

**DADABHOY INSTITUTE OF HIGHER EDUCATION**

**Mid Term Examination**

**ISLAMIC PERSONAL**  
**LAW – I**

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**Questions:**

**Q1: Define concept of Hiba (Gift) under Islamic Law. What are the conditions for the validity of Gift?**

**Q2: Define Will. What are the limitations imposed on the right of will by Islamic law.**

**Q3: Differentiate between Hiba-bil-iwaz and Hiba-ba-shartul-iwaz?**

## What is a Hiba (Gift)?

### **Definition:**

#### **Under Islamic Law:**

The terms "hiba" and "gift" are often indiscriminately used but the term hiba is only one of the kinds of transactions which are covered by the general term gift. A gift by a Muslim man in favour of his co-religionist must be under the Muslim Law. Muslim law recognizes the difference between the corpus and the usufructs of a property.

Under the Muslim Law a gift is a transfer of property or right by one person to another in accordance with the provisions provided under Muslim law are of two types Hiba and Aria. Hiba ( Tamlik al ain) , is an immediate and unconditional transfer of the ownership of some property or of some right, without any consideration or with some return (ewaz); and Aria the grant of some limited interest in respect of the use or „usufruct“ of some property or right. Where a gift of any property or right is made without consideration with the object of acquiring religious merit, it is called sadaqah.

# **Essential Elements of a Gift OR**

## **Validity of a Gift:**

Since Muslim law views the law of Gift as a part of law of contract without consideration, there must be an offer (ijab), an acceptance (qabul), and transfer (qabza).

The following are the essentials of a valid gift: A declaration by the donor - There must be a clear and unambiguous intention of the donor to make a gift. Acceptance by the donee - A gift is void if the donee has not given his acceptance. Legal guardian may accept on behalf of a minor. Delivery of possession by the donor and taking of the possession by the donee. In Muslim law the term possession means only such possession as the nature of the subject is capable of. Thus, the real test of the delivery of possession is to see who - whether the donor or the donee, reaps the benefits of the property. If the donor is reaping the benefit then the delivery is not done and the gift is invalid. Another characteristic of Muslim law is that writing is not essential to the validity of a gift either of movable or immovable property.

### **Relevant Case:**

**In Smt Hussenabi vs Husensab Hasan AIR 1989 Kar, a grandfather made an offer of gift to his grandchildren. He also accepted the offer on behalf of minor grandchildren. However, no express or implied acceptance was made by a major grandson. Karnataka HC held that since the three elements of the gift were not**

**present in the case of the major grandchild, the gift was not valid. It was valid in regards to the minor grandchildren.**

To make gift a Valid Gift, there must be two parties consists of the donor and donee.

### **Who is a Donor?**

Donor's powers are unrestricted in Muslim law-A man may lawfully make a gift of his property to another during his lifetime, or he may give it away to someone after his death by will is called the Donor.

A donor must be Muslim, should be major and has a sound mind.

### **Who can be a Donor:**

A person who is of sound mind and has the mental capacity to understand the legal implications of his act is eligible to make a gift. However, a gift made by a person of unsound mind during lucid intervals is a valid gift. Also, the donor must be free from any coercive or fraudulent influence while making a gift and According to the Hanafi view, if a person is under insolvent circumstances, he is allowed to make a gift. However, the Kazi has the power to declare any gift as void if it is made with a view to defraud the donee.

### **Declaration of Gift by Donor:**

The donor may declare a gift of any kind of property either orally or through a written deed.

### **Right to Make a Gift (HIBA):**

Capacity to make a gift is not solely enough. The donor must also have a right to make a Hiba. A Muslim has a right to gift only those properties of which he has the ownership. If he is simply a tenant in a house, he is not allowed to gift that house to someone because he does not have the ownership of that house. Such a gift is considered as invalid.

However, a Muslim has a right to gift away all his properties which are under his ownership at the time of declaration of the gift. The transfer of the property by the donor must be in the absolute interest of the donee. Therefore, it is imperative that the donor himself has the ownership of that property which he intends to pass on to the donee.

### **Who is a Donee?**

A person who receives gift is called donee. You can be a donee if you meet the conditions and the conditions are as follows:

## **Capacity of a Donee:**

**Child in Mother's womb:** A Hiba cannot be lawfully made in favour of an unborn person. Such a Hiba to unborn person is invalid, with one exception. For example, if the donor makes a gift of some property to a donee and after his death to donee's son who is not in existence, such gift will be void. But a gift to an unborn donee, who is in womb and is born within 6 months of making of the gift, is valid. Therefore, the child in its mother's womb is a competent donee.

To make Gift a Valid Gift, Acceptance of Donee is required, Acceptance manifests the intention of the donee to take the property and become its new owner. Without acceptance, the gift is considered to be incomplete.

**Minor:** In case the donee is minor, the acceptance on behalf of a minor can be given by the guardian of the property of the minor.

**Juristic person:** If a gift is made in favour of any institution or any other juristic person, the acceptance of the gift is made by either manager or any other competent authority.

**Two or more Donees:** Gift made in favour of two or more donees must be accepted by each and every person separately. If the share of each person is explicitly specified by the donor then, they will get the separate possession in the same way as declared by the

donor. But if the share under a gift is not specified and no separate possession is given by the donor, then also the gift is valid and the donees will take the property as tenants-in-common.

Under Islamic law, a gift is complete only after the delivery of possession by the donor and taking of possession by the donee. Thus, it is obligatory that the declaration and acceptance must be accompanied by the delivery of possession of the property.

## **Q2. Define Will. What are the limitations imposed on the right of will by Islamic law?**

A Will is a legal document that spells out your wishes regarding the care of your children, as well as the distribution of your assets after your death. Failure to prepare a will typically leaves decisions about your estate in the hands of judges or state officials and may also cause family strife.

Wills are the most common way for people to state how their property and affairs should be distributed and handled after their deaths. A well-written will eases the transition for survivors by transferring property quickly and avoiding many tax burdens.

Wills vary from extremely simple, single-page documents to elaborate volumes, depending on the estate size and preferences of the person making the will. If a person

dies without a valid will and did not make alternative arrangements to distribute property, a probate court must step in to divide up the estate using legal defaults that give property to surviving relatives.

### **Who can make a Will:**

Formal requirements for wills vary from state to state. Generally, the testator (one making the will) must be an adult of "sound mind," meaning that the testator must be able to understand the full meaning of the document. Wills must be written. Some states allow a will to be in the testator's own handwriting, but a better and more enforceable option is to use a typed or pre-printed document.

A testator must sign his or her own will, unless he or she is unable to do so, in which case the testator must direct another person to sign the will in the presence of witnesses, and the signature must be witnessed and/or notarized. A valid will remains in force until revoked or superseded by a subsequent valid will.

### **Who can Take a Property to Will:**

**Besides competency of legator, there is one more essential requirement of a valid Will and that is the competency of the legatee. The following are the characteristics of a legatee who is capable of taking a Will executed by a legator.**

### **He must be a person in existence:**

A legatee is competent to take a Will on condition that he must be living at the time of death of the legator. This is because a Will comes into effect only after the death of the legator and not when it is made by the legator. Thus, a legatee has to be a person in existence at the time of death of the legator.

A Will can be declared in favour of a non-muslim, minor or an insane person. What is important is that a legatee must be in existence and competent to hold the property. The age, sex, caste, religion, gender and state of mind is insignificant in order to become a lawful legatee. A charitable or religious institution is also capable legatee and any Will in favour of it is lawful.

### **Child in mother's womb:**

A child in a mother's womb is treated as a living person and thus, is a competent legatee under Islamic law under two conditions. Firstly, he must be in existence in the mother's womb at the time of declaration of the Will. Secondly, the child must be born alive within six months from the date of execution of Will under Sunni law and within 10 months under Shia law.

### **Murderer of Legator:**

A Will comes into effect only after the death of legator. Thus there is a possibility that an avaricious and impatient legatee may cause the death of the legator in order to grab the property as soon as possible.

A legatee kills or causes the death of the legator either intentionally or unintentionally is not allowed to take the Will and generally disentitled to take the property. However, under Shia law, if a legatee causes the death of the legator either unintentionally, negligently or accidentally, then he is qualified to take the property and the Will is treated as a valid Will.

### **Consent of Legatee:**

Before transferring legal title to the legatee under a Will, it is important to take the consent of the legatee to know whether he wants to accept the Will or not. The acceptance can be expressed or implied. A legatee has a complete right to disclaim the Will. So, if a legatee declines to own any property bequeathed to him, then the Will is considered to be incomplete and invalid.

### **Joint Legatee:**

Sometimes, legator issues Will jointly in favour of several legatees. In such circumstances, the legatees are known as joint legatees. A Will can be made in favour of joint legatees in two ways-

### **Where the share is specified:**

If the share of all the legatees is specified explicitly by the legator himself under the Will, then there arises no point of confusion regarding the share. The property Will be distributed as per the ratio mentioned by the legator in the Will and each legatee Will get the respective share allotted to him.

### **Where the share is not specified:**

It might be possible that under some cases, the share of each legator is not explicitly described. In such cases, applying the general rule, the property is supposed to be divided equally among the legatees. When a Will is made in favour of a class of persons, such class is treated as a single legatee only and each person gets the equal property.

### **Testamentary Power and its Limits (Bequeathable one-Third):**

A Muslim does not possess an unlimited power of making disposition by Will.

There are two-fold restrictions on the power of a Muslim to dispose of his property by Will, which are in respect of the person in whose favour the bequest is made, and as to the extent to which he can dispose of his property.

This is obvious, because the object behind this restriction is to protect the interests of the testator's heirs.

# No Muslim can make a bequest of more than one-third of his net assets after payment of funeral charges and debts. If the bequeathed property exceeds one-third, the consent of other heirs is essential (Sunni and Shia laws).

Where the heirs refuse to give their consent, the bequest would be valid only to the extent of one-third of the property and the rest of the two-thirds would go by intestate succession.

- i. In respect of bequest of one-third to an heir, the consent of other heirs is required in Sunni law, but not in Shia law. In case of a non-heir (stranger) the consent of heirs is not required in both.
- ii. The above rule of bequeathable one-third will not apply to a case where the testator has no heir. The right of Government to take the estate of an heirless person will not, in any way, restrict the right of a person to make a disposition of his property as he likes. Thus Government is no heir to an heirless person.
- iii. A bequest made for pious purposes is valid to the extent or one-third of the property, both under Sunni as well as Shia law.

### **Revocation of Will**

Muslim law confers on a testator unfettered right to revoke his will. A Muslim testator may revoke, during his life-time, any Will made by him expressly or impliedly.

Thus, if he sells, makes gift of the subject of bequest or deals with the same in any other manner like constructing a house on the piece of land bequeathed earlier, would implied revocation.

For example, where the testator gives land to his friend under a Will but a year later gifts the same to his daughter, the bequest in favour of the friend is automatically revoked.

Where a testator makes a Will, and by a subsequent Will gives the same property to someone else, the prior bequest is revoked. But a subsequent bequest (though of the same property) to another person in the same Will does not operate as a revocation of prior bequest, and the property will be divided between the two legatees in equal shares.

It is not necessary that for revoking an earlier will, another will must be made. A Will can be revoked by a simple and clear declaration to that effect or by a formal deed of cancellation or revocation of Will.

### **Death of Legatee before Operation of Will (Lapse of Legacy)**

Under Sunni law where before the Will can operate, the legatee dies, the bequest will lapse and the property bequeathed would remain with the testator and on his death will go to his heirs in absence of any other disposition by him.

Under Shia law, the legacy will lapse only if the legatee dies without leaving an heir or if

the testator, after the death of the legatee, revokes the Will. However, if the testator even after the death of the legatee does not revoke the Will, on the date of operation of the Will, the benefit under it will pass to the heirs of the legatee.

### **Conclusion:**

A Will is a device which confers right to property to legatee in a gratuity manner, postponed till the death of the legator. It provides an opportunity for a legator to correct the law of succession to some extent. This is because it empowers some of the relatives to obtain a share in the property who are legally from excluded from inheritance under Islamic law. The Islamic law of Will allows a person to devolve his property upon a person of his own choice. But simultaneously, it maintains a rational balance between the law of inheritance and devolution of property under a Will.

### **Q3: Differentiate between Hiba-bil-iwaz and Hiba-ba-shartul-iwaz?**

#### **Hiba-bil-iwaz:**

Under Islamic law, Hiba means gift and iwaz means consideration. Hiba-il-iwaz thus means, the gift for the consideration already given. Under all the laws, there is no system where there is a consideration for the gift. But under Muslim law, there is a system of gift with an exchange.

For example- If A makes a gift of his bungalow in favor of his friend B, and in return, B makes a gift of his car to A, then it is known as Hiba-il-iwaz. The second gift made by B to A is iwaz i.e. return.

### **Requisites of a valid Hiba-il-iwaz:**

Firstly, there must be a complete and valid gift made by the donor to the donee. If the gift made is not according to the rule of Muslim law then it is no gift.

Secondly, there must be a payment consideration made by the donee.

### **Relevant Case:**

**In the case of Khajoorunissa vs Raushan Begam, the facts were that the father gave one-third of his property to his eldest son in return of Rs.10,000 but the consideration was never paid. It was held that the quantum of consideration is not important, the only thing important is that the consideration must be bona fide.**

### **Hiba-ba-Shart-ul-Iwaz**

It means a gift made with a stipulation for return. In this case, the consideration is not paid by the donee by his own choice but it is paid because it is a necessary condition here.

### **Requisites of a valid Hiba-ba-Shart-ul-Iwaz:**

Firstly, the delivery of possession is important; it is revocable until the iwaz is paid.

Secondly, as soon as the iwaz is paid it becomes irrevocable.

Thirdly, a transaction when completed by payment of lwaz, assumes the character of a sale.

**Difference between HIBA BIL IWAZ AND HIBA-BA-SHART-UL-IWAZ:**

<b><u>HIBA-BIL-IWAZ</u></b>	<b><u>HIBA-BA-SHART-UL-IWAZ</u></b>
Ownership in property is transferred for consideration called iwaz. But there is no express agreement for a return or iwaz, that is to say, the return is voluntary.	Ownership in property is transferred for consideration called iwaz. There is an express condition with the gift is for return
Delivery of possession is not essential.	Delivery of possession is essential.
Gift of a mushaa is lawful even where the property is divisible.	Gift of a mushaa where property is divisible is invalid.

Irrevocable from the moment of its making. .	Irrevocable after the performance of the promised condition but not before.
It is like a contract of sale.	In its inception it is like a gift, but operates as a sale when the promised condition is performed.

