make the gift of this house to you, and you give me N10,000 as consideration" or "I give you this house and you give me your garden". Where the recipient signifies his acceptance the gift becomes enforceable whether he has taken delivery or not, and the consideration becomes binding on him.[30] However if consideration is not stated, but the circumstances of the gift shows that consideration should be paid in respect of the gift, the recipient is compelled to either pay the consideration or return the gift. The reason for giving the recipient the option to pay the consideration or to return it is to exonerate the recipient from paying more than the value of the gift even where the customs and practices have clearly shown that. On the other hand, the donor is not compelled to accept what is of lesser value than the subject matter of the gift.[31]

In the opinion of the Muslim jurists, gift with consideration is considered like a contract of sale, thus having the same legal effects with it. In their view, even where delivery has not taken place the gift is not vitiated by death sickness, insanity or bankruptcy of the donor.

However if consideration is not stated, but the circumstances of the gift shows that consideration should be paid in respect of the gift, the recipient is compelled to either pay the consideration or return the gift. The reason for giving the recipient the option to pay the consideration or to return it is to exonerate the recipient from paying more than the value of the gift even where the customs and practices have clearly shown that. On the other hand, the donor is not compelled to accept what is of lesser value than

[30] Al-Juzairi, op cit p.311
[31] Al Kashnawi, op cit p.90

the subject matter of the gift.[32]

In the circumstance where the recipient voluntarily gives consideration of what is higher than the value of the gift, and the donor refuses to accept the consideration, jurists differ; In the view of Al-Qabisi, a Maliki jurist, the donor is compelled to take the consideration even through it is of higher value than the gift. While in the other opinion, he is not compelled to take what is more.[33]

Hence in a situation where there is dispute between the two parties as to whether the gift is with consideration or not the judge is empowered in such circumstance to resort to circumstantial evidence i.e *Shahadat al-haal* to ascertain whether the gift is to be compensated or not.[34]In a situation where the gift is between rich and poor for instance, the poor person gave food to the rich when he returns from a journey; in such case the poor person is not to be paid consideration. Where this happens, judgment is given in favor of the poor after he subscribe to oath of exoneration *Yamin Al-tuhmah*.[35] But where there is no circumstantial evidence which shows the custom and practice in respect of the gift is such that is to be furnished with consideration, the donor's right of seeking consideration will fail.[36]

With regards to the subject matter of gift with consideration, majority of the jurists are of the opinion that whatever is lawful in sale is lawful as subject matter of gift with consideration.[37] Thus it is not valid to make a gift with consideration of a feotus in its mother's womb, or gift of fruits of a tree before they come out.

[32] Malik, A. (n.d) *Al-Mudawwana Al-Kubra*, Dar-al-Fikr, Cairo, Vol. I V, p.142
[33] Al-Kashnawi, op cit p.90
[34] Ibid p.91
[35] Ibid
[36] Al-Juzairi, op cit p.312
[37] Askari, M.A. (n.d*) Irshadus- Sailk Ila Ashrafil Masalik*, Mustapha Albabi & Sons Publishers, Cairo 3rd Edition, p 106

Therefore consideration can be anything which is validly payable in *bay*' *salam* i.e. deferred sale, since in gift with consideration acceptance need not be immediate. Hence in compensating the donor, the recipient is barred from paying consideration out of the subject matter of the gift for instance a donor makes a gift of two animals to the recipient, the recipient cannot take one of the animals and give it back to the donor as consideration for the gift. And where he does so, the donor has the right to revoke the gift of the other.[38] Also, where a donor makes a gift of money anticipating consideration for his gift, in the view of Imam Malik the donor is not to be compensated. He further opined that even where the donor has clearly stated condition for consideration his claim is considered as invalid.[39]

Jurists have advanced divergent opinion where the subject matter of gift with consideration is defective. While the majority view is that the recipient has the right to return the gift and receive the consideration he has already paid, in the other opinion the recipient is prevented from returning the gift.[40]

There are situations where a donor is prevented from receiving consideration for the gift he has made.

(a) In the case of a gift between husband and wife. Where a husband claims consideration for the gift he made to his wife, the claim is unacceptable except if it is clearly stated as a condition or there is clear proof which establishes the intention of receiving consideration.[41] This principle does not apply where the subject matter of the gift is money. But where it is the wife that claims consideration, the claim fails except with an express condition to that effect.

[38] Al Juzairi, op cit p.292
[39] Malik *Mudawanna,* op cit p. 131
[40] Ibid p. 128
[41] Al-Juzairi, op cit p. 312

(b) Where the gift is between a father and his young son. It is not permissible for a father to take anything as consideration for the gift he made to his young child.[42]

A donor who makes a gift to a traveler is also prevented from seeking compensation from the recipient even where the donor is a poor person and the recipient is a rich person.[43]A Muslim is also prevented from giving out as reward what is unlawful in the eyes of *Shari'a* such as alcohol, or pork to a Christian donor even where the donor makes the gift anticipating reward.[44]

2.5.4 Gift of undivided share of property-*Hibatul Musha'*

Every joint and undivided share in any property which is subject to the right of more than one individual can be the subject matter of a gift. Thus jurists have advanced opinions on the validity of this kind of gift depending on the nature of the property whether it is capable of division or not. Where the subject matter of a gift is an undivided share in a property which is capable of being divided, the gift is valid when the property has been divided. But where the subject matter is indivisible, the gift is valid on the condition that its specification is known as transfer of ownership will only be feasible where the undivided portion is known and specified.[45] Jurists further opined that it is better for the donor to sell the property that is indivisible and make the gift out of the proceeds of the sale than to make the gift of an indivisible property.[46] Because in Islamic law for a gift to be valid, it is necessary that the subject matter is defined, distinct and separate from all the other property. A property is held to be indivisible when it admits no division or when the division will render it altogether unfit for use or unfit for the purpose

[42] Ibid
[43] Ibid
[44] Ibid p. 311
[45] Ibid p. 295
[46] Ibid

it was intended for.[47]

However, where the subject matter is capable of division and the donor did not divide it before making the gift, the ownership of the subject matter does not pass by taking delivery. Hence even if the recipient has disposed of it either by selling it or making another gift, his disposition is considered as invalid because the ownership is still vested with the original donor and where he has disposed of it, he has to recompense the donor. According to some of the jurists the gift is considered as void but ownership and possession has passed to the recipient and therefore he can dispose of it by any means he wish.[48] In a situation where the gift is to a co-sharer, it is considered as valid even if the division has not taken place. And ownership of the undivided share of the property either to a co-sharer or to a third party is effected when the share given is divided and separated from the part which is not given. It is the unanimous opinion of the Muslim jurists that the donor has the right of revoking the gift whether delivery has taken place or not. And in the situation where the donor dies, his legal heirs have the right to revoke the gift, because in the preponderant view the gift does not divest the original donor of ownership.[48]

[47] Al-Kashnawi, op.cit p.90
[48] An-Nafrawi, op cit p. 218. Malik, op cit p. 192
[48] Al-Juzairi, op cit p. 295

CHAPTER THREE

ESSENTIALS OF GIFT

3.1 Introduction

In every contractual transaction, there is the need for the fulfillment of certain requirements to make it valid and binding. Gift being an act of liberality by which the donor confers on the recipient ownership of property, it is essential that for its validity certain requirements have to be satisfied. Thus there must be manifestation of the wish to give by the donor, the acceptance of the gift by the recipient either expressly or impliedly; and taking possession of the subject matter by the recipient either actually or constructively. According to majority of the jurists including Maliki, Shafi'i and Hambali schools gift has three essential pillars. They are as follows;[1]

1. The formula *As-Sigha* which constitutes offer and acceptance

2. The contacting parties *Al-Aqidan* that is the donor *Al-Wahib* and the recipient *Al-Mauhub Iahu*

3. The subject matter *Mauhub bihi*- the property or right given.

Each of these pillars has in addition to the general rules governing them, its own peculiar rules and conditions of validity which must be fulfilled before a gift is considered to be valid and enforceable. While majority of the jurists did not distinguish between elements which are inherent to the completion of the gift that is offer and acceptance from elements which are connected to the accomplishment of the gift that is parties and the subject matter.[2] However, Hanafi school holds a different view the majority as it opined

[1] Al-Juzairi A. (1969) *Al- Fiqh-ala Mazahibul Arba'*, Cairo, vol. III, p. 296
[2] Ibid

that the only essential element of a gift is offer and acceptance.[3] They argued that offer and acceptance are the inherent components of a gift the existence of which necessitated the presence of parties as well as the subject matter. Thus to them the only essential element of gift is the offer and acceptance, while parties and subject matter are conditions necessary for the validity of gift.[4]

In the same vein, a contemporary jurist while contributing on the essential elements of a gift, observed that the constituent elements which formed the basic foundation of gift which he called "the pillars" *Arkan* are the obligation and the consent, literally denoting offer and acceptance.[5] While on the other hand the conditions upon which the agreement rest are the stipulations which are the donor, the recipient and the subject matter.[6] From the foregoing discussion, it can hardly be doubted that Muslim Jurists have expressed divergent opinion on what constitute the essential elements of gift.

3.2 Offer- *Al-Ijab*

Offer is the willingness of the donor to give out property which is the subject matter as a gift to the recipient. Thus, offer is defined as the statement which is been made in the first place by one of the parties indicating his intention to give out voluntarily.[7]

Therefore the declaration of an offer must be in clear and unequivocal term.[8] The declaration of an offer can be expressed in writing, verbal or by conduct. Thus, actual words manifesting the intention of giving out of the property are to be used. Words such

[3] Ibid p. 293
[4] Ibid
[5] Sabiq, S. (1983) *Fiqhus Sunnah*, Dar-al Fikr, Beirut, vol. III pp. 93-94
[6] Ibid
[7] Al-Juzairi, op cit p.293
[8] Ibid

as "I give you this property" or "I make a gift of this property or right to you" can be used.[9] Whilst where the offer is by conduct, and act which shows the notion of giving out the thing to the recipient is sufficient to signify the offer. This can be by handing over the subject matter of the gift to the recipient.[10]

3.2.1 The donor- *Al-Wahib*

The donor to make a valid disposition of a gift under Islamic Law must be a person with complete legal capacity. In *Shari'a* the possession of legal capacity indicates that the person is legally liable for his action. Thus a *Mukhallaf* i.e. the person who possesses legal capacity *Ahliyyah* is presumed to have the fitness of a person for the application of the law to his actions or dispositions.[11] According to a contemporary writer while trying to define what legal capacity is proposed:

> The fitness of those on whom the *Shari'a* values or rules are applied … It is a quality by which a person becomes fit for what he is entitled to, or for the discharge of legal obligations to which he is liable to in the eyes of *Shari'a.*[12]

Thus in analyzing the various definitions of legal capacity means fitness of a person whether male or female to acquire rights and be subjected to obligations or duties under the *Shari'a*. Therefore, the basis of legal capacity is human life and that every human being notwithstanding any legal restrictions is presumed to be charged with certain degree of responsibility. For a person to be said to have attained complete legal capacity to dispose of his property as he wishes, certain conditions must be fulfilled:

[9] Ibid
[10] Ibid
[11] Hassam, A. (1993) *Principles of Islamic Law of Jurisprudence,* Islamic Research Institute, Pakistan, vol. I p.292
[12] Qadri, A.A. (1923) *Islamic Jurisprudence in the Modern World* ,Muhammad Ashraf Publishers Lahore, Pakistan p.244

(a) Majority or Maturity - *Bulugh*

Any person who is said to have acquired complete active legal capacity must have reached maturity or adulthood. And such person will continue to operate as a person with full legal capacity until the occurrence of death or any other factor which may cause interdiction on him. Thus at the time of making a gift, the donor must be a person who has attained the age of maturity. According to majority of the jurists the attainment of maturity depends on individual circumstances.[13]

On the other hand jurists have shared divergent opinion where the donor is a minor with discernment, *Sabiyy mumayyiz*. According to Hanafi Jurists discernment, *Tamyiz* is between the ages of seven and fifteen years.[14] Whereas in the view of Maliki Jurists, the age of discernment is determined upon the circumstances of each infant and therefore do not specify years of attaining it.[15] A discerning minor is deemed to have complete receptive legal capacity but deficient active legal capacity which affects his actions and dispositions. Hence, the discerning minor is capable of concluding transactions that are beneficial to him such as accepting gifts. On the other hand, where the transaction is detrimental to him such as making a gift, it is not valid even if the guardian approves it.[16]

(b)Soundness of Mind- *Aql*

A donor must be of sound mind at the time he is making the gift. There are circumstances which vitiate, interrupt or impair soundness of mind. These circumstances

[13] Zubair, A.(1991*) Principles of Islamic Law of Contract*, Islamic International Contract, Lagos, p.49
[14] Kamali, M.H. (1991) *Principles of Islamic Jurisprudence*, The Islamic Texts Society, Cambridge, U.K p. 305
[15] Ibid p. 245, see also Zubair A. op.cit. p. 60
[16] Al-Juzairi, op cit p.300

are:

Insanity- *Al-Junun**:*** Insanity is a mental disorder which prevents the affected person from proper acts and utterances as required by lucid mind. The intellectual faculty of an insane person is completely doused from reasoning and understanding.[17] Hence he is interdicted over his affairs and dispositions. All the jurists are in agreement that an insane person cannot make a valid gift, and where he did so, it is considered as null and void. The guardian of an insane person cannot ratify a gift made by the insane person.[18]

Idiocy/Imbecility *Ut'hu*: An idiot or an imbecile is a person who is neither completely insane nor totally lacking in intellect. Therefore an imbecile is a person whose intellect is considered to be defective and weak.[19] An imbecile differs with an insane person is the sense that sometimes he acts like a sane person and other times like an insane person.

Thus where an idiot makes a gift while in the state of sanity, he is considered to possess legal capacity akin to that of an intelligent minor. Therefore the validity of his disposition is being determined on the basis of its being beneficial or detrimental to him. But where he makes the gift while in the state of insanity, he is considered to be devoid of any legal capacity and such gift is void even where the guardian ratifies the gift.[20]

Persons who are fully competent to make a gift may sometimes be placed under interdictions with a view to safeguarding the rights of others. These interdictions are:

[17] Al-Juzairi, op cit p.366
[18] Kamali, op cit p.305
[19] Ibid
[20] Al-Juzairi, op cit p.300

Death sickness

Death sickness is a sickness which usually leads to and practically connects to death. It is also an illness which causes fear of imminent death in most cases. The meaning of death sickness has created so much controversy among Muslim jurists. Hence according to a contemporary writer "Death illness is an illness from which death is ordinarily apprehended in most cases provided in the particular case in question it has actually ended in death…"[21]

According to *Ad-Dardiri*, a dying person is the person who suffers from sickness, from which a number of its victims die, despite the expertise of medical personnel.[22]A dying person is placed under interdiction in relation to his disposition so as to protect, preserve and safeguard the rights and interest of his heirs. With regards to the effect of the legal capacity of a person in death sickness, jurists have averred that it does not affect his legal capacity but that it put him under interdiction while trying to dispose his property. Once a person is proved to be suffering from death sickness, all his dispositions are considered as *wasiyyah* signifying that he has the legal capacity to dispose of only one third (1/3) of his total property.[23]

Thus where a donor is a person suffering from death sickness, he is only allowed to make a gift of one-third (1/3) of his property. But where the gift is in excess of one-third in such circumstance the gift is suspended and voidable, and will only be validated by the ratification of the heirs.[24]

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[21] Abdurrahim, M.A. (1991*) The Principles of Muhammadan Jurisprudence*, All Pakistan Legal Decision, p. 254

[22] Ad-Dardiri, (1963*) As-Sharh al-Saghir*, Cairo, Vol.II, p. 306

[23] An Nafrawi (1995) *Al- Fawakihud Dawani,* Mustapha Al-Babi Al-Halabi & Sons Press, Cairo, 3rd Edition Vol. II, p.217

[24] Al-Juzairi, op cit p. 296

Insolvency- *At-Taflis*

An insolvent *Muflis* is a person who has incurred debt to the extent that his total assets cannot liquidate it.[25] Thus the declaration of insolvency is by way of judicial order whereby the insolvent is restrained from disposing of his property as he wishes. This is mainly to safeguard the rights of his creditors. In the view of majority of the jurists, an insolvent cannot make a valid gift.[26] In another view of Maliki School, an insolvent can make a valid gift subject to the ratification of his creditor(s).[27]

Apostacy

An apostate is a person who after attaining age of majority changes his religion from Islam.[28]According to *Ad-Dardiri*, a Maliki jurist, apostacy is the renunciation of one's faith by a Muslim clearly either by words or expression that interdicts him.[29] According to majority jurists of Maliki School, an apostate is considered as a dead person due to the punishment that is to be meted out on him and therefore loses his right of ownership over his own property.[30] Where the apostate makes a gift, the gift is considered as void because he lacks ownership of the property in the eyes of the *Shari'a.*

Free Man

Before the gift of a donor becomes valid, he must be a freeman. The gift of a slave is not valid because according to the *Shari'a*, the slave and what he owns are the property of his master. Therefore the slave cannot make any disposition of his property since he is

[25] An Nafrawi, op cit p.221
[26] Al-Juzairi, op cit p.296
[27] Ibid
[28] Ibid
[29] Al-Kashnawi, op cit p. 160
[30] Al-Juzairi, op cit p. 296

deemed not to have conclusive ownership of his property.[31] However, according to Hambali School a slave can make a valid gift with the permission of his master.[32]

From the foregoing it can be seen that for a gift to be valid, the donor must possess the legal capacity to make a valid disposition. Where there is any defect with regards to his legal capacity, it may vary the gift according to the defect.

Thus under Islamic law, a legally competent person to make a gift is a person without any restriction of full age of maturity, sane, of sound mind, owner of the property, not suffering from any defect which affects his mental faculty and consequent order of restraint in law upon his free will of disposition.

3.3 Acceptance-*Al-Qabul*

According to the majority of the jurists including Maliki, Shafi'i and Hambali, acceptance is the statement or action of the recipient made to conform to the offer of the donor. While according to the Hanafi Jurists, acceptance is the statement made in the second place by the other party which completes the contract.[33] It is also the manifestation of willingness coming from the other party. Furthermore according to a contemporary writer acceptance is the response of the party of the second part.[34]

Shafi'i School further regarded acceptance of a gift like that of a contract of sale and thus attached conditions which must be fulfilled before the acceptance is considered as valid.[35]

[31] Ibid
[32] Ibid p.300
[33] Al-Jaza'iri, op cit p. 287
[34] Rayner, op cit p.106
[35] Zubair, op cit p 41

3.3.1 The Recipient- *Al-Mauhub Lahu*

A person who possesses the legal capacity whether complete legal capacity to acquire rights and discharge obligations or on the other hand has the competence to subject his positions to rules of *Shari'a* can be a recipient of a gift, and is considered competent to accept and enjoy the benefits of a gift made to him.

a) The recipient must be in existence or presumed to exist at the time of the gift. According to majority of the jurists a gift can be made to an infant child and the gift is considered as valid. On the other hand, jurists share divergent opinion where the gift is made to a feotus. According to minority view of the jurists, the gift is valid, subject to the condition that the child is born within 6 months of the date of the gift with the presumption of the existence of the child in the womb of its mother.[36] But will be suspended until the delivery of the feotus. Where the feotus is born alive, the gift is valid and enforceable, and where the feotus dies before delivery or at delivery, the gift is regarded as void due to the absence of the recipient. In the majority view a gift to a feotus is not valid.[37]

Where the recipient is a missing person, the gift can be accepted on his behalf by a person appointed to represent him where there is strong presumption of his existence. Thus a gift to a missing person is considered valid until such time when the recipient did not reappear or until such time that will be sufficient to presume his death. In such situation the gift is vitiated.[38] Where it is the donor who dies before the re-appearance of the recipient, the gift is regarded as void and the property returns back to the estate of the

[36] Hussayn, A. (1998) *Muslim Personal Law: An Exposition.* Retrieved July 19, 2013 from NetLibrary Database, pg. 4
[37] Sabiq, op cit p. 430
[38] Malik, A. (n.d) *Al-Mudawwana Al- Kubra*, Dar-al-Fikr, Cairo, vol 6, p.127

deceased donor.[39]

b) The recipient must be a person with the capacity to own the subject matter of the gift even where the ownership is temporary.[40] There is unanimity of opinion among the Muslim jurists that a gift is valid where the recipient is a minor, an insane person, an imbecile or a person who has been interdicted due to his incapacity or bankruptcy.[41]

According to Shafi'i school where a gift is made to a discerning child it is valid if the child accepts and takes delivery by himself. In the view of Hambali School, the acceptance of a minor even when he is a *mumayyiz* is not valid. The jurists of this school further apply this principle on a person who has been interdicted due to his foolishness, imbecility or insanity. In the view of this school, the guardian accepts and takes delivery on behalf of the interdicted persons.[42]

A gift can be made to a person who is absent at the time of the gift. Where the recipient is absent, and will not be able to signify his acceptance and take delivery of the subject matter of the gift, in such situation a representative is appointed to accept the gift and take delivery on his behalf. But the requirement of his knowledge of the gift being made to him must be certain.

In a situation where the gift is made to two recipients, one of them is present and the other is absent will acceptance by one of them constitute acceptance on behalf of the other recipient. According to Imam Malik, taking of delivery by the recipient present is enough to signify the taking of delivery of the recipient who is absent.[43] Thus where a Donor makes a gift of a landed property to two recipients one of them present and the

[39] Ibid
[40] An-Nafrawi, op cit p. 216
[41] Al-Juzairi, op cit p. 294
[42] Ibid p. 300
[43] Malik, *Al-Mudawwana,* op cit p 130, See also *Tuhfatul Hukkam* Verse 1199.

other is absent, and the recipient who is present takes possession of the whole property, the recipient will be deemed to have taken possession for himself and on behalf of the other recipient and he will be barred from denying the other recipient his gift.[44]

A gift is valid if it is made to a *Zhimmi* and where the donor refuses to surrender the subject matter of the gift to the recipient, he is compelled to do so. The same principle applies where the Zhimmi made the gift to a Muslim, and the recipient signifies taking possession, if the zhimmi donor refuses to surrender the subject matter of the gift for the recipient to take delivery, he is compelled to do so.[45]

3.4 Conditions for the Validity of Offer and Acceptance

According to majority of jurists both offer and acceptance are required to fulfill certain conditions of validity before they are considered as essential pillars of a valid gift. These conditions are as follows:

a. That the offer and acceptance should always and necessarily correspond with each other. It means that there must be a connection or a link between an offer and acceptance in relation to the intention of the parties and the subject matter of the gift in the event where the acceptance does not correspond with the offer, according to the view of Shafi'i such gift is not valid.[46] For example where a donor offers two animals to the recipient, and the recipient accepts only one of the animals in such circumstance, the gift is not valid due to lack of correspondence between the offer and acceptance regarding the subject matter of the gift. This is the view of Shafi'i School.

b. That the declaration of offer and acceptance is made by a person who is capable of reasoning and discernment. An insane person, an unintelligent minor and any person

[44] Ibid
[45] An-Nafrawi, op cit p.94
[46] Al-Juzairi, op cit p.300

legally unfit to enter into a contract cannot make a valid gift due to lack of legal capacity.[47]

c. That the acceptance must immediately follow the offer is. This is the view of the minority championed by Shafi'i School. According to this school the acceptance should follow the offer immediately without any delay. Thus the donor should not attach conditions which will suspend the acceptance to a future time or to the occurrence of something. This is because according to them, suspending the acceptance invalidates the gift.

However, according to the majority view held by Maliki, Hanafi and Hambali Schools, the acceptance can be suspended to a later date. They went further to argue that even where the donor attaches a condition and the condition has not been fulfilled before effecting acceptance in such circumstances the gift is validated or invalidated depending on whether the condition is capable of happening or not. They further argue that where the donor stipulates the condition of acceptance to a future date, in such circumstances the gift is valid and the condition is not operative.[48]

d. That both the offer and acceptance must be in clear and unequivocal terms. According to majority of the jurists, where the offer is verbal the expressions used must be clear in signifying the gift. Thus the donor must use words signifying his intention of giving the gift to the recipient. But where the offer is by conduct, the handing over of the subject matter of the gift to the recipient or his guardian is enough to signify the intention of the donor. Where the offer is not in any of the above ways, then the gift can be inferred by reasoning based on the customs and

[47] Zubair, op cit p.42
[48] Al-Juzairi, op cit p.295

practices of that community.[49]

3.5 Modes of Signifying Offer and Acceptance

The means of signifying offer and acceptance are broadly classified into verbal (oral) expressions and non-verbal expressions. While the first classification is based on the assumption that the parties were present at the same time and place the offer and the acceptance were made, the second classification is based on the assumption that either of the parties was not present.

(a) Verbal (oral) expressions

Muslim jurists have unanimously agreed that the most obvious and only mode of expressing offer and acceptance which sufficiently manifest and convey the intention of the parties is verbal expression. Contemporary writers opined that Islamic Law has unanimously chosen verbal expression as the best form of making offer and acceptance, reiterating illiteracy as the main reason.[50]On the other hand, other writers found the reason of illiteracy as suggested by these jurists as insufficient and lacking merit suggesting that verbal mode of expressing offer and acceptance has priority over non-verbal modes due to the following reasons;[51]

i. Oral statement is the natural means by which mutual assent and intention of the parties can be sufficiently expressed.
ii. Oral statement has been adopted as the first means of expression before any other means.
iii. Oral statement is the one that easily portrays the character of the speaker and

[49] Ibid p.294
[50] Ibn Nujayn (n.d*) Al-Ashbah Wa An-Naza'ir*, cairo p. 188 in Rayner, op cit p. 115
[51] Zaydahn, A.(1981) *Al-Madkhal-lid- dirasat-al-Shariyyah al-Islamiyyah*, Beirut ,p. 294-295 in Zubair, op cit p. 55-56

his innermost feelings.[52]

(b) Non-verbal

Muslim Jurists also approve the use of non-verbal expressions in concluding a disposition or contract. The non- verbal mode can be in writing, by conduct, by an agent or modern systems of communication.

i Written expressions

This is the mode by which both the offer and acceptance are signified in a written form. The donor clearly declares his intention in writing to give a gift to the recipient and the recipient signifies his acceptance also in the same method. According to majority of the jurists, including Maliki, Hambali and Hanafi, an offer and acceptance made in writing is valid and binding on the parties.

In the view of Sabiq, writing is the best mode of signifying offer and acceptance. e further gave a sample of a deed of gift in his book while trying to re-iterate his opinion.[53]

ii By agent- *Al-Wakil*

An offer and acceptance can be made through an agent whether the parties are present or not. Thus a donor can assign an agent to offer a gift to a recipient. But Muslim jurists differ on this. Thus according to majority of the jurists a gift is not valid where the donor is not the actual owner of the subject matter of the gift.[54] While according to the minority view of Hanafi, where the donor assigns another person to make a gift on his behalf, such gift is valid provided the agent is acting within the instructions of the donor.

[52] Ibid
[53] Al-Jaza'iri, op cit p. 290
[54] Ibid

On the other hand, a recipient in whose favour a gift is being made can either accept it by himself or can assign an agent to accept it on his behalf. Where the recipient is a person of incomplete legal capacity or a person under interdiction for example a bankrupt, in such circumstances a guardian can be appointed to accept the gift on his behalf.

iii By conduct or actions- *Mu'atah* or *Af'al*

Conducts or actions can strictly be described as taking and giving without a word being uttered. Thus where a donor take an item and handed it over to the recipient without uttering any word a valid gift is said to have taken place. This is the view of the majority.[55]However according to Shafi'i jurists, conduct or action does not clearly manifest the intention of the parties.[56]

iv. By Modern communication systems

Although no express provisions from the classical texts and writings of the jurists of the four Sunni Schools on the validity of a gift concluded by modern communication systems such as telephone, fax, and internet. The reason for this is not far-fetched especially having regards to the fact that these modern communication systems were not in existence at that time.

Notwithstanding the above exposition, it could be inferred by analogy that these modern means of communications are just like verbal or written modes, hence the presumption of its validity under Islamic Law. The validity of the use of these modern means of communication in making offer and acceptance could further be supported from the views held by the majority of the jurists that a disposition or contract could be

[55] Al-Juzairi, op cit p. 293
[56] Ibid

concluded by anything that is customarily regarded as sufficient manifestation and indicative of the mutual assent of the parties.[57]

Writing on this Hattabi opined that it is not necessary that offer and acceptance are expressed in any special form, any word or sign which conveys the meaning of offer and acceptance renders obligatory character on the sale, and most other contracts.[58]

It can be clearly seen that offer and acceptance constitute the essential pillars of a gift as they are used in dictating the intention of the parties. Thus it can be expressed in any form customarily accepted among the society in as much as it clearly indicate the inner desires of the parties to the gift.

3.6 The Subject Matter of Gift- *Al-Mauhub*

It is pertinent to say that any disposition or contract in Islamic Law relates fundamentally with the subject matter or property *Al-mal.* In Arabic terminology it is defined to mean "whatever man possesses."[59] Thus it connotes everything capable of being possessed of man, but excludes everything yet to be possessed. Therefore fish in the river or birds in the air cannot linguistically be described as *Al-mal* or property.

Technically, in trying to define *Al-mal* jurists have advanced many definitions. According to a contemporary writer, property includes benefits derived from property and certain acts or services.[60] While from another perspective it is a term for non human beings which is provided for the interest of man whose possession and usufruct is possible in a normal way. This definition is faulty in the sense that considering property

[57] Ibid 296
[58] Babaji, B. (1999) *Formation of Sale Contract in Islamic Law.* Unpublished LLM Thesis, Ahmadu Bello University, Zaria p.145 quoting Hattabi, (1928*) Mawahibul Jalil*, cairo, vol. 4 p.229
[59] Elias O. (n.d) *Elias Modern Dictionary* p.402
[60] Rayner, op cit p 131

as non human beings excludes slaves who are regarded under Islamic Law as property even though the Law has provided strict regulations on how they are to be used and disposed.

Therefore property may best be defined as anything the possession of which, acquisition and use is possible.[61] These include certain rights and benefits derived from property and certain acts or services rendered by an individual or things in a commercial sense. Thus in a wider sense property includes objects or things that have perceptible existence that is things that are corporeal and tangible in nature, as well as usufruct and beneficial rights which are connected with corporeal or tangible things. Some examples of these usufructs and rights are use or enjoyment of house, vehicles, animals, shares in companies, labour and services of men whereas example of rights include hire and right of way.[62]

Thus from the foregoing, before a property is recognized for use in commercial transactions and dispositions such as gift it most satisfy certain conditions.

a. Lawfulness – In the view of some of the jurist before the subject matter of a gift can be considered as valid, it must be *Mal-Mutaqawwam* that is it is lawful and has commercial value in the eyes of the *Shari'a.* Thus according to Hanafi School the gift of what is not considered as property in the *Shari'a* is not valid. The jurists further opined that even what is regarded as property but is valueless is invalid as a gift.[63] But, in the view of Maliki School a gift of what is valueless in the eyes of *shari'a* is valid and permissible.[64]

Thus in the view of majority of the jurists anything that fails to answer the

[61] Al-Khafif A. (n.d*) Ahkam al-Mu'amalat al-Shar'iyyah* Dar-al-Fikr Publishers, Cairo p.162
[62] Ibn Rushd, op cit p.250
[63] Al-Juzairi, op cit p.295
[64] Sabiq, op cit p.277

requirements of being property for example blood, dead animals which has not been slaughtered, pork and idols are considered as illegal commodities. Also, things that are valueless in the eyes of the law for example alcohol are considered as unlawful, hence the effect of the gift of these things is considered as null and void.

But jurists have advanced different opinions on the legality of making of gifts of certain commodities even though they are considered as impure. Example of this kind of gift is that of a dog. According to majority view of Maliki school the gift of a dog is valid based on the benefits to be accrued from the dog. Thus they further opined that the dog has to be a hunting dog.[65]

It is pertinent to consider the donation or gift of blood which is prevalent among our society. The blood of human being or an animal considering the injunctions of the Holy Qur'an is considered as unlawful and forbidden. It is not considered as property having value in the eyes of *Shari'a*. Therefore it is allowed for a Muslim to make a gift or donation of his blood base on the justification for the gift is base on the jurisprudential maxim *Adhdharurat tubihul Ma'athurat*. According to Hanafi School, the gift of such things is valid since benefit is accrued from their use. While according to the majority view since its being unlawful, the uses of such things is also prohibited and therefore conclude that such gift is invalid.[66]

(b) Ownership- Ownership of the subject matter of a gift is established by possession which can either be actual or constructive. Actual possession is where the donor is in full control of the subject matter. For instance a donor cannot make a gift of fish in the river or birds in the air because as at the time he is making the gift, he is not in actual

[65] An-Nafrawi, op cit p.216
[66] Ibid

possession of the subject matter.[67]

On the other hand constructive possession is where the subject matter even though is not within the control of the donor to dispose of it as he wishes, he can make gift of such items. Thus an example of this can be illustrated where a donor makes a gift of the skin of the animal he slaughtered for *Eid*. Even though the skin of animal which he slaughtered is for the purpose of *Eid* is prohibited in sale, it is valid to make a gift of such skin.

Another illustration is the gift of water or grass because according to the view of majority of the jurists, water and grass are not possessive properties and therefore cannot be subject matter of gift.[68] So also the gift of what is not one's property without the permission of the owner. Thus a father cannot make a gift of the property of his son which he is holding on his behalf without the permission of the son.

(c) Delivery-For a subject matter to be valid in gift it has to be capable of being delivered to the recipient. According to the majority of the jurists it is a condition which must be satisfied because in their view, it is only the taking of delivery by the recipient that establishes clear proof of transfer of ownership and therefore becomes a condition necessary for the validity of the gift. Hence, the subject matter of the gift must be things which are valid and capable of being delivered.[69] For example a donor cannot make a gift of the enjoyment of his wife because in the eyes of *Shari'a*, it is a prohibited act to transfer such right. Also, a donor cannot make a gift of the slave woman who has born a

[67] Ibn Rushd, op cit p.248
[68] Al-Juzairi, op cit p.296
[69] Ibid p. 297

child to him.[70]

(d) Existence -There are divergent views among the Muslim jurists as to whether or not the subject matter of gift must be in existence at the time of the gift. Thus according to the view of the majority with the exception of Shafi'i, a gift of what is unknown and non-existent is valid. Hence the gift of milk in the udder of an animal or the gifts of fruits before they come out is valid.[71]

But Shafi'i is of the view that the gift is invalid because it is a condition that the subject matter must be in existence at the time of making the gift and even where the donor has empowered the recipient the authority to take possession whenever the subject-matter comes into existence the gift is still invalid. For example where a donor makes a gift of the oil which is extracted from seed of soya bean or sesame, according to Shafi'i, the gift is not valid, and it will not be valid until the oil is extracted and the donor takes the oil and give it to the recipient. Shafi'i went further to apply this same principle to gifts of animal before they are born.[72]

Nowadays it is common practice to see gifts being made of what is unknown or non-existent. A gift of the kid of a goat even before the pregnancy can be made. And relying on the view of the majority the gift is valid.

In the view of majority a gift is valid even where the subject matter is unknown *Al-Majhul* or where there is uncertainty *Gharar* regarding it.[73] Thus a gift of what is not determinable *Musha*[74] is also valid. In a situation where a donor makes a gift of his

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[70] Al-Azhari, M. (n.d) *Jawahirul Iklil; Sharh Mukhtasar Khalil* Dar al Fikr, Beirut, vol. 2, p.212
[71] Malik, *Al-Mudawwana* op cit p. 120
[72] Al-Juzairi, op cit p. 295
[73] Al-Kashnawi, op cit p.90
[74] Al-Juzairi, op cit p. 295

portion of a house to a recipient which is a capable of being divided, the gift is valid. But where the donor makes a gift of half of a house which cannot be divided, according to the view of Hanafi, it is not valid. But according to the majority, the gift is still valid even where the actual portion is not determinable. Hanafi jurists are of the view that where the property is capable of being divided, the donor is to divide the property first before making the gift of the portion he decided to make the gift of. As earlier discussed the subject matter of gift must be something which is capable of being possessed lawfully. Thus it can be corpus which can either be goods, movable or immovable property, usufruct or rights attached to property.

Hence with regards to corpus, they are things that are determinate and specific which can either be movable property, *Al-Manqul*, for example cars, clothes, animals, furniture etc. Or they can be immovable property or landed property *Aqar* which includes land and things which are permanently attached to the land such as buildings, trees and wells. On the other hand, *manfa'at* or usufructs can also be the subject matter of gift. Usufruct means the profit, benefit, enjoyment or the use of a property. Thus according to the view of the jurists a gift of usufruct is either in perpetuity or for a fixed period of time. Thus when a gift is in perpetuity, it is considered that the recipient will enjoy such gift till death after which it reverts back to the donor or his legal heirs.[75] This is also known in Arabic terminology as *Al-Umra* whereby the recipient enjoys the benefit of his gift during his life time. While if the gift of the usufruct for a specified period of the time, the gift will lapse upon the expiration of the time.[76]

Hence examples of usufructs and usufructry rights are the gift of a hired house or that of shares in a company or services and labour rendered by human beings and

[75] See the discussion of *Al'umra* in Al-Jaza'iri, op cit p. 350
[76] Al-Azhari, op cit p.214

animals.[77]

3.7 Delivery or Taking Possession- *Hauz* or *Hiyazah*

Delivery or taking possession, according to Muslim Jurists, is the transfer of control of the subject matter of gift from the donor to the recipient or his representative in the sense that the donor is deprived of the control of the gift. Thus *Hauz* is a necessary requirement of the law which must be clearly proved before a valid gift is said to have been concluded.[78]

The issue of delivery or taking Possession has created so much controversy among Muslim jurists. According to the Majority of the jurists, a gift is not complete until actual delivery of the donated item is effected to the recipient of the gift. Thus according to Shafi'i, Hanafi, Hambali and minority view of Maliki School, delivery is an essential condition for the validity of gift.[79] But in the opinion of Imam Ahmad bn Hambal, delivery is neither an essential element nor a requirement for the completion of the gift.[80]

However, Maliki jurists went further to assert that a gift is not complete except with delivery or taking possession. Thus to them, where delivery has not taken place, the gift is not considered binding even though it is valid.[81]

According to Shafi'i jurists, gift is not complete except with taking possession. But the jurists attach the condition of permission of the donor before taking of possession can be effected by the recipient of gift. They add further that where the recipient takes possession of the property without the permission of the donor, in such circumstance the

[77] Malik *Al-Mudawwana* ,op cit p. 120
[78] Qadri, op cit p.445
[79] Ibn Rushd, op cit p.247
[80] Ibid
[81] Al-Juzairi, op cit p. 298

recipient should recompense the donor.[82] They further opined that it is not enough of taking possession for the donor to put the gifted item in the hands of the recipient, but that the donor has to clearly state that he is delivering the property.

In the contrary view of the majority jurists of Maliki School, offer and acceptance are the only essential elements of a gift, but taking delivery is not an essential condition according to the popular view of this school.[83]

According to this school, where a donor makes a gift of a house and the recipient signifies his acceptance, the house becomes the property of the recipient and the donor will be barred from retracting.[84] For instance where a donor makes a gift of an item to the recipient and he signifies his acceptance, refusal of the donor to surrender the property or item to the recipient, in such situation, the donor is forced to do so.[85]

In the view of Ibn Juzayy Al-Kalbi, a Maliki jurist, a gift is not complete except with delivery. According to him, proof of the gift per se is not enough to make the gift complete except there is proof of delivery, because to him delivery is a condition.[86]

According to Ibn Abdus-Salam who is also a Maliki Jurist, acceptance and delivery are two important elements to be considered in the sense that acceptance is an essential element while delivery is a condition for validating the gift.[87]Thus the wisdom of delivery in gift is a precaution taken by *Shari'a* to protect the wealth of the heirs from being squandered by a donor, who may donate his wealth indiscriminately to people, thus

[82] Ibid p.300
[83] Ibid p. 297
[84] Ibid

[85] Al-Azhari, op cit p.212
[86] An-Nafrawi, op cit p.216
[87] Askari, M.A. (n.d) *Irshadus Salik ila Ashrafil Masalik,* Mustapha Al-Babi Al-Halabi Publishers, Cairo p.105

denying the right of the heirs to inherit him. It is in trying to checkmate these excesses that these conditions are attached.

According to An-Nafrawi, the gift is binding on the donor where he makes the offer whether verbally or by conduct that clearly shows the intention of making the gift, and it is for the recipient to take delivery of the property and should not stop from taking delivery even where the donor asks him to do so.[88]

It is the requirement of some Maliki Jurists that taking possession must be witnessed by two credible witnesses of unimpeached character who witnessed the delivery of the subject matter of gift. Thus after acceptance has been effected, delivery of the gifted item or property must be exercised by the recipient. Because where delivery has not taken place, the legal status of the gift changes according to the divergence of opinion of the Muslim jurists.[89]

While to some of the jurists where the recipient fails to secure delivery of the subject matter of the gift while he is capable of doing so, and the donor dies or becomes a dying person in such situation, according to Hanafi, Shafi'i and Maliki school the gift becomes void and it becomes part of the inheritable estate of the donor.

On the other hand, where it is the recipient who dies before taking possession of the property or subject matter of the gift, jurists have divergent views; one of which is that the gift becomes void by the death of the recipient, and the other view is that the legal heirs of the recipient are entitled to accept the gift from the original donor.[90]

The same principle applies where the donor becomes an insane person or a

[88] An-Nafrawi, op cit p.216
[89] Ibid
[90] Askari, op cit p. 105

bankrupt, in such circumstances the gift is said to have failed due to the incapacitation of the donor and where the recipient signifies his taking possession he will be prevented from exercising such right.[91]

3.7.1 What constitutes delivery?

Delivery is said to be constituted where the recipient is seen to be in control or possession of the substance or property given to him as a gift either by himself or his representative (who must be legally competent to take possession on his behalf).

Thus the recipient must be seen to be enjoying the benefits of the property or thing given to him. Once the recipient is seen to have assumed or asserted authority over the property, the legal presumption is that the ownership is vested in him.[92]

It should be noted that where a father makes a gift to his infant child or idiot child, the requirement of taking possession must be seen to be exercised by the father.[93] Thus delivery of the property is exercised by the father where he establishes two witnesses who are of moral probity to witness the gift to his infant child. The father should be seen to be apparently controlling the property on behalf of the child and the benefit realized from it is being spent for the welfare of the child. Where the gift made by the father to the child is a house, then the father must cease from occupying the house.[94]But where the gift is made to a grown up child, in such circumstances, the recipient child shall accept the gift himself.[95]

But where the recipient is a daughter, the father takes delivery on her behalf, and

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[91] Ibid
[92] Al-Juzairi, op cit p.297
[93] Al-Qairawani, M.(n.d) *Ar-Risala,* Alhudahuda Publishing Co, Zaria p. 72
[94] Malik *Al-Mudawwana,* op cit p130
[95] Ibid

the daughter will not collect the gift from the father even when she has grown up unless she marries.[96] Hence if she fails to take possession of the property after her marriage until the death of the father, the gift is considered a nullity.[97]

Thus the practice and procedure necessitating taking delivery can be deduced as follows:

a. Where a father makes a gift of a house to minor child, delivery is exercised by the father on behalf of the child by vacating from the house for not less than a year from the time of the gift. It must also be clearly seen that the revenue generated from the property is spent for the welfare of the recipient that is the child. Thus surrendering of the revenue generated from the property by the Father to the Child constitutes sufficient delivery to the child.[98]

b. Where the father admits delivery of the property to his child, this is not considered as sufficient delivery. For instance where the gift is in respect of cash, the father has to establish, through credible witnesses, that he separates such cash from his own and took delivery on behalf of the child.[99]

But a different approach was given by An- Nafrawi. In his opinion, the gift is still valid and executable where the father remains in possession at his death or when he is declared bankrupt or he becomes sick or insane. Thus to this jurist, the gift is still valid due to the fulfillment of the essential requirement for the validity of the gift.[100]

Sometimes there may be some legal consequences even where there is continued

[96] Ibid p.132
[97] Ibid
[98] Al-Kashnawi, op cit p.89
[99] Ibid
[100] An Nafrawi op cit p.90

occupation of the property that is being given out as a gift. Jurists have given legal status to such situations where there is continued occupation depending on the extent of occupation as follows:

i. Where the donor continues to occupy the whole subject matter of the gift and there is proof of control by the recipient or his legal representatives in the circumstances where the donor dies while still residing in a house the gift is considered void.[101] The gift is only considered as valid and enforceable where the donor vacates the house for at least a year, and the recipient is seen in full control of the property subsequent re-occupation therefore will not invalidate the gift, but the donor will be treated as a tenant.[102]

ii. Where the donor continues to occupy the substantial part of the property, for instance where he continues to occupy one-half of the property, this enough constitute sufficient evidence of lack of delivery of the occupied part, and where the donor dies while still in occupation, the gift will be deemed of only the half that is not occupied by the donor, and the subsequent half occupied by him, reverts back to the heirs automatically.[103]

iii. Where the Donor is in occupation of a negligible portion of the gift, the gift is still valid and enforceable because sufficient delivery is construed to have taken place and therefore mere occupation of the negligible portion does not invalidate the gift.[104]

As earlier stated, where a valid offer and acceptance have been concluded, depending on their nature, where a donor refuses to surrender the subject matter of the

[101] Ibid
[102] Ibid
[103] Ibid
[104] Ibid

gift to the recipient, the donor will be compelled to do so.

3.8 Revocation of Gift

Revocation of a gift is the right that is given to the donor to take back the gift he has made earlier to the recipient. The issue of revocation of a gift has been an area of controversy where jurists have divergent opinions.

According to the view of Maliki, Shafi'i and Hambali Schools, a donor does not have the right to revoke the gift he has made to another.[105] The difference on revocation arises as a result of differences as to what constitutes a valid and enforceable gift. In the preponderant view of Maliki School, a gift is valid and binding by the mere statement of offer and acceptance and that taking delivery is not a condition. This affects the right of the donor to revoke his gift. While in the second view of this school delivery is a condition precedent of the validity of the gift, and therefore a donor has the right to revoke a gift where the recipient has not taken delivery. This is also the view of Shafi'i and Hambali Schools.[106]

However, Hanafi School is of the view that a donor can revoke a gift he has made either wholly or partially and whether delivery has taken place or not. Even in a situation where the donor renounces his right of revocation, he can still exercise such right and his statement will not bar him from the right of revocation.[107]

The reason for these juristic differences is the *Hadith* of the Prophet (S.A.W). While the jurists who are of the opinion that the donor does not have the right to revoke rely on the *Hadith* in which the Prophet (SAW) was reported to have said. It is not

[105] Al-Juzairi, op cit p. 305
[106] Ibid
[107] Ibnul Abidin,(n.d) *Raddul Mukhtar, A Commentary on Durrul Mukhtar* vol. 4 p. 566

permissible for a person to retract or revoke his gift except a father of what he gave his son.[108] And the *Hadith* in which the Prophet (SAW) was reported to have said "He who takes back his present is like a dog that swallows its vomit."[109]

On the other hand, the jurists who are of the opinion, that the donor has the right to revoke his gift rely on the *Hadith* in which the Prophet (SAW) said "Whoever makes a gift has a right over it provided he has not been rewarded for it."[110]

This in the view of Ibnul Qayyim in his book *I' Lamul Muwaqqi'in* explaining the above *hadith,* is of the opinion that the right of revocation is only available to the donor where he made the gift in anticipation of reward, and the recipient has not given him any consideration, in which case the donor has the right to revoke his gift.[111]

Imam Abu Hanifa is of the view that it is permissible for a donor to revoke a gift except where the gift is made to strengthen blood relationship and affinity. The Hanafi School explains certain circumstances in which the donor forfeits his right to revoke a gift as follows:

(1) Where there is an increase in the value of the property. It is not permissible for a donor to revoke a gift where the gift has increased in its value. The increase depends on whether it is attached to the subject matter of the gift or not. The jurists of the school differ where the increase is annexed to the gift. Some of them hold that revocation in the circumstance is not permitted. For instance where a donor makes a gift of an animal that is thin and later it becomes fat or where he made a gift of a lamb and it grows into a sheep, the donor will not have the right

[108] Bukhari, op cit p. 477
[109] Ibid
[110] Ibn Rushd, op cit p.250
[111] Sabiq, op cit p. 282

to revoke the gift.[112] But where the increase is not annexed to the actual gift the donor's right of revocation is only in respect of the original gift, for example the donor gives a gift of a cow, and the cow born a calf, the donor has the right to take back the cow as it was the original gift he made, but not the calf.[113]

Another example is where the donor makes a gift of a garden to the recipient before the fruits come out, and later the fruits come out, the donor will only exercise his right of revocation on the garden and not the fruits. In essence, the right of revocation is lost where the increase in value of the subject matter of the gift was due to the action of the recipient.[114]

(2) The second circumstance is where either of the parties dies.[115] For instance where a donor makes a gift of a house to his brother and the brother subsequently dies after taking possession of the property, the donor can no longer take back the gift. Also, where it is the donor who dies after the delivery of the subject matter, the legal heirs of the donor cannot revoke the gift.[116]

(3) The third circumstance is where the gift is with condition of giving consideration, the donor's right of revocation is lost.[117] Thus where the donor makes a gift of a house and stipulates that consideration will be given by the recipient, such condition is valid and provided the recipient has given the consideration, the right to revoke the gift is lost.

(4) The fourth circumstance is where a husband makes a gift to his wife. In such

[112] Al-Juzairi, op cit p. 304
[113] Ibid
[114] Ibid
[115] Ibid
[116] Ibid
[117] Ibid p. 305

circumstance he is not permitted to take back the gift. But if the gift is made before the marriage, he is entitled to revoke the gift.[118]

(5) The fifth circumstance is where a donor makes a gift to his relatives to strengthen his ties with them, it is not permissible for the donor to revoke the gift. In holding this view, the jurists rely on the *Hadith* of Umar, bn khattab "whoever makes a gift to strengthen blood ties should not revoke it."[119]

Where the donor makes a gift to any other person within the prohibited degrees, his right of revocation is forfeited even where the relatives are unbelievers or *Zhimmis.*[120]

(6) The sixth circumstance is where the subject matter of gift is destroyed. The right of revocation in the circumstance is lost.[121] Hence, in a situation where the donor revokes the gift by claiming the existence of the property and the recipient denies its existence claiming that it is not existent, revocation is not permissible unless both of them agree, or the judge gives decision to that effect.[122]

Thus where the revocation take place either by agreement or by the judgment of the court, the gift is regarded as annulled and the property is returned to the previous owner i.e. the donor. The implication of this is that delivery or taking of possession by the recipient will not be regarded as a condition.

Majority of the jurists including Imam Malik, and his disciples are of the view that the right of revocation is exclusive for the parents i.e. both the father and mother alone.[123]

[118] Ibid
[119] Ibn Rushd, op cit p.250
[120] Al-Juzairi, op cit p. 305
[121] Ibid
[122] Ibid
[123] Ibid

Shafi'i includes the Grandparents, how high so ever, while on the other hand, Imam Ahmad bn Hambal hold that right of revocation belongs to the father alone.[124]

The right of revoking the gift by a father is exercisable by him on his free child whether the child is a male or a female, a minor or has attained majority and whether he is rich or poor. The only requirement is that the child must be free. Thus where he is a slave, the father cannot revoke the gift, this is because the slave and his property belong to the master.[125]

However before the father's revocation can be regarded as valid, these conditions must be fulfilled:

a. That the father must have made the gift to the son due to affection of the child or that the child is in need of it.

b. That he must have made the gift seeking Allah's reward not for affection, and he has stated the condition of revoking the gift whenever he wishes to.[126]

In the case of the mother, additional condition is added upon the previous two that the child's father must be alive. Furthermore, where the mother makes a gift to her young child while the father is alive she cannot revoke it after the death of the father. In the circumstance the child has become an orphan i.e. the principle is the same whether the mother makes the gift to a minor child or a mature child after the death of the father.[127]

On the other hand, where the mother makes the gift to a mature child during the lifetime of the father, the mother's right of revoking the gift is still valid. This also applies

[124] Ibid
[125] Ibid p. 308
[126] Ibn Rushd, op cit p.251
[127] Malik *Al-Mudawwana,* op cit p. 135

when the father becomes insane or bankrupt.[128]

Hambali School holds that the right of revocation is only exercisable by the father alone.[129] In a situation where the father makes a gift to one of his children, denying the others, revoking the gift becomes mandatory on him, because according to this view equality among the children is a legal duty on the father.

3.8.1 Factors that Prevent Revocation of a Gift by the Parents

The majority of the Jurists agree that parents have no right to revoke the gift they have made to a child in the following circumstances:

(a) Where the property ceases to be in the ownership of the child.[130] This may be by selling the property, giving it out as a gift or mortgaging it. This is because ownership of the property has been transferred to a third party. But when the recipient child sells half of the property, either of the parents can revoke the gift in respect of the half (or any portion) which has not been sold by the child.[131]

Where the property or subject matter of gift returns back to the child either through sale, by way of gift or inheritance after it has ceased to be in his possession, the parent is not entitled to revoke the gift. But when the gift returns to the child due to an annulment of the sale due to the insolvency or bankruptcy of the buyer or because of any defect in the gift, the parent is entitled to revoke the gift.[132]

Hambali and Shafi' schools are of the view that where the subject matter is no longer under the control of the child for instance, the child mortgages the property and the

[128] Ibid p. 309
[129] Ibid
[130] Ibid
[131] Ibid p. 310
[132] Ibid

mortgagee has taken possession of the property, either of the parents is not entitled to revoke the gift. But if subsequently the child settles the loan or debt and the property returns to him, the parent can revoke the gift.[133]

(b) Where there is an increase in the gift itself or its value. In the view of the majority where the increase is attached with the property for example where the father makes a gift of a sick animal, and it recovered in the hands of the child, or where the father give a gift of an ignorant slave and the child educates him/her, or in another instance, he makes a gift of a young animal and it grows. In all these instances the father cannot revoke the gift.[134] However, Shafi'i holds that the father can take back the gift together with the increase.

But where the increase is such that is not specifically attached to the gift, the father's right of revocation is only allowed on the original gift. For example a cow he has given as a gift delivers its young one, revocation is only valid on the original gift i.e. the cow and not the calf.[135]

However, where the subject matter of gift is a landed property the overweighing view is that the father cannot revoke the gift if the child has developed the land by planting trees or building structure on it. But where the value of the property has depreciated or part of the property has been destroyed, the father's right to revoke the gift is exercisable.[136]However, Maliki jurists are of the view that the father is not entitled to revoke the gift where the property has depreciated.[137]

c. Where the child has married because of the gift or has received debt because of the gift. However where the child is already married or indebted at the time of the gift, the

[133] Ibid
[134] Ibid
[135] Ibid
[136] This is the view of Hambali jurists
[137] An-Nafrawi, op cit p.217

father can take back his gift because the gift is not the reason for contracting the marriage or taking the loan.[138]

d. Where the subject matter of the gift is lost or destroyed while in the possession of the child. Or where it is capable of being destroyed, for example egg or seeds that have been planted.[139]

e. Where the child is sick. This is because if the child dies, the property becomes the right of his heirs. However, if he recovers from the sickness the right of revoking the gift is allowed.[140] But for the father to have the right of revocation, the child must not be under any interdiction due to his foolishness or bankruptcy. Thus, if so, the father is barred from revoking the gift.[141]

f. Where the subject matter of the gift is "debt" which the son owes the father or where the subject matter is usufruct, for instance the right to stay in a house for a year. [142]

g. Where the gift is to a slave child, because immediately the gift is concluded, the property is no longer that of the slave child, but becomes the property of his master.[143]

3.9 Factors that Invalidate Gift

There are factors due to which a gift is considered invalidated. They are:

a. Where the recipient negligently fails to take delivery until the bankruptcy or

[138] Al-Juzairi, op cit p.308
[139] Ibid
[140] Ibid
[141] Ibid
[142] Ibid
[143] Ibid p. 309

insanity of the donor.[144]

b. Where the donor makes a gift of the same subject matter to another recipient before the first recipient takes possession of the property. This action of the donor is enough to signify revoking the gift he has earlier made to the first recipient.[145]

c. Where the recipient neglects to accept the gift until the donor becomes sick of which he dies. In this situation the gift is invalid even where he has taken possession. This is because it is a condition that the recipient must accept the gift when the donor is in good health. Hence, the gift is suspended until the donor recovers where he dies the gift is invalidated. The effect of this is that the recipient will not receive one-third (as a bequest). Where the donor recovers from his sickness, the gift is valid. [146]

With regards to selling of the subject matter of the gift by the donor, jurists have divergent opinions. According to Hambali jurists, where the donor sells the subject matter of the gift to another person before the recipient takes possession, the gift is considered as invalid, because selling the subject matter is enough to signify revoking the gift.[147]

Other jurists hold that invalidating the gift depends on whether the recipient is aware of the gift made to him by the donor. Where the recipient is not aware of the gift and the donor sells the subject matter, the recipient is given the option to allow the sale and collect the price, or to annul the sale and take his gift. [148]

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[144] Askari, op cit p.104
[145] Malik *Al-Mudawwana,* op cit p.137
[146] Al-Juzairi, op cit p.308
[147] Ibid
[148] Hattabi, M. (1928) *Mawahibul Jalil; Sharh Mukhtasar Khalil,* Dar-al-Fikr, Cairo p.57

But where the recipient is aware of the gift and the donor executes selling of the subject matter due to the extravagance of the recipient, the sale is valid. But jurists differ on whom the price belongs to? In the preponderant view the price is for the recipient.[149]

From the foregoing it is a detestable act to revoke a gift as willingness is its bedrock and therefore only in certain instances will the donor have such right. In essence it is mainly to safeguard the motives of the gift.

[149] Ibid

CHAPTER FOUR

THE LAW PERTAINING TO GIFT UNDER KADUNA, KANO AND KEBBI STATES

4.1 Introduction

The limitations for the applicability of Islamic Civil Law traces its roots from the provisions of the Constitution of the Federal Republic of Nigeria, 1999 whereby it classically restricts the application of Islamic law to Islamic Personal law, which is only an aspect of the law. Even though on the other hand it has accorded powers to States to establish courts and vest them with the jurisdiction the states deem fit for those courts.

Prior to the coming of the colonialists to Nigeria, the principles of *Maliki* School of jurisprudence dominate and regulate the affairs of most of the courts applying Islamic law in Northern Nigeria. The Emir Courts and Alkali Courts as they were called at that time were manned by learned and pious judges, the decisions of which were always based on authorities from the *Qur'án Sunnah* and *Fiqh* books. Virtually the procedures applied by these courts were deduced from these sources.[1]

With the coming of the colonialists, the Emir Courts and Alkali Courts were abolished, and Islamic law was no longer considered as an independent system, its being recognized as native law and custom.[2] The colonialists established Area Courts to replace the Emir Courts and Alkali Courts at the same time subjecting Islamic law to the tripartite test of repugnancy, inconsistency and incompatibility to the English common law.[3]Also it is in this context that the application of Islamic law by the courts was restricted to Islamic

[1] Oba, A. A. (2004) The Shari'a Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction. *American Journal of Comparative Law.* 52 (859): 885
[2] Ibid
[3]Mahmud, A.B.(1988) *A Brief History of Shari'a in the Defunct Northern Nigeria* p.12

Personal law.

The implementation of *Shari'a* in some of the Northern States as championed by Zamfara State was to bring religious reforms which bring a new chapter in the Nigerian Muslims and of their relations with their non-Muslim neighbors. The reforms were not meant to reform the religion in its entirety but to reform the laws and institutions of the states into conformity with Islam, through legislations at both state and local government levels aimed at making the legislating jurisdiction in various ways more *Shari'a* compliant than they had formerly been.[4]

Thus, the main aim of the legislation was to create *Shari'a* courts to apply the full range of Islamic law; civil and criminal, to Muslims. Also, appeals from the *Shari'a* Courts in all matters were directed to the state *Shari'a* Court of Appeal.[5]

4.2 The Kaduna State *Shari'a* Court Establishment Laws, 2001

The preamble of this law provides for the rationale for enacting the *Shari'a* Court law at the same time amending the Area Courts law by justifying its legality based on the provisions of the Constitution. The law is formed of eleven parts and 60 sections which by its format is said to borrow a leaf from the Area Courts Law.

However, unlike the Kano State *Shari'a* Court Laws and Kebbi State *Shari'a* Court Laws the Kaduna State *Shari'a* Court Law was silent on the grades of the *Shari'a* Courts created, but has empowered the *Grand kadi* to establish such courts.[6] Section 3 of the law defines it as a court established under or in pursuance to this law or deemed to have been so established. This definition is vague as it does not seem to be helpful in

[4]Ostien, P.(2007) *Shari'a Implementation in Northern Nigeria (1996-2006): A Sourcebook* Spectrum Books Ltd, Ibadan. P.15
[5]Ibid
[6]Section 4, Kaduna State Shari'a Courts Establishment Laws 2001

defining what *Shari'a* Court is. This same definition was adopted by the *Shari'a* Court (Civil Procedure) Rules 2010 of Kaduna State.

On the mode of instituting civil proceeding at the court, Section 19 of the law provides for persons allowed to institute an action before the court, even though it does not specifically mention the mode of commencing civil actions. Referring to Section 3 of the Kaduna State *Shari'a* Laws it provides that a civil action may be commenced or instituted in a *Shari'a* court in two ways namely;

- By writ

- By any other mode or manner as may be prescribed by rules of the court.[7]

While the first mode of instituting an action is indicative of how the cumbersome English legal system has impacted on what ought to be a simple and less technical *Shari'a* based system of initiating court proceeding. The second mode will be better understood from the provisions of Order 2 of the *Shari'a* Court (Civil Procedure) Rules,[8] which provides that every civil cause or matter is to be commenced by a complaint made in person or authorized representative of the person making the complaint. The problem with this provision is that complaint has not been interpreted anywhere in the rules.

While trying to provide for jurisdiction the Kaduna state law under section 20 provides that persons subject to the jurisdiction of *Shari'a* Court are persons of Islamic faith and others who consent in writing to the exercise of jurisdiction by the *Shari'a* Court. Thus it can be discerned from this provision that any Muslim may institute an action at the competent *Shari'a* Court. But where it is a non Muslim who decides to

[7]Ibid Section 3
[8]Shari'a Court (Civil Procedure)Rules of Kaduna State,2010 and Kano State Shari'a Court (Civil Procedure)Rules,2001

initiate a civil action against another in a *Shari'a* Court, the requirement of written consent is necessary to confer on the *Shari'a* Court jurisdiction to entertain the suit.[9]

On the other hand, in trying to define subject matter jurisdiction, the *Shari'a* Courts Law in Section 22 was subtle in such a way that Islamic law was not mentioned but rather, it empowers the court under the Schedules to entertain civil matters as listed in the First Schedule of the Law. Thus, it can be deduced that the civil jurisdiction of the *Shari'a* Courts as provided by Section 22 and the First Schedule of the *Shari'a* Courts (Civil Procedure) Rules of Kaduna state include land matters (subject to the Land Use Act) matrimonial causes or matters under Islamic law, inheritance, guardianship and custody of children under Islamic law. This clearly indicates the wide range of civil matters which the *Shari'a* Court is competent to entertain and receive complaint thereof.

Unlike the Kano and Kebbi State *Shari'a* Court Laws, the Kaduna state law has made provisions for the practice and procedure to guide the *Shari'a* Courts generally bordering on issues of jurisdiction, appearances of parties place of trials etc.

On the laws to be applied by the *Shari'a* Courts in conducting its proceedings, Section 24 of the law provides that the law to be administered in civil matters shall be the Islamic law of *Maliki* School.

Thus, the law in Section 60 conferred on the *Grand kadi* the power to make rules for the practice and procedure of the courts in addition to the provisions of Section 27 of the law which makes provisions for practice and procedure generally.

4.3 The Kano State *Shari'a* Court Establishment Laws, 2000

Kano State is among the pioneer states in adopting the *Shari'a* legal system,

[9]Kaduna State Shari'a Courts Establishment Laws, 2001

following the footsteps of Zamfara state pursuant to the yearnings and aspirations of its citizens. This lead to the enactment of the *Shari'a* Court Establishment Law of Kano State in 2000. The law consisted of a preamble which relates to the justification for it and its legality based on the constitutional provisions that give rationale for the new law, which includes freedom of thought, conscience and religion among other fundamental human rights as enshrined under Chapter IV of the 1999 constitution; the legislative power to make the laws as was evoked under Section 4 (7) while Section 6(4)(a) and Section 6 (5)(a) – (j)[10] were also cited to justify the creation of courts with subordinate jurisdiction to the High Court among others.

Hence, the law under Section 3(1) provides for the establishment of *Shari'a* Courts thereby creating two grades of the court i.e. the *Shari'a* Court and Upper *Shari'a* court. Unlike the Kaduna State *Shari'a* Court Law, the Kano state law in Section 7 provides, that the practice and procedure to be applied by the *Shari'a* Courts in civil matters shall be in accordance with the principles of Islamic law and procedure, in addition to any codified practice and procedure made by the pursuant to Section 279 of the Constitution. The law further provides that in exercising his power of making the codified rules the *Grand kadi* is to be guided by the principles of *Rajih Mashhur Mu'tamad* i.e the preponderant view of *Maliki* School of jurisprudence.[11]

On the issue of jurisdiction, the provisions of Kano State Law conferred exclusive jurisdiction on the *Shari'a* Court to entertain all matters where all the parties are Muslims. And where they are non Muslims, they must express their consent in writing.[12] However,

[10] Constitution of the Federal Republic of Nigeria, 1999
[11] This is an addition upon the provisions of Kaduna State Law
[12] Section 5(2) of Kano State Shari'a Courts Establishment Law, 2000

the Kano State *Shari'a* Court Law made provisions for territorial jurisdiction[13] of the *Shari'a* Courts which is limited to specific local government areas, while the Upper *Shari'a* Court is empowered to assume jurisdiction in any matter or dispute that occurs within the territorial boundaries of the State.

In other respect, the Kano State *Shari'a* Court Law is said to be similar with the other States *Shari'a* Court Laws which will rightly be concluded that it borrowed a leaf from the Area Courts Laws on matters pertaining to transfer of cases by the *Shari'a* Courts, control of the *Shari'a* Courts, Ancillary Powers and Appeals.

4.4 The Kebbi State *Shari'a* Court Establishment Laws, 2000

The Kebbi State *Shari'a* Law[14] is a relatively short law compared to that of Kano and Kaduna states. After providing a brief preamble for the rationale of implementing the law, it further relies on the constitutional provisions under Section 4(7), Section 38(1) and Section 6(4) of the 1999 Constitution to implement the *Shari'a* law as it does not impede the constitutional provisions. In furtherance of this law under Section 4(1)(a)(b) provides for the establishment of courts as conferred on the House of Assembly to do so by virtue of Section 6(4)(a) of the 1999 constitution which provides, 'A house of Assembly of state shall have the power to create new or additional courts with subordinate jurisdiction to that of a High Court.'[15] It is in consequence of this that the Kebbi State House of Assembly established two grades of *Shari'a* Court i.e. the *Shari'a* Court and Upper *Shari'a* Court.

On the issue of jurisdiction, the Kebbi State *Shari'a* Court establishment laws

[13] For instance Column I & II of schedule (paragraph 2 (1) and (2) of the sharia courts (Establishment and Territorial Jurisdiction) Order 2000 of Kano State.
[14] Kebbi State Sharia Courts Establishment Law, 2000
[15] Constitution of the Federal Republic of Nigeria, 1999

under Section 9 provides that the *Shari'a* Courts shall be competent to hear and determine all civil matters and causes where all the parties are Muslim including any proceedings involving; marriage, *al-Nikah* guardianship and maintenance *al-Kafala* and *an-Nafaqa*, succession *al-Mirath,* will *al-Wasiyya*, gift, *al-Hiba*, endowment *al-Waqf*, land law, *Hukm Nizamil Ard*, contract *al-Aqd* etcetera. [16]In contrast with the Kano and Kaduna State *Shari'a* Laws, this law has provided a sample of areas where the *Shari'a* Courts shall have jurisdiction to entertain. Unlike the Kaduna State Shari'a Laws, the Kebbi State *Shari'a* Laws provides that the applicable law in *Shari'a* Courts in both civil and criminal proceedings to include the Holy *Qur'an, Sunnah,*H*adith, Ijma* and *Qiyas* e.t.c with other subsidiary sources as interpreted by the reference books.[17] This law further provides for a list of reference books to guide the *Shari'a* Courts in conducting its proceedings. This is an improvement upon the provisions of the Kaduna State *Shari'a* Court Laws.

By virtue of Section 11 of the Kebbi State *Shari'a* Court Laws, it provides for the practice and procedure to be applied by a *Shari'a* Court to include;

i. The Islamic law and procedure as contained in the sources and reference books.

ii. The *Grand kadi* shall issue rules of practice and procedure

Conclusively, it can be argued that the Kebbi State *Shari'a* Courts Law is an abridged and modified version of the Area Courts Law.

4.5 Jurisdiction of the Courts to Entertain Matters Pertaining to Gift

The power of a court or judge to entertain an action depends on the subject matter in dispute and the parties involved in the suit. Thus subject matter can either be landed property, chattels or any other issues involved. The jurisdiction of the *Shari'a* Courts to

[16] Section 9 Kebbi State Shari'a Court Law, 2000.
[17] Ibid Section 10

entertain matters is dependable on the state law establishing them.[18]

4.5.1 Jurisdiction of the courts to entertain matters pertaining to gift under the Kaduna State *Shari'a* Courts Law, 2001

The Kaduna State *Shari'a* Courts Law conferred jurisdiction on the *Shari'a* Courts to entertain matters pertaining to gifts aptly provided in Section 22 where it provides for the subject matter jurisdiction of the *Shari'a* Court, Although the section was silent, it referred the civil jurisdiction of the court in the First and Second Schedules of the Law respectively.[19]

Thus according to this Section and the First Schedule of the Kaduna State *Shari'a* Court Laws, civil causes and matters that are within the jurisdiction of the *Shari'a* Court include land matters (subject to the Land Use Act), matrimonial causes or matters under Islamic Law, guardianship and custody of children under Islamic Law, inheritance e.t.c. And any other cause or matter under Islamic Law as may be authorized by any written law. This indicating that the intention of the section was not to limit the jurisdiction of the court to the matters specified in the schedule.

The above provision clearly indicates the different types of civil causes and matters that a *Shari'a* Court is competent to entertain even though no specific mention of gift has been made in the law, it will be inferred that by virtue of Section 22 and the First Schedule respectively the court is conferred with exclusive jurisdiction to entertain all civil matters and therefore is competent to decide matters that pertain to gift.

[18] S. 5 of Kano State Shari'a Courts Law, S. 20 and S. 22 Kaduna state Shari'a Court Law, 2001 and S. 9 Kebbi State Shari'a Court Law, 2000

[19] Kaduna State Shari'a Court Laws 2000

4.5.2 Jurisdiction of the courts to entertain matters pertaining to gift under the Kano State *Shari'a* Courts Law, 2000

The Kano State *Shari'a* Courts Law conferred on the *Shari'a* Courts absolute exclusive jurisdiction provides in Section 5 of the Law that the court shall have jurisdiction to entertain all matters in respect of civil proceedings where the parties are Muslim or where non Muslims they have consented to the jurisdiction of the court.[20]

Unlike the Kaduna State Law, the Kano State Law had not made any effort to clarify the subject matter jurisdiction of the court, but rather delve more on the territorial jurisdiction of the court. Although it has clearly provided that exclusive jurisdiction is conferred upon the *Shari'a* Courts to entertain all civil matters where all the parties are Muslims[21] where one of the parties is a non Muslim he gives a written consent. Therefore it will be inferred that even though no clarification of the areas of its application has been made, the generality of the provision has given the courts powers to entertain matters pertaining to gift.

In the Kano law, territorial jurisdiction of the courts was rather given preference as it provides that the territorial jurisdiction of *Shari'a* Court is limited to specific local government areas, while the territorial jurisdiction of the Upper *Shari'a* Court is to assume jurisdiction in any matter or dispute that occur within the territorial boundaries of Kano State.[22]

Also, the Kano state (Civil Procedure Rules) was silent on the issue of jurisdiction of the courts as it provide under Order 2 Rule 1 that the court shall not entertain a cause or matter which it consider that it has no jurisdiction or sufficient power to try but shall

[20] Kano State Sharia Court Establishment Law, 2000
[21] Ibid see also Shari'a Court Establishment and Territorial Jurisdiction Order 2000 of Kano State
[22] Column (1) Paragraphs 2 (1) and (2) of the Kano State Sharia Courts (establishment and Territorial Jurisdiction) Order 2000

transfer or obtain the transfer of the case to a court of competent jurisdiction.[23] This is clearly buttressing the issue of territorial jurisdiction rather than subject matter jurisdiction.

4.5.3 Jurisdiction of the *Shari'a* Courts to entertain matters pertaining to gift under the Kebbi State *Shari'a* Courts Law, 2000

The Kebbi State *Shari'a* Court Law like the Kano State *Shari'a* Court Law under Section 9 of the Law provides that the court shall have jurisdiction to entertain all matters in respect of civil proceedings where the parties are Muslims or where non Muslims they have consented to the jurisdiction of the court.[24]

However, the Kebbi State Law further provide for subject matter jurisdiction where it state that the court shall have jurisdiction including all proceeding involving; Marriage, guardianship and maintenance, succession, will, gift, endowment, land law and contract . Apart from listing the above areas where the court will have jurisdiction, it further provides reference books that will guide the *Shari'a* courts in conducting its proceedings which is an improvement upon the provisions of Kano and Kaduna State Laws respectively.

Hence, this law has clearly signified that the *Shari'a* courts have jurisdiction entertain matters pertaining to gift in Islamic Law and that such proceedings are to be conducted either by the principles and practice of Islamic Law or by rules of practice as may be made by the *Grand kadi.*

[23] Kano State Shari'a Court (Civil Procedure) Rules, 2000
[24] Kebbi State Shari'a Court Establishment Law 2000.

4.6 Practice and Procedure in Cases Pertaining to Gift.

The attitude and manner in which the society is making and receiving gift has created the impression that the desired intendment of the institution is sometimes not actualized. While the principles of the law on this concept has been so comprehensive, the essence of which is to strengthen mutual love and remove rancor, however, the attitude of people towards these principles have led to litigations in courts challenging the gift. This is usually due to failure of the parties to adhere to the principle of the law.

In Rabi'u Salihu v Fatima Gogo[25] failure of the donee to confirm a gift made to her until the death of the donor was upheld to nullify the gift. In Hadiza Ado and Anor v. Buba Ya'u [26] in a claim for a gift of a house by the defendant's father to the plaintiff during the subsistence of their marriage, the claimant failed to prove actual possession of the subject matter. While the defendant was able to prove continued occupation of the gift by the donor till his death. The issues for determination were whether failure on the part of the recipient to take possession vitiates the gift. Secondly whether continued occupation nullifies the gift.

In its judgment the court rightly upheld failure of the recipient to take possession and the continued occupation by the donor nullifies the gift

However in a contrary decision of the court in Maikano, Hari and Aiyor v. Tsoho Da'ado[27] which is a locus classicus case on the principles of gift under Islamic Law enunciated the conditions which a gift must satisfy in order to be valid are declaration of the gift by the donor; acceptance of the subject matter by the donee himself or his agent and possession being delivered by the donor to the donee. The facts of the case in a

[25] (1963) 1 SLR p.11
[26] (unreported) AC/K/13/87 Wudil, Kano State
[27] (1987) 1 SLR p.164

nutshell were the donor (now deceased) made a gift of four rooms in a house to the second recipient during his marriage, which he accepted and took possession. However, earlier before, she had made a gift of three rooms in the same house to another recipient. Although the first recipient and second respondent had not lived in the house, there was evidence that she took possession of the rooms, renovated them and let them out to tenants. The first respondent also let out two rooms to tenants, stayed in one room and the fourth room was occupied by the donor after she had moved out for sometimes and returned.

The issue at the trial court was the validity of the gift she had made to the respondents respectively. After considering the evidence before it, the trial Upper Area Court declared the gift a nullity on the ground that the deceased returned to the house and stayed with the first respondent immediately after she made the gift, she has automatically revoked the gift, and the house in question is to become part of her inheritable estate. Dissatisfied, the respondents appealed to *Shari'a* Court of Appeal Kano which in its judgment allowed the appeal and reversed the decision of the Upper Area Court. On further appeal to the Court of Appeal, the judge relying on the principles of the law on gifts in *Jawahirul Iklil*, Commentary of *Mukhtasar* at page 214 which states that 'except if the donor lives in a small portion of the house and rents the remaining for the benefit of his ward the whole gift is complete" dismissed the appeal and affirmed the decision of the *Shari'a* Court of Appeal in reversing the decision of the Upper Area Court.

There are other situations whereby the donor sought revocation or recompense for the gift he has earlier made this scenario mostly happen in marriage cases where failure of the marriage to take place makes the groom to be institute an action claiming either return of the gift items or recompense of their value. Although it is settled principle of the law

that gift are not generally recoverable once the recipient has taken possession but where the gift is made on account of marriage in the event of the marriage not coming into fruition the gift are recoverable in Sa'a and Saratu v. Ibrahim Iro[28] the issue of whether gift made on account of marriage are recoverable in the event of breach of promise to marry, the court held that a would be husband can only recover what is identifiable and physically available . Also in in Tanimu v. Bilkisu Bukar[29] where a would be husband sought recompense of the gift he made due to failure of the marriage taking place the court upheld that items given as part of the preliminaries for completion of the marriage are recoverable. Whereas gift made gratuitously while seeking the recipient hand in marriage are not recoverable.

The practice and procedure which a *Shari'a* Court will follow in conducting its trials depends on the provisions of the *Shari'a* Court Establishment Laws and the *Shari'a* Court Civil Procedure Rules of the states respectively. The Kaduna State *Shari'a* Court Law while providing on the laws to be administered in civil causes aptly stated in Section 24 of the law, that the *Shari'a* Court in hearing and determining civil matters shall administer the Islamic Law of *Maliki* School. Clearly signifying that the principles of Maliki School of jurisprudence as clearly enunciated by the classical books is the law to be applied.[30]

Unlike the Kaduna State Law, the Kano State Law has not made any express provision on the applicable law that will guide the courts in conducting trials, but under the section providing for practice and procedure it states that the procedure to be applied in all civil matters will be in accordance with the principles of Islamic Law and

[28] (1985)1 SLR p.121
[29] (Unreported) AC/K/399/1992 Zaria, Kaduna State
[30] Section 24, Kaduna State Shari'a Courts Law 2001

procedure.[31]

While the Kebbi State *Shari'a* Court Law on the other hand under Section 10 provides that the applicable law in *Shari'a* Courts in both civil and criminal proceedings shall include the Holy Quran, *Sunnah*, *Hadith*, *Ijma*, *Qiyas* etc. with other subsidiary sources as interpreted by the reference book.[32]

However on the practice and procedure in conducting civil trials by the *Shari'a* Courts, the states in their various sections of the law respectively conferred on the *Grand kadi* the powers to make rules that will serve as a guide to the court in its proceedings. In addition to those principles enunciated by Islamic Law which are deduced from the classical books

Kaduna State Law in Section 27 and in Section 60 respectively made a general provision on the power conferred on the *Grand kadi* to make rules for the practice and procedure to be applied in proceedings. While Kebbi State in Section 11 provides that the practice and procedure of proceedings before a *Shari'a* Court, the court will be guided by;

- Principles and Practice of Islamic Law.

- Rules of Practice as may be made by the *Grand kadi*.[33]

Kano State *Shari'a* Courts Law under Section 7 provides "the Practice and Procedure to be applied in civil matters by the courts shall be in accordance with;

(b) The Principles of Islamic Law and Procedure; and

(c) Any codified practice and procedure of Courts made by the *Grand kadi* pursuant

[31] Section 7, Kano State Sharia Court Law, 2000
[32] Section 11, Kebbi State Sharia Court Law, 2000
[33] Section 10, Ibid

to Section 279 of the Constitution.[34]

The Section further stated that in exercising his power under paragraph (c) above, the *Grand kadi* shall be guided by the principles of *Rajih Mashhur Mu'utamad* in accordance with Maliki School of Law.

It is a classical requirement as provided by the principles of Islamic of Law and the *Shari'a* Civil Procedure Rules that the judge shall ensure he has power (jurisdiction) to entertain a dispute. This is dependable upon the type of claim brought before him and the subject matter. Thus every civil action is Islamic Law is commenced by way of complaint[35] either made in person or by an authorized representative of the person making the complaint. The problem here is that no effort has been made to interpret what complaint means.

Another complexity in Islamic Law procedure is the task of distinguishing the plaintiff *Al-Mudda'iy* from the defendant *Al-mudda'a alayhi,* It is trite in Islamic Law to say that he who goes to court to lodge a complaint is necessarily the plaintiff while the person against whom complaint is lodged is automatically the defendant. Thus it is the duty of the judge to examine the statement of claim before him and decide who among the parties the plaintiff is and who shall be the defendant. As rightly canvassed by Kadi Ambali, he opined that the big challenge of the trial court is to know the procedures applicable in any given claim. The court has to fully understand the claim, its basis and the relationship of the two contending parties to the subject matter of claim to determine on whom to place burden of proof and who is at the receiving end.[36] Hence this will help

[34] It is pursuant to this that the Shari'a Court Civil Procedures were made.

[35] Ibn Farhun, (2005*) Tabsiratul Hukkam,*Al-Maktabatu al-Azhariyya Litturas*i,* Cairo, Egypt, p. 9, Order 2 Rule of Kano State Sharia Courts Civil Procedure) Rules 2000 and Kaduna State Civil Procedure Rules

[36] Ambali, M. A. (2003) *The Practice of Muslim Family law in Nigeria*, Tamaza Publishing Co,

in determining who is actually the plaintiff and the defendant.

The Kano *Shari'a* Court (Civil Procedure) Rules provided under Order 11 Rule 5 that it is the duty o the court to determine who is the plaintiff and who is the defendant whereby it states that the judge shall examine the statement of claim before him and decide as to who among the parties shall be the *mudda'i* the plaintiff and who shall be *Mudda'a alaihi*, the respondent. The judge shall then call upon the *mudda'i* to bring evidence to prove his case.

In Shatacche v. Balarabe[37] the Court of Appeal rightly observed that it is the duty of the judge to conduct preliminary investigation in order to determine who is the claimant/plaintiff and the defendant. It is not a matter of course to say that whoever initiates or institutes action becomes the plaintiff and the other party a defendant.

In the case of Muhammadu v. Mohammed[38] where the plaintiffs filed a suit at the Augie Upper Area Court, Kebbi State claiming the distribution of the estate of their deceased Father. After identification of the estate of the deceased, the defendants/respondents claimed gift of some of the farms forming the estate of the deceased. The trial judge ordered the claimants to call witnesses to prove their claim, which they did, upon which the Judge affirmed ownership of the properties so claimed to the defendants. It is a settled principle of Islamic law that where a defendant counterclaimed, he turns to a plaintiff forcing him to adduce evidence to prove his claim. In the appeal the appellants as plaintiff sued the respondents as defendant for the determination and distribution of their father's estate but the respondents claimed gift of some part of the estate which makes the burden of proof shift to them and therefore must

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Zaria. p. 107

[37](2002) 10 NWLR pt. 775 p. 227

[38](2001) 6 NWLR pt708 p.105

be made plaintiffs as rightly canvassed by *Muntaka Coomassie* JCA (as he then was) relying on *Ihkamul-Ahkam*, short commentary on *Tuhfatul Hukkam* p.8 and *Mayyara*, vol.1 p.17 this exercise by the trial judge is considered in Islamic procedure the most essential aspect of a trial. It is the principle under Islamic Law that a father has the right to make gift of his property to any of his children during his lifetime provided the property belongs to him and the conditions for such gift are satisfied.

Hence, as rightly put by a Maliki Jurist, anybody that has the knowledge to distinguish the plaintiff from the defendant has discovered the gate to a just decision.[39]

By way of emphasis, the first responsibility of the judge is to determine between the parties the plaintiff and the defendant. While the plaintiff is the party stripped of advantage in terms of possession and circumstances, the defendant is presumed stronger which makes the burden of proof to lie on the plaintiff to produce evidence.

Another aspect which the *Shari'a* Court (Civil Procedure) Rules has made provision of deducing from the classical principles of *Maliki* School is the admission of documentary evidence which the Rules under Order 11 rule 7 provides that "where the plaintiff *Mudda'i* tenders any document in evidence, the judge shall admit evidence and may require the proof of authenticity of such document. And where the plaintiff is able to prove his case the judge shall enter judgment in his favour.

The method by which a document is admissible as proof requires authenticity in accordance with the law applicable to a cause or matter. The requirement of admissibility of document in evidence as clearly elucidated by the classical jurist is that a written document has to be attested to by either the original writer of the document or by two

[39] An-Nafrawi, op cit p.118

male witnesses of unimpeachable character. In Hafizu Ado v. Dauda & Ors[40] as most cases relating to Islamic Law of gift usually arose in a suit for determination and distribution of the estate of the deceased, the father (Ali) died intestate leaving certain no children behind as the estate is being distributed to the heirs, one of his sons claimed gift of one of the property should not be part of the estate to be distributed claiming that it has already been given to him by his late father (with whom he stayed and cared for until death). The complainant showed proof of document of the gift which was neither signed by the donor nor witnessed by any person. The trial court relying on the principles accorded by Maliki School upheld the gift as valid because in the view of this School a gift can either be oral, written or by conduct, and suffice it to say that even though the document does not signify actual deed of transfer, it shows evidence of the gift being made to the recipient. Thus the written document has clearly manifested the intention of the donor to make the gift to the recipient and the recipient has taken possession of the gift is enough to confer absolute title of the house on the recipient.

The Rules also made further provisions on the procedure of providing witnesses where circumstances necessitate such and in case of failure on the part of the plaintiff to produce the witnesses, or he produces only one witness, the court shall ask the plaintiff to take an oath to buttress his claim or to complement the evidence of his single witness.[41] Thus it is a well established principle of Islamic Law that he who assert must prove and this can only be done by calling at least two unimpeachable male witnesses, or one male witness with the claimant's oath. In the case of Sa'a and Saratu v. Ibrahim Iro(supra), the plaintiff/respondent filed an appeal seeking to recover gifts he made to the dependants on account of breach of promise to many. The plaintiff was asked to produce witnesses to

[40] (Unreported) UAC/K/86/92 Kano, Kano State
[41] Or 11 R9 Kano State Sharia Court (Civil Procedure) Rules

buttress his claim. The plaintiff brought three witnesses to support his claim upon which the court observed the evidence of two of the witnesses as unrealiable. The court therefore ordered the plaintiff to take an oath to substantiate the claim of his single witness which he refused, but instead asked the court to proffer the oath of rebuttal to the defendants. But failure of the plaintiff to subscribe to the oath led to the dismissal of part of his of claim.

In the case of Kaka v Magwanja[42] the facts of the case were the plaintiff sued claiming 2 farms as being rented to the defendant's father by the Plaintiff's father. On the other hand the defendant asserted one of the farms as a gift made to his father which he inherited. Both parties called witnesses to adduce evidence of their proof of claim. The issue for determination in the case was whether the Shari'a Court of Appeal Birnin Kebbi was right in impeaching the evidences of 2 of the defendant/ respondent witnesses, allowing the evidence of the unimpeachable witness to be supported by an oath as valid to prove the gift of the second farm to his father. And whether the oath will complete the required evidence to confirm the gift to him. Consequently the court confirmed the gift to the defendant/respondent after taking the oath to complete the evidence of his one witness. On further appeal, the Court of Appeal affirmed the decision of the lower court and dismissed the appeal on the basis of lack of merit. Base on the principles of Maliki School, the impeachability of a witness is determined base on the fact that a witness is a relative and will in one way or the other benefit from the subject matter in question, or he has specific interest to the subject matter and where a witness is declared as impeachable, his evidence is not accepted. However where the party adducing evidence is able to provide a witness with unimpeachable character his evidence can be supported by an oath to be taken by the party adducing the evidence. Hence the principal requirement of the

[42] (2004) 9 NWLR pt 717,p.124

law is for a party seeking to prove his claim to provide at least two witnesses of unimpeachable character to prove his claim. Where he is not capable of providing the minimum, the evidence of a single witness supported by an oath is enough to prove his claim. It is correct to state that Islamic law is quiet clear on the procedure that failure of the plaintiff to subscribe to an oath to substantiate his case will led to a dismissal of his claim.

However, where the defendant has admitted the claim of the plaintiff either in full or part of it, the need to call witness by the plaintiff is averred and judgment is entered in favour of the plaintiff.[43] In Sa'a & Saratu v. Iro (Supra) the Court entered judgment in favour of the plaintiff on part of the claims admitted by the defendants.

Another principle of the law which was provided by the Civil Procedure Rules is the procedure where the plaintiff fails to produce any witness or tells the court of his inability to bring any witness to testify in support of his claim, it becomes apparent that the judge shall request the defendant to swear the oath of denial to free himself from liability. This was also upheld in Sa'a & Saratu v. Iro where failure on the part of the plaintiff to subscribe to the oath of affirmation, the court requested the defendant to subscribe to oath of rebuttal.

Hence in a situation where the defendant counterclaimed the claim of the plaintiff, the burden shifts to him to prove his claim. In Muhammadu V. Garba,[44] where the plaintiff filed a suit for the distribution of the estate of his deceased father consisting of three houses and a farm, the defendants counter claimed two of the houses as gift intervivos to them by the plaintiff's father.

[43] Or 11 R4
[44] (1983) 1 SLR p.212

The Court opined that the proof of whether a gift has been made to the two defendants rests on them which they brought four witnesses to substantiate their claims respectively. One of the witnesses affirmed the gift to one of the defendants who was asked to take an oath in lieu of another witness to complete the evidence of two witnesses as required by the law.

However, where a defendant's claim is against a deceased person it is a settled principle of Islamic Law that the claimant is asked to take an Oath proffered as *Yaminul Qada'i*, which is a kind of oath preferred to a claimant over a deceased person's property, or where the claim involves the property of a person absent or a minor. Per Wali, J.C.A. (as he then was) in Muhammadu v. Garba (supra) where the Court of Appeal ordered the defendants/respondents in addition to the evidence they have adduced as proof of gift to subscribe to the oath of *Yaminul Qada'i* to complete their evidence in support of their respective claims.

In the case of Hadiza Ado and anor v Buba Ya'u,[45] the plaintiff sued at the Area Court, Wudil claiming a house given to her as a gift by the defendant's father during the subsistence of their marriage. The defendant denied the claim of the plaintiff and claimed continued occupation of the house by the donor till his death upon which it devolves as part of the estate of the deceased. The issue at the court was whether continued occupation of the house constitutes revocation and therefore nullifies the gift. Secondly, whether failure on the part of the donee to take possession of the subject matter of the till death of the donor vitiates the gift. On the first issue, the court held the gift as void due to continued occupation of the subject matter by the donor. While on the second issue, failure on the part of the donee to take possession of the gift nullifies the gift making it

[45] (Unreported)AC/K/13/87 Wudil, Kano State

unenforceable without any legal effect.

4.7 The *Shari'a* Court of Appeal

The *Shari'a* Court of Appeal is a constitutionally created court having its jurisdiction well rooted in the constitution which mainly applies to Islamic personal status. The *Shari'a* Court of Appeal was first established in 1960 to replace the Muslim Court of Appeal which heard and determine appeals from Native Courts and Area Courts. The decisions of the *Shari'a* Court Appeal were considered as final. Being considered as a superior court of record, the Shari's Court of Appeal has been and is still a controversial court having concurrent jurisdiction with the High court which was created to allay the fears of Muslims on the fate of Islamic law.[46]

By virtue of the provisions of Section 260(1) and Section 275(1) of the 1999 Constitution which established the *Shari'a*_Court of Appeal of the FCT and that of the state Section 262(2) and Section 277 (1) conferred on this Court respectively,[47] appellate and supervisory jurisdiction to decide proceedings involving questions of Islamic Personal Law and any other jurisdiction which may be conferred upon it by the Act of the National Assembly, in the case of *Shari'a* Court of Appeal of the Federal Capital Territory and the State House of Assembly in the case of *Shari'a* Court of Appeal of the State. [48]

There of S. 262 (2) (d) and S. 277 (2) (c) respectively further elucidate on what Islamic Personal Law entails as to include any question regarding marriage where all the parties are Muslim; or any question of Islamic Personal Law regarding *waqf*, gift,

[46] Keay and Richardson, (1988) in Abdulmalik Bappa Mahmud, *A Brief History of Shari'a in the Defunct Northern Nigeria* p. 37
[47] Constitution Federal Republic of Nigeria, 1999
[48] Ibid

succession where the testator, donor or deceased is a Muslim. Thus, the emphasis placed on the jurisdiction of the *Shari'a* Court of Appeal to entertain matters pertaining to Islamic personal Law has created lots of controversies. The issue of gift is a matter which falls under the jurisdiction of Islamic Personal Law as clearly stated by the Constitution, but a times litigations or proceedings that arose from such gift virtually as will be seen later involves land or properties that are attached to the land. And the issue of competency to entertain the matter comes into question as to which court has the jurisdiction to entertain such a case? Since by virtue of the provisions of Section 39(1) of the Land Use Act of Nigeria, it conferred exclusive original jurisdiction on the High Court to entertain proceedings relating to land which is subject of statutory right is of occupancy.

> "The High Court shall have exclusive original jurisdiction in respect of the following proceedings:-
>
> Proceedings in respect of any land the subject of a statutory right of occupancy include proceedings for a dedication of title or statutory right of occupancy.

On the other hand appellate jurisdiction is conferred on the High Court to hear and determine issues relating to customary right of occupancy of a land or landed property and not the *Shari'a* Court of Appeal. This is clearly the position of the Court of Appeal in the case of Alhaji Sa'idu Maje v. Da'u Dillallin shanu[49] where it held;

> It is crystal clear that the subject matter of the claim before the trial *Shari'a* Court instituted by the appellant which found its ways on appeal through the Upper *Sharia* Court and later to the lower Court purely pertained to dispute on land or put in another way, it related to title to land (house). It in no way relates to Islamic personal law at all.

The learned justice further asserted that

> The appellant is at liberty to take his appeal to the Katsina State High Court of Justice if he so wishes which is the proper and appropriate Court

[49] Appeal NO CA/K/142/S/2005

having Jurisdiction…[50]

The decision of the Court of Appeal in the above case, where the title to a landed property is a customary right of title which by virtue of Section 41 of the Land Use Act confer Jurisdiction on the Area Court, Customary Court or any other competent court of equivalent jurisdiction (which makes the *Shari'a* Court inclusive) to have jurisdiction in such matter that will be inferred appeal from such Area Court or *Shari'a* Court will not lie to the *Shari'a* Court of Appeal since it does not fall under the issues enumerated under Section 277(2) of the Constitution of which the *Shari'a* Court of Appeal has the right to entertain appeals on.

In the case of Umara Fannami v. Bukar Sarki[51] dispute which involves ownership of a landed property does not qualify as a dispute involving Islamic Personal Law. Similar decision of lack of jurisdiction of the *Sharia* Court of Appeal to entertain appeals involving claims of title to land or declaration of title was up held by the Court of Appeal in Alhaji Amadu Rufa'i v Alhaji Abdurrahman.[52] In trying to solve this anomaly created by the Constitution in limiting the jurisdiction of the *Shari'a* Court of Appeal, the various states that implemented *Shari'a* made an effort to extend the jurisdiction of the Court in their various Laws which the Constitution under Section 277 (1) clearly provides.

> The *Shari'a* court of Appeal shall in addition to such other jurisdiction as may be conferred upon it by the Law of the state exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal Law in.[53]

Albeit this provision of the constitution that conferred on the House of Assembly

[50] Ibid p. 291
[51] (1961-1989) 1 Sh.L.R.N p.94
[52] Appeal No. CA/K/120/S/97.
[53] Constitution Federal Republic of Nigeria, 1999

the power to extend the jurisdiction of the *Shari'a* Court of Appeal met with criticisms by the superior courts.

In the case of Ahmadu Usman v. Sidi Umaru[54] the Supreme Court was clearly of the view that the jurisdiction of the *Shari'a* Court of Appeal cannot be extended beyond Islamic Personal Law as per Ogundare JSC in the lead judgment, where he clearly stated.

"The purpose of setting up of the *Shari'a* Court of Appeal and the Customary Court of Appeal of any state that desires either or both is to give these two superior courts of record restrictive appellate and supervisory jurisdiction in respect of Islamic personal Law.[55] In the case of Magaji v. Matari[56] Karibi Whyte JSC opined that the intention of the constitutional provision which is very clear is to confine and limit the exercise of the jurisdiction of the *Shari'a* Court of Appeal to subject matter of Islamic Personal Law.

However in the opinion of Uwais CJN which will be precluded as close to the intendment of the constitutional provision opined that the provisions of Section 277(2) of the 1999 constitution which is an ipsissima verba reproduction of Section 11 of the *Shari'a* Court of Appeal Law in nebulous and capable of many interpretations. In his opinion from one point it suggests that the matters itemized in Section 277(2) are not exhaustive of question of Islamic Law and the parties, being Muslims, can agree on any other question to be of Islamic personal status.

In pronouncing the lead judgement in Maida v Modu,[57] his Lordship Justice Muntaka Coomassie JSC vividly captured the absurdity of limiting the jurisdiction of the Shari'a Court of Appeal. He opined thus;

[54] (1992)7 SCNJ p.14
[55] ibid
[56] (2000) 5 SCNJ 140
[57] (2000) 4 NWLR pt 659 p.99

> It seems to be settled that the new 1999 Constitution does not in any way improve the jurisdiction of the *Shari'a* Courts in this country, it does not enhance the jurisdiction of those courts. This in my view, with all sense of responsibility is unfair… In most cases this appeal inclusive one discovered that the land in dispute is situated in such a way that the rule of *lex situs* applies and lastly the subject matters and issues involved call for intensive application of Islamic Law and procedure which are not available in Common Law system. Moreover, the law to be applied is quite alien to the parties and *Shari'a* courts. I do not think that justice could be said to have been done to the parties and the subject matter.[58]

Thus it can be clearly seen that all these efforts that were made by the states in enhancing the jurisdiction of the *Shari'a* Court of Appeal resulted in the Court of Appeal and Supreme Court knocking off many Islamic Law cases decided by the *Shari'a* Court of Appeal which are outside the personal status.

Therefore, the anomaly of landed property as a subject matter of gift which falls under personal status is clearly outside the jurisdiction of the *Shari'a* Court of Appeal, it is clear that the relics of the legal regulation of gift in Nigeria are found in a subsection in the section of the Constitution where the jurisdiction of the *Shari'a* Court of Appeal is outlined

[58] Ibid p.112

CHAPTER FIVE

CONCLUSION

5.1 Summary

Gift is a transaction which is every individual partakes in either as a donor or a recipient, the main rationale of which is to strengthen mutual ties amongst the members of the community as encouraged by the Prophet (S.A.W). Thus the principles of Islamic Law on gift were extensively discussed vis-a-vis the views of Maliki, Shafi'i, Hanafi and Hambali schools of jurisprudence.

The opinion of the Muslim jurists on the definition and nature of gift in Islamic Law shows that it is the transfer of property from one person to another with the condition of willingness forming the bedrock of the transfer. While some of the jurists consider gift as contract which is valid with the offer, acceptance and delivery of the subject matter, other jurists opined it to be a disposition and therefore valid with the offer only.

Also, the legality of gift as an act of righteousness as envisaged in the Qur'anic injunctions and *Ahadith* of the Prophet (S.A.W) encouraging individuals to conduct in making it shows the recommendation of partaking in it as it encourages love at the same time removing grudge and rancor.

Similarly, jurists have divergent views on whether delivery of the subject matter of the gift is an essential condition or a requirement for the completeness of the gift. While those that suggested it is a condition opined that it is only with delivery that proof of transfer of ownership could be established, others are of the view that the gift is valid and binding with offer and acceptance.

The right of revoking a gift is another area which has enjoyed divergence of views among the Muslim jurists. Thus in one of the opinions, right of revocation by the donor is exercisable by the donor where the recipient has not taken delivery of the subject matter. In another view the right is not exercisable where then subject matter has been delivered to the recipient. However, in a contrary opinion of some Muslim jurists revoking a gift is valid whether delivery has taken place or not.

The contention on the jurisdiction of the Shari'a Courts as spelt out by the enabling laws of the chosen states on whether the courts can hear and determine matters involving gift is not without controversy. While the States conferred exclusive jurisdiction to the courts in all civil matters, Kebbi State further specified the civil matters making gift inclusive. Kaduna State on the other hand provided that in land matters, the jurisdiction of the court is subject to the provisions of the Land Use Act. Also, the appellate jurisdiction of the Shari'a Court of Appeal was limited, as the court does not have jurisdiction in land matters. Since the court with original and appellate jurisdiction in respect of Statutory right of occupancy and Customary right of occupancy is the High Court.

5.2 Findings

The jurisdiction of the Shari'a Courts to entertain matters pertaining to gift is dependable on the enabling laws of each state that established the courts and vested them with the jurisdiction they deem fit for them.

The jurisdiction of Shari'a Courts in Kaduna State in matters involving gift is not exclusive by virtue of the provision in the law that in land matters the jurisdiction of the court is subject to the Land Use Act.

It has been observed in this research that most of the cases that involved gifts are based upon the subject matter of land or property attached to land. Thus by virtue of the combined effects of provisions of Section 39 and Section 41of the Land Use Act, the *Shari'a* Court of Appeal does not have the jurisdiction to entertain matters pertaining to land even where the proof of ownership or title is base on Islamic Law of gifts which the court has jurisdiction to entertain.

The extension of the jurisdiction of the Shari'a Court of Appeal based on the powers conferred on the House of Assembly to establish and determine the jurisdiction of such courts in no way enhanced the jurisdiction of the Court in entertaining other matters outside Islamic Personal Status, as it does not vest additional jurisdiction on the courts. Thus the unlimited jurisdiction granted to the *Shari'a* Court of Appeal in these states is considered as derogation from the constitutional provisions limiting the jurisdiction of the *Shari'a* Court of Appeal to Islamic Personal Law matters as such an attempt intrudes on the constitutional jurisdiction of the High Court.

There is strong inter-connection between gift and succession as it is clear from most of the cases decided by the courts, the issue of ownership base on gift arose from claims of distribution of estate of a deceased person. There are numerous cases decided by the court where by defendant(s) counter claim gift of some properties upon the claim of the plaintiff seeking distribution of the estate of a deceased person.

5.3 Recommendations

The classical Arabic literature(s) and works on Islamic law of gift need to be translated into English and other local languages. Translating these reputable works will help in appreciating the comprehensiveness of the principles of law relating to the concept of gift and its application. In essence it will help in achieving its desired motive

which is to encourage love and affinity, strengthen mutual ties at the same time removing enmity and rancor in our society.

There is the need for enhancing the appellate jurisdiction of the Shari'a Court of Appeal beyond Islamic Personal Law matters. This is only feasible by amending Section 262 and Section 277 of the 1999 Constitution respectively. This will safeguard the decisions of the court from being quashed for lack of jurisdiction.

Also, the clarification of the constitutional provisions empowering the House of Assembly of a state to establish courts and vest them with jurisdiction is important. This will help in determining the extent of the powers to be conferred on these courts and their limitation.

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