

THE LEGAL EFFECTS OF GIFT

20.1 *The primary legal effect is the transfer of title to donee*

The primary legal effect is the passage of title to the donee, without any compensation or counter-value, after the two elements of offer and possession are complete. If either the donor or the donee dies prior to possession, the gift stands annulled.

The transfer of title is non-binding, that is, *ghayr lāzim* or terminable. The transfer of title can be reversed, unless some external factors intervene. Imām al-Shāfi‘ī said that the transfer of title is binding and it cannot be reversed or terminated.

20.2 *The gift can be revoked in a limited number of cases*

The right to revoke the gift is considered morally abominable, but legally valid.

20.2.1 **Cases in which a gift cannot be revoked**

The donor cannot revoke the gift in the following cases:—

- (a) A gift given to kindred within the prohibited degree cannot be revoked, even the donor's own child. A gift made to a relative who is not in the prohibited degree can be revoked.
- (b) A gift given to a husband or to a wife cannot be revoked.
- (c) A gift given to a poor person is treated as *ṣadaqah*, which cannot be revoked.
- (d) A gift made to a stranger or to a relative, who is not in the prohibited degree, but for which the donor has charged an *'iwad* (counter-value; consideration), cannot be revoked.

According to some jurists, gift to kindred within the prohibited degree, husband and wife, and *ṣadaqah* to a poor person are in reality subclasses of *hibah bi'l-'iwad*.

20.2.2 **Restriction on revocation due to external factors**
A gift made to a stranger or to a relative, who is not in the prohibited degree, may be revoked, but the following factors prevent revocation:—

- (a) When the property has increased physically through an increase that is physically linked to the property, like a house on which another story has been constructed, or land in which plantation has taken place, a cloth that has been dyed or stitched. A rise in price or the accumulation of *ribā* is not considered an increase. A decrease in the value of the property does not prevent revocation.
- (b) When the property is no longer in the ownership of the donee, that is, he has sold it or given it away as a gift.
- (c) If the donor dies, the heirs do not have the right to revoke the gift.
- (d) If the donee dies after he has taken possession of the gift. The property now belongs to his heirs.

20.2.3 **Revocation is with consent of donee or through judicial decree**

Revocation of a gift cannot take place without the consent of the donee as it amounts to cancellation (*faskh*) of the contract.

20.3 *Hibah bi'l-'iwad* or gift for a consideration

Gift with a consideration or *'iwad* is a gift in which the donor expects some compensation from the donee for making the gift. *'Iwad*, which may be called consideration, compensation or counter-value, is of two types: consideration after the conclusion of the gift contract; and consideration stipulated in the offer of the gift.

20.3.1 *'Iwad* after the contract

An *'iwad* after the contract of gift is in reality a counter-gift by the donee. It is like the donee saying, "This is a counter-value for your gift," "This is in lieu of your gift," "This is in return for your *sadaqah*." In all these statements, the counter-value is linked to the earlier gift of the donor. This is *'iwad* that will prevent revocation by the first donor. The donee may make a gift to the donor that is independent of the earlier gift. In such a case, each donor will retain the right of revoking his gift. There are three conditions for an *'iwad* to be effective in preventing a revocation: (a) It should be in lieu of the gift and be linked to it; (b) It should

not be paid from the property received as a gift; and (c) The donor should take possession of the *'iwad*, which is an indication of his consent.

20.3.2 *'Iwad* at the time of the contract

As for *'iwad* that is stipulated initially in the gift like the donor saying, "I gift you this property on the condition that you give me this horse," it amounts to an *'iwad* that prevents revocation of the gift. The three jurists maintain that this transaction is initially a gift, so that all the conditions like *mushā'* and others apply, and ownership is transferred on taking possession, but once concluded it takes the rule of sale, so that it can be returned due to defect, absence of inspection, third-party claims, with pre-emption working if it is land.

20.4 Legal effects of *marad al-mawt* on gift

Gift during death-illness is just like *hibah* during health. It is completed with possession and ownership is transferred, but up to one-third of the estate of the deceased. If possession is not taken prior to the death of the donor, the gift becomes void.

The difference between a gift during *marad al-mawt* and a bequest is that ownership is transferred after the death of the legator, but in a gift made during death illness ownership stands transferred and is then limited to one-third of the estate after the death of the donor. If a person gifts his house during illness to a person, when that house was his entire property, the donee will be allowed to retain one-third of the house and he will pay the value of the remaining two-thirds to the heirs. The same will apply if the donee sells the house prior to death. A judicial decree will be required for the return of the property itself, if the property still exists in the possession of the donee.

The heirs of the donor may permit the operation of the gift beyond one-third of the estate.

If a donor, who made the gift during health, revokes the gift when the donee is undergoing *marad al-mawt*, the revocation will take effect only through a judicial decree (consent of the donee will have no legal effect). The creditors and the heirs of the donee will have no recourse to the donor in such a case.

21.1 *Ṣadaqah* (Charity)

21.1.1 *Ṣadaqah* (Charity) resembles gift in several respects

Ṣadaqah has the same legal status as a gift with respect to the taking of possession of the property on the part of the recipient, and also with respect to the rules pertaining to *mushā'* (undivided property).

There is also no difference between *ṣadaqah* and a gift when given to a person who possesses the *niṣāb* and one who does not, that is, one who is reasonably well off and one who is not, or between the rich and the poor.

21.1.2 Distinction between *ṣadaqah* (charity) and *hibah* (gift)

In *ṣadaqah*, the donor does not intend or expect any kind of *'iwad* (return; counter-value) from the recipient or donee, but in a gift he may expect such a return or even demand it from the donee. The giver of charity expects a spiritual reward (*thawāb*) from Allah Almighty.

Revocation or return of the property given is possible in a gift, but revocation of charity is not permitted. If a person gives a gift to the poor or to one who comes seeking alms, he cannot revoke such a gift as it is treated like *ṣadaqah*.

21.1.3 Different situations arising from an act of *ṣadaqah* (charity)

If a person in a state of health says, "All that I own is *ṣadaqah* for the poor," it will be interpreted as his moveable wealth that is subject to *zakāt*, but it will not include his immovable property.

There is no harm if a person gives charity to another and then he inherits the same property from the other person upon the death of such other person.

If a person in health says, "The rent of this house is *ṣadaqah* for the poor," and then dies before delivery of possession by a recipient, the rent becomes part of his heritable estate.

If a person builds a mosque within his house, while he still lives in part of the house, and people come and pray in it, the mosque will remain part of his heritable estate.

21.2 'Āriyyah (Gift of Benefits; Lending of Property; Bailment)

21.2.1 The meaning of 'āriyyah and its essential element

'Āriyyah means the transfer of ownership of usufruct (benefits) of moveable or immovable property to another without *'iwad* (compensation or consideration). It is called 'āriyyah as it is devoid of a return benefit.

The essential element of 'āriyyah is an offer from the lender (*mu'ir*). As for acceptance from the borrower (*musta'ir*), it is not considered part of the *rukn* (essential element) by the three jurists, on the basis of *istihsān*. Analogy dictates that it should be part of it. The issue is similar to *hibah* in relation to vows.

The offer is explicit with the word 'āriyyah, but other words that clearly convey the intention to transfer the benefits and not the corpus of the property are also accepted, like "I will feed you from this land," or "This land is yours for purposes of sustenance." When words implying a gift are used in an unqualified sense, they can be interpreted to mean 'āriyyah.

21.2.2 The conditions of the essential element of 'āriyyah

The conditions are as follows:—

1. **Sanity and discretion:** The person making the offer of 'āriyyah must be sane and possess discretion. 'āriyyah cannot be made by an insane person or by a minor who cannot discriminate between right and wrong. Majority (*bulūgh*) is not a condition and a minor authorised by his *walī* can lend property to another. Imām al-Shāfi'ī disagrees.
2. **Possession:** Possession by the borrower (*musta'ir*) is an essential condition, because 'āriyyah is an act of donation, and by itself the offer does not complete the contract, unless there is possession, as in the case of *hibah*.
3. **Normal use of property should not lead to destruction or consumption:** The property borrowed must be one that can be benefited from without leading to its consumption or destruction, as in the case of land, a horse, a car, tools of trade and so on. If the property stands consumed or destroyed by normal use, as in the case of wheat or currency, 'āriyyah is not valid. The reason is that

the legal effects are established for the benefits alone and not the corpus of the property.

4. **No need to specify a period of use:** *'Āriyyah* is valid even if a period of borrowing is not specified.

21.2.3 The legal effects of the contract of *'āriyyah*

21.2.3.1 TRANSFER OF OWNERSHIP IN BENEFITS

The legal effect of *'āriyyah* is that ownership in the benefits stands transferred to the borrower till such time that the lender demands it back, the specified period is over, or the borrower returns it on his own. According to al-Shāfi'ī (God bless him), no ownership is transferred to the borrower, it is merely permission to use the property.

The result of the above legal effect is that the borrower can further lend the property as he owns the benefits. According to Imām al-Shāfi'ī, he cannot lend it further to another person, because he does not own the benefits.

21.2.3.2 ABSOLUTE AND RESTRICTED LENDING

'Āriyyah is either absolute or it is restricted. Absolute lending means that no place, time or period of use is specified. In restricted lending, the place, time, period and manner of use may be specified. Absolute lending is restricted by customary practice.

The ownership established for the borrower is *ghayr lāzim*, that is, non-binding. Thus, the lender can demand his property back whenever he likes, even if a period of use had been specified. If, however, the lender had given his land to the borrower for cultivation, he cannot take it back until the borrower has harvested the crops he had planted.

21.2.3.3 THE CONTRACT CAN BE REVOKED

As *'āriyyah* is a non-binding contract giving the authority to the lender to take back his property whenever he likes, the lender is not permitted to let out the property on hire to a third person, because *ijārah* is a binding contract and the specified period has to be observed. The borrower may lend the property to another on the same terms, so he can take it back when it has been demanded from him.

21.2.4 The nature of possession exercised by the borrower of property

21.2.4.1 PROPERTY HELD IN TRUST

The borrower holds the borrowed property in trust (*'amānah*) during the time of day (or night) when it can be put to use and also during the

time when it cannot be put to use). The borrower is not liable to compensate the lender if the property is destroyed during the exercise of such possession. According to Imām al-Shāfi'ī, the borrower is liable to compensate the lender if the property is destroyed during a time when such property is not customarily put to use.

21.2.4.2 BAILMENT AND 'ĀRIYYAH

The possession of the borrower is like that of a bailee, that is, he will be held liable for compensation if there is transgression or negligence on his part, but not otherwise. The difference between bailment for the sole benefit of the bailee and 'āriyyah is that such bailment is permitted only in moveable property, while 'āriyyah is permitted for real estate as well, that is, this type of bailment is for commodate loans alone.

21.2.4.3 RETURN OF PROPERTY

The borrower is also liable if the property is demanded back by the owner/lender, or the specified period of use is over, but he continues to hold it after that and the property is destroyed.

If the borrower returns the property to the owner/lender, to his representative, or family member, either himself or through his representative, he cannot be held liable for loss. Customary practice will be acknowledged in such cases for determining what is reasonable.

In case of a dispute between the lender and the borrower about a certain stipulation, it is the statement of the lender that will be given preference.

21.3 Qard (Loan)

21.3.1 The meaning of qard (loan) and its essential element

Qard (loan) means the transfer of ownership (title) in fungible moveable property without the stipulation of an *'iwad* (return benefit) where the moveable property stands consumed or destroyed by use creating a liability for the borrower to return a similar property on demand by the lender.

Qard is similar to 'āriyyah with the difference that in 'āriyyah the property borrowed is not destroyed and the same property has to be returned, while in *qard* a similar has to be returned.

Qard of currencies is actually a part of the contract of *ṣarf* (exchange of currencies), but it is discussed here as it is an act of charity and a loan can be given in things other than currency.

The term *qard hasan* is sometimes used for this transaction, but is actually a misnomer as *qard hasan* refers to a transaction between the servant and the Almighty Creator, as mentioned in the Qur'ān.

This is the only type of *qard* (loan) acknowledged by the *shari'ah* as valid. The details will be discussed in the Book of *Ṣarf*.

The essential element (*rukn*) of *qard* is offer and acceptance, according to the predominant view. The other view considers offer alone to be the essential element as in the case of *hibah* and *'āriyyah*. In *qard*, as a liability is created for returning a similar, the contract is considered a contract of sale with offer and acceptance as the essential element.

21.3.2 The conditions of *qard* (loan)

Qard (loan) is an act of donation as there is no counter-value or *'iwad* (return benefit), therefore, the insane person, the minor, the *walī* or *waṣī* of a minor do not have the capacity to undertake the *qard* transaction.

Possession by the borrower of the property loaned is an essential condition for *qard*, just as it is in *'āriyyah* and *hibah*.

Qard is valid in things that have a *mithl* or exact similar, and these are commodities sold by weight, cubic measure or those countable things that are very similar to each other like eggs and loafs. In commodities that are not fungible, that is, do not have similars like animals, various kinds of fruit and other dissimilar things, *qard* is not permitted.

Qard is treated in a manner similar to *'āriyyah*, therefore, it is not necessary to specify a period of repayment.

A benefit for the lender cannot be stipulated in the contract of *qard*. If it is stipulated, it amounts to *ribā* and renders the contract *fāsid*.

21.3.3 The legal effects of *qard* (loan)

The view of the *Zāhir al-Riwāyah* is that immediately upon conclusion of the contract (and possession by borrower) title in the property borrowed stands transferred to the borrower and a corresponding liability of paying back by *mithl* (similar) is attached to the *dhimmah* of the borrower. According to *Abū Yūsuf*, this happens the moment the borrower uses the property in whole or in part.

A period of payment need not be specified, and even when it is specified, the lender has the right to seek early repayment.

As *qard* is an act of charity, it is recommended that the lender not fix a period and seek repayment when the borrower is enjoying financial ease. It is to be noted that being a transaction of charity, the contract of *qard* does not accept agency as no one can seek charity for another.

To ensure repayment, the lender has a right to seek collateral or surety for repayment