

HIBAH (GIFT) IN PAKISTAN IN THE LIGHT OF SHARI'AH

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I. Concept of Gift Under Muslim Law

The concept of Gift, or *Hiba* in Muslim law has existed from the very inception of the religion, circa. 600 A.D. While Muslim Law has not been shown to recognise the differentiation of land into estates, it does recognise the difference between the ownership of the land and the right to enjoy it.

Unlike English Law, ownership comes only with the full deed of the land and not with the simple possession or temporary tenancy. *Hiba* is only one of the aspects covered by the Transfer of Property Act under the term 'gift'. It is the transfer of the property and all rights along with it, without expectation of any compensation.

Human being is endowed with the instinct to desire and possess property. To regulate and control human urge for property Islamic law identifies two basic ways of acquisition of property; acquisition through one's own efforts and acquisition through inheritance. However, a person can dispose off his/her property in any way he likes, provided that it does not violate legal principles and his transaction is given effect during his life time. *Hibah* is one of the meritorious ways of disposal of property. Therefore, this paper attempts to present an analysis of the structural elements of *hibah*, its, legality and conditions. It also delineates the revocability or otherwise of *hibah* contract.

In general, property can either be acquired through a person's own effort or by way of inheritance. A person, acquiring a property or obtaining its possession, can sell or dispose of it in any way he likes, provided that it does not go against the principles of the law and his transaction is given effect during his life time. (Ali, 1965:3)¹ His power over his property is however, limited when he intends his dispositions to be operative after his death or it is made at the time of suffering from a mortal disease (death-illness). In such a situation, his power of disposition is restricted to a third of his property only by right of his heirs. The aim of imposing such restriction is to prevent a testator from undesired interference with the course of the devolution of property according to the law among the heirs. However, the testator may give a specific portion, as much as a third, to a stranger as *wasiyah* (will). *Hibah* is one of the meritorious ways of disposal of property. It is therefore, imperative, to highlight the meaning of *hibah* its components, legality, conditions and its revocation according to Muslim jurists.

The term *Hiba* has been defined in several aspects by the courts of Pakistan and, pursuant to this, the term has also been seen to exclude all nature of services, for services do not exist at the time of the promise- they can only be performed after the promise to perform is made, which implies that the same cannot fall under the definition of *Hiba* which requires the object to be in physical existence at the time of the gifting. It has been widely construed that the term *mal* has to apply to the object so gifted for the laws of *Hiba* to apply.

Surprisingly enough, all gifts are revocable before the actual transfer of property is made (i.e.) any person can unilaterally revoke his or her promise to gift before the promise is fulfilled. After possession, the laws of revocation differ between Sunni and Shi'a laws.

¹ Ali, Syed Amir, 1965., *Muhammadan Law*: v.1, ed. by Raja Said Akbar Khan, Lahore Law Publishing.

II. Introduction

Gift is a transfer of property where interest is transferred from one living person to another, without any consideration. It is a gratuitous and *inter vivos* in nature. This is the general definition that is accepted by all the religions, including Muslim law. As per the Muslim Law, a gift is called as *Hiba*.

Under English laws, right in property is classified by a division on the basis of immoveable and moveable (real and personal) property. Rights in land described as "estate" under English Law do not always imply only absolute ownership but it also includes rights which fall short of it and are limited to the life of the grantee or in respect of time and duration or use of the same.

Under Muslim Law, the concept of Gift developed much during the period of 610 AD to 650 AD. In general, Muslim law draws no distinction between real and personal property, and there is no authoritative work on Muslim law, which affirms that Muslim law recognises the splitting up of ownership of land into estates. What Muslim law does recognize and insist upon, is the distinction between the corpus of the property itself (called as *Ayn*) and the usufruct in the property (as *Manafi*). Over the corpus of property, the law recognises only absolute dominion, heritable and unrestricted in point of time. Limited interests in respect of property are not identical with the incidents of estates under the English law. Under the Mohammedan law they are only usufructuary interest (and not rights of ownership of any kind). Thus, in English law a person having interest in immoveable property for limited periods of time is said to be the "owner" of the property during those periods and the usufruct is also regarded as a part of the corpus. On the other hand, in Muslim law, a person can be said to be an "owner" only if he has full and absolute ownership. If the use or enjoyment of property is granted to a person for life or other limited period such person cannot be said to be an "owner" during that period. The English law thus recognises ownership of the land limited in duration while Muslim law admits only ownership unlimited in duration but recognises interests of limited duration in the use of property. This basically differentiates Muslim Law's concept of property and gift from that of English Law.

Under Muslim Law, the religion of the person to whom gift is made is not relevant. In Pakistan, there is a separate statute that governs the matters related to transfer of property. The Transfer of Property Act, 1882 under Chapter VII talks about gifts and the procedure for making the same. Yet as per section 129 of the Act, the Transfer of Property Act, 1882 does not apply to the Muslims making gift.

III. Tabarru'at (Gifts and Charitable Acts)

The term '*tabarru'* (*pl. tabarru'at*) is derived from the root b-r-', meaning "to excel". For instance, "He excelled in knowledge, courage, or other qualities; or he excelled his companions in knowledge; or he was, or became accomplished; perfect or complete, in every excellence, and in goodness".² Tabarru' bil-'ata' means, "he gave what was not incumbent or obligatory on him; he gave supererogatorily; or he gave gratuitously, unasked, or unbidden." The jurists, taking into consideration the basic linguistic meanings and the essence projected by *wasiyyah*, *waqf*, *hibah*, *'ariyah*, *qard* and other similar contracts derive the technical meaning of *tabarru'* as, "a contract which extends wealth or its benefit to others, immediately or in the future, without desiring a compensation and with the intention of doing a pious deed (*bi qasd al-birr wal-ma'ruf*). This definition presents *tabarru'* contract as the genus and

² al-Jawhari, Isma'il b. Hammad. al-Sihah: Taj al-lugha wa-sihah al-'arabiyya. Ed. Ahmad 'Abd al-Ghafur 'Attar. 7 vols. 4th ed. Beirut: Dar al-'Ilm lil-Malayin, 1410/1990.

places *wassiyah*, *waqf*, and the like as its sub-contracts (*anwa'*). *Tabarru'at*, inclusive of its sub-contracts, are acts of piety and charity.³ This is grounded in Q 5: 2: "*Help ye one another in righteousness and piety, but help ye not one another in sin and rancor: Fear Allah. For Allah is strict in punishment.*"

The Qur'an commentator, *al-Jassas al-Razi* (d. 369/980) elaborates: The verse enjoins every Muslim to support another in all types of acts which come under piety.⁴ Acts of charity that support each other either in kind or cash or in any other form of benefit are part and parcel of piety. Another verse (Q 2:180) states: *It is prescribed, when death approaches any of you, if he leaves any goods, that he makes a bequest to parents and next of kin, according to reasonable usage; this is due from the God-fearing.*

Even though the verse is specifically on the topic of bequest (*wassiyah*), it sheds light on the essence of *tabarru'at*. The verse encourages the dying person to consider his or her parents and next of kin in the spirit of love. The person is advised to allocate certain amount for parents and next of kin from his or her property without asking for anything in return.

The spirit in *tabarru'at* is to share wealth and benefit others because of love and not because of personal gain. *Tabarru'at* is about caring for each other. Another verse of the Qur'an emphasizes that *righteousness is not about performing salutary regulations only, but it is also about caring for each other. With the salutary regulations, a righteous man should strive for love of Allah and the love for his fellow-men: It is not righteousness that ye turn your faces towards east or west; but it is righteousness to believe in Allah 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 wayfarer, for those who ask, and for the ransom of slaves; to be steadfast in prayer, and practice regular charity; to fulfil the contracts which ye have made; and to be firm and patient, in pain (or suffering) and adversity, and throughout all periods of panic. Such are the people of truth, the God-fearing.*⁵

In this verse, extending assistance to kin, orphans, needy, wayfarer, beggars, and slaves are all considered as acts of piety, providing that the assistance rendered should proceed from love and no other motive.

Hadiths also shed light on the importance of *tabarru'at*. Jurists present "*tahaddu tahhabbu* (exchange gifts so that you may love one another)"⁶ as the principle source on which the legality of *Hibah* is based. This hadith touches upon the essence of *tabarru'at*, which is to give gifts to friends and relatives out of love. The legality of *tabarru'at* is established through consensus as well; the Muslim ummah agree on it to be a pious act.⁷

The conception of the term 'gift' as used in the Transfer of Property Act, 1882 is somewhat different from the practice under the Muslim Law. 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. *Hiba* (*Tamlík al ain*), is an immediate and unconditional transfer of the

³ Al-Mawsu'a al-fiqhiyya. 45 vols. Kuwait: Wizarat al-Awqaf wa al-Shu'un al-Islamiyya, 1404-1423, "Tabarru'"

⁴ Abu Bakar Ahmad Ibn Ali al-Razi al-Jassas, *Ahkam al-Qur'an* (Beirut: Dar al-Kutub al-'Ilmiyyah, 3rd edn., 2007), vol. 2, p. 381

⁵ Al-Baqarah (2: 177)

⁶ Jamal al-Din Abi Muhammad 'Abd Allah b. Yusuf al-Zayla'i, *Nasb al-Rayah Takhrij Ahadith al-Hidayah* (Beirut: Dar al-kutub al-'Ilmiyyah, 2nd edn., 2002), vol. 4, p. 297

⁷ Al-Mawsu'ah al-Fiqhiyyah, "Tabarru'"

ownership of some property or of some right, without any consideration or with some return (*ewaz*); and the term '*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'. The other types of gifts include *Ariya (Tamlík al manafe)*, where only usufruct is transferred and *Sadqah* where the gift is made by the Muslim with the object of acquiring religious merit.

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. The first is called a disposition inter vivos; the second, a testamentary disposition. Muhammadan law permits both kinds of transfers; but while a disposition inter vivos is unfettered as to quantum, a testamentary disposition is limited to one-third of the net estate. Muhammadan law allows a man to give away the whole of his property during his lifetime, but only one-third of it can be bequeathed by will.

The *Hanafi* lawyers define *hiba* as '*an act of bounty by which a right of property is conferred in something specific without an exchange*'. The Shias hold that '*a hiba is an obligation by which property in a specific object is transferred immediately and unconditionally without any exchange and free from any pious or religious purpose on the part of the donor*'. Muslim law allows a Muslim to give away his entire property by a gift inter vivos, even with the specific object of disinheriting his heirs.

In order to perform acts of *tabarru'at* as a contract, a Muslim has to deal with its components (*arkan*). According to the majority view, these are four:

- 1) Donor (*Mutabarri'*)
- 2) Recipient (*Mutabarra' lahu*)
- 3) Donated-item (*Mutabarri' bihi*)
- 4) Contract-words which inform the donating intention of the donor (*Sighah*)

Each component has its conditions (*shara'it*) and the validity of the *tabarru'at* contract depends on these conditions. These conditions are many and vary according to the sub-contracts of *tabarru'at*. Works of Fiqh discuss these conditions in detail.

The legal outcome of *tabarru'at*: If the terms and conditions of *tabarru'at* contracts are met, as a result the donated item will transfer from the donor to the recipient. This transfer depends on the nature of the item. For instance, if the donated item is a bequest (*wasiyyah*) then its ownership will transfer from the deceased to the recipient. Similarly, if the donated item is a loan (*'ariyah*), then the right to reap benefit from the item will transfer to the borrower. In this way, the donated item in *waqf* and other sub-contracts of *tabarru'at* will transfer to the recipient according to nature of the contract. These preliminary details of *tabarru'at* lead us to the discussion of its aims and objectives (*maqasid*).

IV. Essentials of Hiba

Since Muslim law views the law of Gift as a part of law of contract, there must be an offer (*izab*), an acceptance (*qabul*), and transfer (*qabza*). When 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. 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.

Thus, the following are the essentials of a valid gift:

- a) A declaration by the donor: There must be a clear and unambiguous intention of the

donor to make a gift. Declaration is a statement which signifies the intention of transferor that he intends to make a gift. A declaration can be oral or written. The donor may declare the gift of any kind of property either orally or by written means. Under Muslim law, writing and registrations are not necessary. Under Muslim Law, declaration as well as acceptance of gift may be oral whatever may be nature of property gifted. When the gift is made in writing, it is known as *Hibanama*. This gift deed need not be on stamp paper and also need not be attested or registered. The declaration made by the donor should be clear. A declaration of Gift in ambiguous words is void. While oral gift is permissible under Muslim law, to constitute a valid gift it is necessary that donor should divest himself completely of all ownership and dominion over subject of gift. His intention should be in express and clear words. According to McNaughton, "*A gift cannot be implied. It must be express and unequivocal, and the intention of donor must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void when he continues to exercise any act of ownership over it.*"

The declaration should be free from all the impediments such as inducement, threat, coercion, duress or promise and should be made with a bona fide intention.

- b) 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. Donee can be a person from any religious background. *Hiba* in favor of a minor or a female is also valid. Child in the mother's womb is a competent donee provided it is born alive within 6 months from the date of declaration. Juristic person is also capable of being a donee and a gift can be made in their favor too. On behalf of a minor or an insane person, any guardian as mentioned under the provisions of Muslim law can accept that gift. These include:

- Father
- Father's Executor
- Paternal Grand-Father
- Paternal Grand Father's Executor.

- c) 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.

The mode of delivery of possession depends completely upon the nature of property. A delivery of possession may either be:

- Actual
- Constructive

- i. Actual Delivery of Possession: Where the property is physically handed over to the donee, the delivery of possession is actual. Generally, only tangible properties can be delivered to the donee. A tangible property may be movable or immovable. Under Muslim law, where the mutation proceedings have started but the physical possession cannot be given and the donor dies, the gift fails for the want of delivery of possession. However, in such cases if it is proved that although, the mutation was not complete and the donee has already taken the possession of the property, the gift was held to be valid.

- ii. Constructive Delivery of Possession: Constructive delivery of possession is sufficient to constitute a valid gift in the following two situations:
- Where the Property is intangible, i.e. it cannot be perceived through senses.
 - Where the property is tangible, but its actual or physical delivery is not possible.

Under Muslim law, Registration is neither necessary, nor sufficient to validate the gifts of immovable property. A *hiba* of movable or immovable property is valid whether it is oral or in writing; whether it is attested or registered or not, provided that the delivery of possession has taken place according to the rules of Muslim Law.

V. Constitutional Validity of Hiba

The question of whether the first exemption was constitutionally valid in regards to the right to equality (Article 25 of the Pakistan Constitution) was rather rapidly solved by the Courts, validating the disposition on the grounds of ‘reasonable classification.

It is enough to say that it is now well settled by a series of decisions of Courts that while Article 25 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation, and in order to pass the test of permissible classification, two conditions must be fulfilled, namely:

- (1) That the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and,
- (2) That differentia must have a rational relation to the object sought to be achieved by the statute in question.

The classification may be founded on different bases such as, geographical, or according to objects or occupations and the like. The decisions of this Court further establish that there is a presumption in favor of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional guarantee; that it must be presumed that the legislature understands and correctly appreciates the needs of its own people and that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds; and further that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.

It is well known that there are fundamental differences between the religion and customs of the Muslims and those of others, and, therefore the rules of Muhammadan law regarding gift are based on reasonable classification and the provision of Section 129 of the Transfer of Property Act exempting Muslims from certain provisions of that Act is not hit by Article 25 of the Constitution.

The most essential element of *Hiba* is the declaration, “*I have given*”. As per *Hedaya*, *Hiba* is defined technically as:

“*Unconditional transfer of existing property made immediately and without any exchange or consideration, by one person to another and accepted by or on behalf of the latter*”.

According to Fyzee, *Hiba* is the immediate and unqualified transfer of the corpus of the property without any return.

VI. The Aims (Maqasid) of Tabarru'at

Shari'ah rules set by God are associated with the profound and wise purposes and the most sublime aims in order to achieve human interest in this world and the Hereafter (*masalih al-khalq wa al-akhirah*). These interests are inclusive of acquiring what is good and beneficial (*jalb al-masalih*) and rejecting what is evil and harmful (*darr al-mafasid*). This intent of *Shari'ah* is known as the higher objective (*maqasid al-shari'ah al-'aliyah*). According to Jamal Eldin Attia, Ibn 'Ashur has referred to this intent with different terms such as "general intents (*al-maqasid al-'ammah*)", "the supreme intent (*al-maqsid al-'azam*)", "overall intents (*al-maqasid al-jumlah*)", and "higher intents".⁸ A passage from Ibn 'Ashur's Treatise furnishes a better understanding of the term in discussion. He writes:

*From a comprehensive thematic analysis of the textual sources of the shari'ah pertaining to the objectives of legislation, we can draw the following conclusions. Both its general rules and specific proofs indicate that the all-purpose principle (maqasid 'amm) of Islamic legislation is to preserve the social order of the community and insure its healthy progress by promoting the well-being and righteousness (salah) of that which prevails in it, namely the human species. The well-being and virtue of human beings consist of the soundness of their intellect, the righteousness of their deeds as well as the goodness of the things of the world where they live that are put at their disposal.*⁹

These higher objectives are not exclusively associated with a particular type of *Shari'ah*-ruling. These objectives are observable in many types of rulings. A higher objective of legislation is to set things right (*salah*) in all types of human activity and remove corruption (*fasad*) from it. In other words, the higher objective of *Shari'ah* is to pursue overall well-being of people both on individual level and organizational level. Setting things right here is not confined to religious matters only such as setting right beliefs and acts of ritual worship, but it also relates to "worldly condition and social affairs".¹⁰

Coming back to *Tabarru'at*, it serves the higher objective of *Shari'ah*. It promotes mutual help (*muwasat*) among the members of the society. Mutual help achieve numerous benefits for the humans on individual and society level such as assisting the destitute, enriching the poor, education, environment preservation, unity and so on. Human well-being depends on these types of acts. A major obstacle to these acts is human greed which in this case is the corruption (*fasad*). Human greed gives birth to negative traits such as selfishness, betrayal, cheating, and other likes. These vices counteract human and social well-being. By legislating *tabarru'at* the *shari'ah* not only instills mutual help as a constituent of well-being, but protects from those vices which obstruct the very pursuit of well-being.

As for the specific objectives (*al-maqasid al-khassah*) of *tabarru'at*, Ibn 'Ashur mentions four for the purposes of legislating *tabarru'at*:

- 1) Proliferating donations and charitable acts
- 2) Donations must be made voluntarily
- 3) Providing room to the terms held by the benefactors
- 4) Avoid making donation an instrument to violate property of the other

Proliferation of donations and charitable acts (*takthir al-tabarru'at*):

There are benefits both for individuals and community in *tabarru'at*. The *shari'ah*, in order to

⁸ Gamal Eldin Attia, *Towards Realization of Higher Intents of Islamic Law*, translated from Arabic by Nancy Roberts, Washington: The International Institute of Islamic Thought, 2007, p. 101

⁹ Muhammad al-Tahir Ibn al-'Ashur, *Treatise on Maqasid al-Shari'ah*, Translated from Arabic by Mohamed El-Tahir El-Mesawi (Washington: The International Institute of Islamic Thought, 2006), p. 87

¹⁰ Muhammad al-Tahir Ibn al-'Ashur, *Treatise on Maqasid al-Shari'ah*, p. 88, 89

increase charitable acts, has taken special measures in promoting and encouraging *tabarru'at*. Human vices such as greed and other vices emerging from it are obstacles which put righteous acts like donation to a halt. If not halting, at the minimum it disturbs the continuity of such acts. The Qur'an in this regard says: *But those who before them had homes and had adopted the Faith, show their affection to such as came to them for refuge, and entertain no desire in their hearts for things given to the (latter), but give them preference over themselves, even though poverty was their (own lot). And those saved from the covetousness of their own souls--they are the ones that achieve prosperity.*¹¹

The verse describes the *Ansar of Madinah*, who shared whatever means they had with the new migrants from Makkah. This contribution was only possible for them when they freed their hearts from avariciousness (*shuhh*). We can understand from this that the *shari'ah* rules alone are not enough to convince people to perform righteous acts. Encouragement, stimulation, and reward are important factors which can convince people to take part in good actions. So, the *shari'ah*, besides laying down rules pertaining to *tabarru'at*, encourages and calls people to participate in charitable activities. Imam Malik allocated a special chapter on hadiths which promote charitable acts in his *al-Muwatta'*. He titled the section as: "Bab al-Targhib fil-Sadaqat (Chapter on Encouragement to give Charities)". *Al-Qabas*, a commentary of *al-Muwatta'* states that "*Imam Malik provided great benefit through this title. Through this title, he separated the traditions pertaining to rules from the traditions on virtues of donations and charitable acts.*"¹² The verses of the Qur'an, Hadiths, and practice of companions in relation to giving gifts, *waqf*, zakat, and other forms of charity are many. Ibn al-'Ashur discussed these with quotations and derived the objective of *shari'ah* to be proliferation of *tabarru'at* contracts which will increase the benefits for the community at all levels.¹³

To Make Donations Voluntarily and without Hesitation:

The second specific objective is to make donations voluntarily and without any hesitation. This is because the act of giving a portion of one's wealth without any compensation is the act of well-known (*ma'ruf*) kindness. Intention of such acts should be to sincerely benefit society and the donor should aspire for a reward from Almighty Allah only. In addition, such kindness should not lead to harm. The Qur'an supports this: No soul shall have a burden laid on it greater than it can bear. No mother shall be treated unfairly on account of her child. Nor father on account of his child, an heir shall be chargeable in the same way.¹⁴

The verse indicates that "*if giving charity results in harm, it will cause people to fear doing good, for good must not result in evil*".¹⁵ A hadith about it uses the term *tib nafs minhu* which means sincere consent: "*Property of a brother is not permissible for another except one which he gave with sincere consent (an tib nafs).*"¹⁶

The recipient has to make sure that the donation he received is accompanied with sincere consent of the donor. To assure sincere consent, the donor is given enough time to consider his contract binding after he or she has made decision to donate. There is flexibility compared

¹¹ Q 59: 9

¹² Malik bin Anas, *Al-Muwatta' of Imam Malik*, translated by Aisha A. Bewley (Spain: Madinah Press Granada, 1997), p. 419

¹³ Muhammad al-Tahir Ibn al-'Ashur, *Treatise on Maqasid al-Shari'ah*, pp. 303-304; 'Izzuddin Ibn Zaghbihah, *Maqasid al-Shari'ah al-Khassah bi al-Tabarru'at wa al-'amal al-khairi*, p. 9

¹⁴ *Al-Baqarah* (2: 233)

¹⁵ Muhammad al-Tahir Ibn al-'Ashur, *Treatise on Maqasid al-Shari'ah*, p. 304

¹⁶ Umar b. 'Ali b. al-Mulaqqin, *Al-Badr al-Munir fi Takhrij al-Ahadith wa al-Athar al-Waqi'ah fi al-Sharh al-Kabir*, edited by Mustafa Abu al-Ghayt Abd al-Hayy (Saudia: Dar al-Hijrah, 1st edn., 2004), vol. 6, p. 693

to the interval provided by the exchange contracts. Ibn al-'Ashur argues that donor's reflection and resolution regarding donation stretches until the recipient has taken possession (*tahwiz*) or until the witness has confirmed the donation (*ishhad*). Ibn 'Ashur quotes a hadith as well as opinions of legal schools who held that possession is necessary condition for *tabarru'at* contract to become binding. He comments that those legal schools which did not see possession as a requisite ignore the element of kindness and benefaction in *tabarru'at* contracts. They treat them just like the exchange contracts. The flexibility provided by the *Shari'ah* is to protect the benefactors from harm. The *Shari'ah* requires them to donate with sincere concern and not because of any internal or external pressure. This flexibility is a motivational factor for people to partake in good actions.¹⁷

Providing Room to the Terms Held by the Benefactors:

The third objective of the *Shari'ah* in relation to *tabarru'at* is to provide room to the terms and conditions set by the benefactors. These terms play important role in validating the *tabarru'at* contract. This objective is connected to the first objective (proliferation of donation and charitable acts). Giving a portion from one's wealth requires good motive which comes from religious munificence (*arihah diniyah*) and noble morality. This good motive can easily be obstructed by evil thoughts. A verse states: *The evil one threatens you with poverty and bids you to conduct unseemly. Allah promised you His forgiveness and bounties. And Allah cares for all and He knows all things.*¹⁸

The verse, already quoted under the first objective, "*And those saved from the covetousness of their own souls--they are the ones that achieve prosperity*", is about those internal factors which weaken the good motive. Q 2: 268 is about external factors which can also discourage the benefactors. Stipulation of strict conditions like the ones in exchange contracts can easily obstruct good motives of benefactors. To overcome this situation, the *Shari'ah* made room for the terms and conditions set by the benefactor. For instance, *Shari'ah* permits the benefactor to stipulate the commencement of his donation with his death. This is done through wills and testaments. Disposal of property in normal circumstance is only valid in the lifetime of a person, but here a level of flexibility is provided by the *Shari'ah*. The *Shari'ah* allows the donor to lay down conditions according to the nature of *tabarru'at* whether they are general (*ta'mim*), specific (*takhsis*), temporary (*ta'jil*), permanent (*ta'bid*), and other forms of conditions. This is so, provided that the conditions do not contravene the higher objective of the *Shari'ah*.¹⁹

Avoid Making Donation an Instrument to Violate Property of the Other:

The fourth specific objective Ibn 'Ashur presents is that *tabarru'at* should not be used as an instrument to violate other's property (*dhari'ah ila ida'ati mal al-ghayr*). For instance, the benefactor, in order to prevent his children from inheriting his property, gives his entire property as *waqf*. The practice of the pagan Arabs in the pre-Islamic era was similar to this. Bequests (*wasayah*) were used by them to deprive their next of kin and allocate their property for the notables of their tribe. After the advent of Islam, bequests were reduced to one third only, any amount beyond that belonged to the next of the kin after paying the creditors. Since this transition was still new for the Muslims, the old practice of giving bequests exceeding 1/3 was still in practice. There are incidents where the Prophet, upon him peace and blessing, reminded his companions to give bequests no more than a 1/3. When Sa'd Ibn Waqqas fell sick in Makkah, the Prophet, upon him peace and blessings, visited him and Waqqas said, "*I*

¹⁷ Ibn al-'Ashur Treatise on Maqasid al-Shari'ah, pp. 304-308; 'Izzuddin Ibn Zaghbihah, Maqasid al-Shari'ah al-Khassah bi al-Tabarru'at wa al-'amal al-khairi, p. 14

¹⁸ Al-Baqarah (2: 268)

¹⁹ Ibn al-'Ashur, Treatise on Maqasid al-Shari'ah, pp. 308-309

have lot of wealth and only two daughters. Do I bequeath two thirds of my property?" The Prophet, upon him peace and blessings, replied, "No!" Then I said, "one third". The Prophet, upon him peace and blessings, said: "a third and a third is a lot. Leaving your heirs rich is better than leaving them poor to beg from people."²⁰ People used bequests and donations to alter inheritance or harm creditors. The new legislations brought by *Shari'ah* were to prevent people from using *tabarru'at* in manipulative ways.²¹

VII. Application of Hibah (Gift Contract) and Maqasid

Hibah literally means conveying a benefit to someone without any consideration for return.²² Technically, the Hanafi and the Shafi'i jurists define *Hibah* as: "A voluntary contract that results in uncompensated ownership transfer between living individuals". A more specific definition is provided by the Hanbali jurists: "*Hibah* is a contract initiated by an eligible party to transfer ownership of existent and deliverable properties to another without compensation. The properties may be known or unknown, but they must be conventionally given as gifts, and the contract language must specify that it is a gift or a property transfer, etc."²³ These definitions concentrate on individuals as donors. This was the practice during the early times. The contemporary practice has given rise to a new scenario. Instead of individuals, organizations and institutions now play an important role as donors. The higher objective of *tabarru'at* which we discussed earlier (i.e. mutual help) does not necessarily have to be offered by individuals. Organizations can offer it as well.

Based on the literal meanings and the technical definitions, the purpose of the *Hibah* contract is to convey benefit to the recipient by gifting them a property free of compensation. It is a manifestation as such of *Ihsan* (beneficence) which takes a high profile in Islamic ethos. The verses of the Qur'an and the hadith which recommend *Hibah* also support this. For instance, "But if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer". Similarly, the hadith: "Exchange gifts so that you may love one another".²⁴ Love, affection, and fraternity are important elements in human relations for mutual welfare and well-being. One of the ways to realize these objectives is to offer and exchange gifts in family, society, and within the circle of friends. *Hibah* serves philanthropic purposes. Through *hibah*, people's needs are satisfied. Furthermore, charitable foundations can fulfill their social responsibilities through receiving and distributing *hibah*.

In the areas of inheritance, *hibah* can serve the purpose of overcoming some of the rigidities of distribution that may be caused by adverse circumstances. If, for example, a person has sons and a grandson who is invalid due to injuries or accident, and the estate is divided according to the inheritance law, the disadvantaged grandson will be excluded from taking a share by his father and uncles. In this situation, the grandfather can use *hibah* to allocate a

²⁰ Muhammad Ibn Hibban al-Busti, *Sahih Ibn Hibban bi Tartib Ibn Bilban*, edited by Shu'ayb al-Arnut (Beirut: Mu'assisah al-risalah, 2nd edition, 1414 AH), Hadith no. 4249

²¹ Ibn al-'Ashur, *Treatise on Maqasid al-Shari'ah*, pp. 309-310

²² Qasim Ibn 'Abd Allah al-Qunawi, *Anis al-Fuqaha fi Ta'rifat al-Alfa' al-Mutadawilah bayna al-Fuqaha'* (Beirut: Dar al-Kutub al-'Ilmiyyah, 2004), p. 95

²³ Wahbah al-Zuhayli, "Financial Transactions in Islamic Jurisprudence" in *Al-Fiqh al-Islami wa Adillatuh*, translated by Mahmoud A. El-Gamal (Beirut: Dar al-Fikr al-Mouaser, 2nd edn., 2007), vol. 1, 539

²⁴ Jamal al-Din Abi Muhammad 'Abd Allah b. Yusuf al-Zayla'i, *Nasb al-Rayah Takhrij Ahadith al-Hidayah* (Beirut: Dar al-kutub al-'Ilmiyyah, 2nd edn., 2002), vol. 4, p. 297

part of his estate to his grandson in his lifetime. In modern commerce, hibah ascertains the smooth flow of transactions in the market place. When *hibah* is applied in conformity with its true purpose it can facilitate new transactions and transfer ownership.²⁵

VIII. Subject Matter of Gift Under Muslim Law

Now the question which we have in mind is what can be subject matter of Hiba, under Muslim law. As per the provisions of Transfer of Property Act, 1882, the subject matter of the gift must be certain existing movable or immovable property. It may be land, goods, or actionable claims. It must be transferable under s 6. But it cannot be future property. A gift of a right of management is valid; but a gift of future revenue of a village is invalid. The release of a debt is not a gift, as a gift must be of tangible property. It is submitted that the release of a debt is not a gift as it does not involve a transfer of property but is merely a renunciation of a right of action. It is quite clear that an actionable claim such as a policy of insurance may be the subject of a gift. It is submitted that in a deed of gift the meaning of the word 'money' should not be restricted by any hard and fast rule but should be interpreted having regard to the context properly construed in the light of all the relevant facts. Therefore, in order to constitute a valid gift, there must be an existing property. In Mohammedan law, any property or right which has some legal value may be the subject of a gift.

Under the Muslim law, following constitute the subject matter of *Hiba*:

- 1) It must be anything (moveable or immovable, corporeal or incorporeal) over which the right of property may be exercised or anything which exists either as a specific entity or an enforceable right, or anything designable under the term *mal* (property).
- 2) It must be in existence at the time when the gift is made. Thus, gift of anything that is to be made in future is void. For example, a donor makes a gift the fruits of his mango garden that may be produced this year. This gift is invalid since the mangoes were not in existence at the time of making the gift.
- 3) The donor must possess the gift.
- 4) A gift of a part of a thing which is capable of division is not valid unless the said part is divided off and separated from the property of the donor; but a gift of an indivisible thing is valid. For example, A, who owns a house, makes a gift to B of the house and of the right to use a staircase used by him jointly with the owner of an adjoining house. The gift of A's undivided share in the use of the staircase is not capable of division; therefore, it is valid.

According to Hanafi law, the gift of an undivided share in any property capable of division is, with certain exceptions, incomplete and irregular (*fasid*), although it can be rendered valid by subsequent separation and delivery of possession. For instance, A makes a gift of her undivided share in certain lands to B, and the share is not divided off at the time of the gift but is subsequently separated and possession thereof is delivered to B, the gift although irregular (*fasid*) in its inception, is deemed valid by subsequent delivery of possession.

Exceptions: Gift of such undivided share is valid which is incapable of division:

- a) *Hiba* by one co-heir to the other; For instance, A Muslim woman died leaving a mother, a son, and a daughter. The mother made a gift of her unrealized one-sixth

²⁵ In a discussion with Hashim Kamali, he commented that: "Hibah is also utilized for the purpose of cleansing impermissible income or profit which is obtained through doubtful means, especially in the banking sector. Hibah can also be given to the non-Muslims by the state or charitable foundation for their welfare and also help them adjust to what might mean to some a new life

share jointly to the deceased's son and daughter. The gift was upheld by Privy Council.

- b) *Hiba* of a share in free hold property in a large commercial town; For instance, A owns a house in Dhaka. He makes a gift of one third of his house to B. The Property being situated in a large commercial town; the gift is valid.
- c) *Hiba* of a share in a *zimindari* or *taluka*; According to Ameer Ali the doctrine of *Musha* was applicable only to small plots of land, and not to specific shares in large landed properties, like *zamindaris*. Thus, if A and B are co-sharers in a *zamindari*, each having a well-defined share in the rents of undivided land, and A makes a gift of his share to B, there being no regular partition of the *zamindari*, the gift is valid.
- d) *Hiba* of a share in a land company.

Muslim law recognizes the difference between the corpus and the usufructs of a property. Corpus, or *Ayn*, means the absolute right of ownership of the property which is heritable and is unlimited in point of time, while, usufructs, or *Manafi*, means the right to use and enjoy the property. It is limited and is not heritable. The gift of the corpus of a thing is called *Hiba* and the gift of only the usufructs of a property is called *Ariya*.

Hence a critical scrutiny of concept of Gift under Muslim law, gives us the following instances regarding what can be subject matter of *Hiba*:

- anything over which right of property may be exercised.
- anything which may be reduced to possession.
- anything which exists either as a specific entity or as an enforceable right.
- anything which comes within the meaning of the word mal.

Gift of services is not valid because it does not exist at the time of making the gift.

IX. Kinds of Gifts

There are several variations of *Hiba*. These include:

- *Hiba bil Iwaz*
- *Hiba ba Shart ul Iwaz*
- *Sadkah*
- *Ariyat*

Hiba- bil-Iwaz:

'*Hiba*' means 'gift' and '*Iwaz*' means 'consideration'. *Hiba Bil Iwaz* means gift for consideration already received. It is thus a transaction made up of two mutual or reciprocal gifts between two persons. One gift from donor to donee and one from donee to donor. The gift and return gift are independent transactions. Therefore, when both i.e., *hiba* (gift) and *iwaz* (return or consideration) is completed, the transaction is called *hiba-bil-iwaz*. For example, A make a gift of a cow to S and later B makes a gift of a house to A. If B says that the house was given to him by A by way of return of exchange, than both are irrevocable.

So, a *Hiba Bil Iwaz* is a gift for consideration and in reality, it is a sale. Thus, registration of the gift is necessary and the delivery of possession is not essential and prohibition against *Mushaa* does not exist. The following are requisites of *Hiba bil Iwaz*:

- 1) Actual payment of consideration on the part of the donee is necessary. Adequacy of the consideration is not the question. As long as the consideration is bona fide, it is

valid no matter even if it is insufficient.

- 2) A bona fide intention on the part of the donor to divest himself of the property is essential.

Gift in lieu of dower debt- An oral transfer of immovable property worth more than 100/- cannot be validly made by a Muslim husband to his wife by way of gift in lieu of dower debt which is also more than 100/-. It is neither *Hiba* nor *Hiba bil Iwaz*. It is a sale and must be done through a registered instrument.

Hiba-ba-Shartul-Iwaz:

'*Shart*' means 'stipulation' and '*Hiba ba Shart ul Iwaz*' means a 'gift made with a stipulation for return'. Unlike in *Hiba bil Iwaz*, the payment of consideration is postponed. Since the payment of consideration is not immediate the delivery of possession is essential. The transaction becomes final immediately upon delivery. When the consideration is paid, it assumes the character of a sale and is subject to preemption (*Shufa*). As in sale, either party can return the subject of the sale in case of a defect.

It has the following requisites:

- Delivery of possession is necessary.
- It is revocable until the *Iwaz* is paid.
- It becomes irrevocable after the payment of *Iwaz*.
- Transaction when completed by payment of *Iwaz*, assumes the character of a sale.

In general, *Hiba bil Iwaz* and *Hiba ba Shart ul Iwaz* are similar in the sense that they are both gifts for a return and the gifts must be made in compliance with all the rules relating to simple gifts.

X. Revocation of Gift

Although there is a tradition which indicates that the Prophet was against the revocation of gifts, it is a well-established rule of Muslim law that all voluntary transactions, including gifts, are revocable. The Muslim law-givers have approached the subject of revocability of gift from several angles. From one aspect, they hold that all gifts except those which are made by one spouse to another, or to a person related to the donor within the degrees or prohibited relationship, are revocable.

The Hedaya gives the reasons thus: "*The object of a gift to a stranger is a return for it is custom to send presents to a person of high rank that he may protect the donor; to a person of inferior rank that the donor may obtain his services; and to person of equal rank that the donor may obtain an equivalent and such being the case it follows that the donor has the power of annulment, so long as the object of the deed is not answered, since a gift is capable of annulment*".

The texts of Muslim law lay down a long list of gifts which are irrevocable. The contents of the list differ from school to school, and the Shias and the Sunnis have the usual differences. The Muslim law-givers also classify gifts from the point of view of revocability under the following two heads:

- Revocation of gifts before the delivery of possession
- Revocation of gifts after the delivery of possession.

Revocation of gifts before the delivery of possession:

Under Muslim law, all gifts are revocable before the delivery of possession is given to the donee. Thus, P makes a gift of his motor-car to Q by a gift deed. No delivery of possession has been made to Q. P revokes the gift.

The revocation is valid. In this case, it will not make any difference that the gift is made to a spouse, or to a person related to the donor within the degrees of prohibited relationship. The fact of the matter is that under Muslim law no gift is complete till the delivery of possession is made, and therefore, in all those cases where possession has not been transferred the gift is incomplete, and whether or not it is revoked, it will not be valid till the delivery of possession is made to the donee.

The revocation of such a gift, therefore, merely means that the donor has changed his mind and does not want to complete it by the delivery of possession. For the revocation of such gifts, no order of the court is necessary. Fayzee rightly says that this is a case of inchoate gift and it is not proper to apply the term revocation to such a gift.

Revocation after the delivery of possession:

Mere declaration of revocation by the donor, or institution of a suit, or any other action, is not sufficient to revoke a gift. Till a decree of the court is passed revoking the gift, the donee is entitled to use the property in any manner; he can also alienate it.

It seems that:

- all gifts after the delivery of possession can be revoked with the consent of the donee,
- revocation can be made only by a decree of the court.
-

The revocation of a gift is a personal right of the donor, and, therefore, a gift cannot be revoked by his heirs after his death. A gift can also not be revoked after the death of the donee.

According to the *Hanafi* School with the exception of the following cases, a gift can be revoked even after the death of the donee.

According to the *Hanafi* School, with the exception of the following cases, a gift can be revoked even after the delivery of possession. The exceptions to the same are:

- When a gift is made by one spouse to another.
- When the donor and the donee are related within the prohibited degrees.
- When the donee or the donor is dead.
- When the subject-matter of the gift is no longer in the possession of the donee, i.e., when he had disposed it off by sale, gift or otherwise or, where he had consumed it, or where it had been lost or destroyed.
- When the value of the subject-matter has increased.
- When the identity of the subject-matter of the gift has been completely lost, just as wheat, the subject-matter of gift, is converted into flour.
- When the donor has received something in return (*iwaz*).
- When the object of gift is to receive religious or spiritual benefit or merit, such as *sadaqa*.

The *Shia* law of revocation of gifts differs from the Sunni law in the following respects: First, gift can be revoked by a mere declaration on the part of the donor without any proceedings in

a court of law; secondly, a gift made to a spouse is revocable; and thirdly, a gift to a relation, whether within the prohibited degrees or not, is revocable.

XI. Unfair Gifts

Fear Allah and Treat Your Children Fairly: Allah has enjoined upon children to honour and respect their parents. He has made the parents' rights very great and has connected duties towards to parents to duties towards Him and the obligation to worship Him alone (*Tawheed*).

Allah says (interpretation of the meaning): "*Worship Allah and join none with Him (in worship); and do good to parents...*" [*Qur'an al-Nisaa' 4:36*]

And Allah has given the children rights over their parents, such as education and a good upbringing, spending on their needs, and treating them fairly.

One of the bad social phenomena that are to be found in some families is the lack of fair treatment towards the children. Some fathers and mothers deliberately give gifts to some of their children and not others. According to the correct view, this is a *haram* action, unless there is some justification for it, such as one child having a need that the others do not have, e.g., sickness; debt; a reward for memorizing the Qur'an; not being able to find work; having a large family; full-time studies, etc. The parent should have the intention when giving something to one of his children for a legitimate (*shar'iah*) reason-that he will do the same of any of his other children should the need arise. The general evidence (*daleel*) for this is the ayah (interpretation of the meaning): "*Be just: that is nearer to piety; and fear Allah.*" [*Qur'an al-Maa'idah 5:8*].

The specific evidence is the *hadeeth* narrated from *al-Nu'maan ibn Basheer* (may Allah be pleased with him), who said that his father brought him to the Messenger of Allah (peace and blessings of Allah be upon him) and said: "*I have given this son of mine a slave that I had.*" The Messenger of Allah (peace and blessings of Allah be upon him) said: "*Have you given something similar to all of your children?*" He said, "No." So, the Messenger of Allah (peace and blessings of Allah be upon him) said: "*Then take (the slave) back.*" (Narrated by *al-Bukhaari*; see *al-Fath*, 5/211). According to another report, the Messenger of Allah (peace and blessings of Allah be upon him) said: "*Fear Allah and be fair to your children.*" He said: so, he came back and took his gift back. (*al-Fath*, 5/211). According to another report, "*Do not ask me to bear witness to this, for I will not bear witness to injustice.*" (*Sahih Muslim*, 3/1243).

A male should be given the share of two females, as is the case with inheritance. This is the view of Imam Ahmad (may Allah have mercy on him) (*Masaa'il al-Imaam Ahmad li Abi Dawood*, 204). Imaam Ibn al-Qayyim explained it in detail in his footnote on *Abu Dawood*. Anyone who looks at the state of affairs in some families will note that some of those parents who do not fear Allah favour some of their children over others when it comes to gift-giving. This fills the hearts of the children with hatred towards one another and sows the seeds of enmity. A father might give gifts to one child because he (the child) resembles his paternal uncles, and withhold gifts from another because he resembles his maternal uncles; he might give to the children of one wife things that he does not give to the children of another; or he might put the children of one wife but not the children of another into private schools. This

will backfire on him, because in many cases the child who has been deprived will not honor his father in the future. The Prophet (peace and blessings of Allah be upon him) said to the man who had preferred one of his children over others in giving him a gift: *"Would you not like all of them to honor you equally?"* (Narrated by Imaam Ahmad, 4/269; Sahih Muslim, no. 1623).

One of the Salaf said: "Their rights over you are that you should treat them all fairly, and your right over them is that they should honour you."

Another way in which parents fail to treat their children fairly is when they bequeath something in their will to some of their children, or they give them more than the share allocated to them by *sharee'ah*, or they deny some of their children their inheritance. Some women bequeath their gold to their daughters and not their sons, despite the fact that it is a part of the inheritance, or a woman might state in her will that a gift given to her by one of her children should be given back to him after she dies, claiming that she is being kind to him just as he was kind to her. All of this is not permitted, because there is no bequest to an heir [i.e., one cannot bequeath something to one of the heirs whose share is dictated by *sharee'ah*]. Whatever was a part of the possessions of the mother or father who has died belongs to all the heirs and is to be shared out according to the laws enjoined by Allah.

Each parent should remind the other if he or she is not being fair and should stand firm on this issue, so that justice will be established. This includes referring matters to scholars as is indicated in the report which follows the *hadeeth of al-Nu'maan ibn Basheer* who said:

"My father gave me some of his wealth, and my mother 'Amrah bint Rawaahah said: 'I will not accept this until you ask the Messenger of Allah (peace and blessings of Allah be upon him) to bear witness to it.' So, my father went to the Prophet (peace and blessings of Allah be upon him) to ask him to bear witness to the gift he had given me. The Messenger of Allah (peace and blessings of Allah be upon him) said to him, 'Have you done this for all your children?' He said, 'No.' He said, 'Fear Allah and treat all your children fairly.' So, my father came back and took back his gift." (Narrated by Muslim)

It is not the right of anyone to "throw away" any property they have. If someone behaves irrationally, or in a way deemed to be detrimental to his own or his family's interests, then a decree may be issued by a court of law preventing that person from disposing with any property he owns. Any disposition with property should be clearly in the interest of the owner or his family.

In Islam, our right to our property is limited to our lifetime. It is not an absolute right, because all money and property belong to God alone. We are placed in charge of it by His will, and in accordance with His law. This is terminated the moment a person dies. He or she has no longer any claim over it. Hence, it is divided in accordance with God's law of inheritance, not according to wishes of the deceased. However, God has allowed us to dispose with an amount not exceeding one-third of our property by will. This is a gesture of charity He has granted us, so that we are able to do something with that money for our poor relatives who are not our heirs, or to other poor people or to serve some charitable purposes. The Prophet, peace be upon him, says: *"God has given you one-third of your property as part of His grace, so that you may give it away."*

If a man who was deathbed illness gave his property to someone through a deed of transfer by gift, who is not his heir, one third of his property, that would have been valid because it

would be within the provisions of the Islamic law of inheritance. But he gave him the entire house, which was perhaps all that he owned. Moreover, the man was ill and died without having recovered. The Prophet, peace be upon him, judged a similar case, when a man had freed six slaves he owned shortly before his death. He practically had no other money. His heirs put the case to the Prophet, peace be upon him, and he ruled that only one-third of his property could be dispensed with in this way. The Prophet, peace be upon him, freed two slaves and the other four were given to the man's heirs to be divided among them in accordance with Islamic law.

This shows that the argument if advanced by the beneficiary that the man was merely dispensing with his property is invalid. The man was ill, and he soon died. Hence, it is an action taken in the illness leading to his death. As such, it is to be reviewed and determined illegal. Indeed, you cannot give any one of your own children any extra portion of your property, other than what he or she may have as their share of inheritance, depriving the other heirs of their shares. Surely, if the beneficiary of gift who is not his legal heir or in case it is given to one of his sons, and he takes the house, he leaves the donor or his father in a difficult position on the Day of Judgment. Moreover, he will have to answer to God for a serious situation.

The Prophet, peace be upon him, says: *"I am only a human being and you put to me your disputes. Some of you may have a better argument over others. Let everyone reflect: If I give him something, which belongs by right to his brother, I am only giving him a brand of fire. He may take it or leave it."*

The donee/beneficiary in this case may have the better argument in the shape of the deed of transfer by gift. But the house is a brand of fire in his hand. If he takes it, it will definitely burn his hands. If he leaves it and gives it back to his the donee's or father's heirs as the case may be, he will get reward from God, which far outweighs what he gave up.

XII. Conclusion

The conception of the term gift and subject matter of gift has been an age old and traditional issue which has developed into a distinct facet in property law. Different aspects related to gift in property act and its distinction with the Mohammedan law and its implications has been the major subject matter of this article. In considering the law of gifts, it is to be remembered that the English word 'gift' is generic and must not be confused with the technical term of Islamic law, *hiba*. The concept of '*hiba*' and the term 'gift' as used in the transfer of property act, are different. Under Mohammedan law, to be a valid gift, three essentials are required to exist:

- Declaration of gift by the donor.
- An acceptance of the gift, express or implied, by or on behalf of the donee.
- Delivery of possession of the subject of gift.

The English law as to rights in property is classified by a division on the basis of immovable and moveable (real and personal) property. The essential elements of a gift are:

- The absence of consideration
- The donor

- The donee
- The subject-matter
- The transfer; and the acceptance

Thus, this striking difference between the two laws relating to gift forms the base of this project in understanding its underlying implications.

To conclude the researcher can say that, the gift is a contract consisting of a proposal or offer on the part of the donor to give a thing and acceptance of it by the donee. So, it is a transfer of property immediately and without any exchange. There must be clear intention by the donor to transfer the possession to the donee for a valid gift. It can be revoked by the donor. And the provisions for the same have also been mentioned.

The giving of gifts whether great or small is an act of benevolence, and is praised by Allah swt. Exchange of gifts has a profound bearing on creation of brotherly feeling among the people. Beside its social desirability and effect, the contract of gift also can be used as instrument of adjusting to certain extent the law of inheritance. For instance, the principle of exclusion which prevails in all the schools, and the absence of the right of representation cause much hardship. This can be adjusted through the application of the contract of *hibah*. For example, if a person has three sons and one of them dies in the lifetime of his father leaving behind children, these children are excluded from the inheritance of their grandfather by their uncles. Therefore, to solve this problem of the exclusion of the grandchildren recourse should be made to the *hibah* contract. It also can be used as an instrument by the banking system to enhance their financial activities by providing *Shra'iah* compliant incentives to the customers.

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