THE MEANING, NATURE AND ESSENTIAL ELEMENT OF GIFT (HIBAH)

18.1 The literal and technical meaning of hibah (gift)

The literal meaning of *hibah* is "gift," "donation" and "grant." The *wāhib* is called the donor and the *mawhūb lahū* is the donee, while the *mawhūb* is the donated property.

In its legal sense, *hibah* is a unilateral contract that requires an offer from the donor to transfer the entire corpus of his marketable property, that is present, immediately to the donee, and it requires performance from the donee in the form of taking possession.

18.2 The essential element (rukn) of gift

The essential element of gift is an offer from the donor and performance from the donee. The elements are thus two: (a) an offer from the donor and (b) the act of possession by the donee. There is no need of a formal acceptance by the donee. If the donee remains silent in the session of the contract, and takes over possession, the gift is valid. Acceptance of the gift is required when the donee is already in possession of the property, as in the case of a bailee to whom a gift is made by the owner.

As this is a unilateral contract, there is a disagreement among jurists whether the term *hibah* (gift) applies to offer alone or to both offer and performance in the form of possession. It is different from the contract of sale, a bilateral contract, in which the essential element (*rukn*) applies to both offer and acceptance. The disagreement is illustrated by the case where a person makes a vow that he will make a gift to someone, but then does not. He breaks his vow if the word *hibah* applies to the offer alone, but does not break it if the term includes acceptance through possession on the part of the donee.

18.3 The distinction between gift and concepts related to gift

The following concepts need to be distinguished from gift:

1. *Ṣadaqah* (charity): This is exactly like gift, but is done solely for seeking nearness to Allah and without expectation of a reward or compensation from the individual. The entire corpus of the property is transferred and possesion is required. The concept is explained later.

2. *'Āriyyah:* Where the corpus is not tansferred to the other party, only the *manfa'ah* (usufruct, benefit) is transferred, by delivering the property to the other party for use, the contract is called *'āriyyah*. It is the permission to use property. The corpus is not destroyed by use and is returned after use to the owner. It is called commodate loan. Certain forms of bailment fall under this concept.

3. *Qarḍ* (loan): This is exactly like *'āriyyah* above, with the difference that the corpus given for use is consumed or destroyed through use; like wheat, money and so on. The consumption or destruction of property gives rise to the liability (*ḍamān*) of returning the principal (*aṣl*) to the owner in the form of identical substitute, like wheat for wheat or *dīnārs* for *dīnārs*.

4. *'Umrā*: This term is not to be confused with *'umrah* (pilgrimage). When a person says to another, "This house is yours for your life; if I die before you it will be yours permanently, but if you die before me it will revert to me." The Ḥanafī school treats this as a gift proper invalidating the stipulation of time, which is life of the donee in this case.

5. *Ruqbā*: This is exactly the same as *umrā* above, except that in some cases it may admit of a period shorter than life, implying that the owner can take it back when he likes. The Ḥanafī school treats this as a gift proper invalidating the stipulation of time, which is life of the donee in this case.

6. *Minḥah* (grant); *nahl* (gift); *'aṭī'ah* (grant): These terms are all given the rule of *hibah* by the Ḥanafī school.

18.4 The contract of gift is a weak contract and therefore *ghayr lāzim* (terminable)

Hibah (gift) is a valid (*jā'iz*) contract and its permissibility is proved through the Qur'ān and *Sunnah*. A gift is given for three reasons: (i) it is given to a close relative due to affection for the relative; (ii) it is given to a stranger without demanding a return gift, but with the expectation of a return gift; and (iii) it is given to a stranger with the stipulation of a return gift or counter-value. The reasons stated in points (ii) and (iii) make it a weak contract, therefore, it is considered revocable or terminable, which is called *ghayr lāzim* in *fiqh*.

The contract is not terminable unilaterally and is based upon the consent of the donee or the decree of court. Further, it is confined to case (ii) in the previous paragraph. In this case too a number of restrictions are imposed that prevent it from becoming terminable. This will be explained below.

18.5 The offer cannot be made contingent, linked to the future or pertain to non-existent property

The definition of *hibah* (gift) and the distinctions drawn indicate that the offer of gift cannot be made dependent upon time or linked to the future, or pertain to property that will be created in the future. A gift is the immediate transfer of ownership of property that exists and is present. This may have consequences for actionable claims (choses in action).

THE CONDITIONS OF GIFT (HIBAH)

19.1 Conditions Pertaining to the Donor

19.1.1 The donor must be sane and a major having the legal capacity to make a gift

Hibah (gift) is an act of voluntary donation (*tabarru'*), therefore, it must be made by one who has the legal capacity to make a donation. The person who has such a capacity is sane and a major.

A gift made by a minor or by an insane person is not valid, as it as an act of incurring loss and they do not have the capacity to undertake such an act, just as they do not have the right to grant divorce or to emancipate a slave.

19.1.2 The father as *walī* does not have a right to make a gift on behalf of a minor or an insane person

The father (as *walī*) does not have the right to make a gift on behalf of his son or on behalf of an insane person, as it is an act of loss without a counter-value.

If the father stipulates a counter-value (*'iwad*) for making such a gift, it is still not permitted according to Abū Ḥanīfah and Abū Yūsuf, but Imām Muḥammad said that it is permitted if he stipulates a counter-value.

19.2 Conditions Pertaining to the Property and Donee

19.2.1 The property must be present at the time of making the gift

The property must be present in physical form at the time of making the gift. It is not permitted to gift property that will be present at a future date like the future fruit of a tree or the offspring of an animal. It is also not permitted to gift things like an existing foetus of an animal or the milk in the udder of a cow, because of uncertainty, even if the animal is delivered to the donee to obtain the gifted thing. The rule is applied strictly and even flour in wheat that is present is not allowed.

This rule is different from the rule for bequest (*waṣīyah*) as associating something to what is after death is permissible, and possession is not a condition in bequest. The rule is also different from the case of

a debt claim gifted to a third person for obtaining possession, which is permitted by way of *istiḥsān* as discussed below. An argument similar to debt is given for wool on the back of the animal if the animal is delivered for recovery and shearing. This is done on the basis of *istiḥsān* as wool on the animal or milk in the udder is not considered wealth (until separated).

19.3 The property must be marketable wealth, that is, it must have some value according to the law

The property must be marketable wealth, which has a value in the eyes of the law. Thus, a gift of things that are not property at all, like a freeman, carrion, blood, and swine, is not permitted. These things have no legal value for a Muslim.

The property must be wealth in the absolute sense and not wealth in part and not so in part, like slaves who are partly free: *umm al-walad*, *mudabbar* and *mukātab*. Things that are not assigned a value under the law, like wine, that is, not marketable by Mulims cannot be gifted either. Wine can be converted into vinegar, but in its state as wine it has no value.

19.4 The donor must own the property whether it is property in the physical sense or debt

The donor must own the property that is the subject of *hibah* (gift). Property not owned by the donor cannot be the subject of a gift without the permission or authorisation of the owner.

Property which is claimed by another or to which the right of a third person is attached, like the right of a mortgagee, cannot be the subject-matter of a gift.

A debt claim can be the subject-matter of a gift if it is made to the debtor himself. A debt claim may be gifted to a person other than the debtor for taking possession of the debt from the debtor. This is permitted on the basis of *istiḥsān*. Analogy (*qiyās*) dictates that it should not be permitted even if the credito/donor has granted the donee permission to take possession, because possession is an essential condition of a gift and being a debt makes posession probable. This is distinguished from the case of the debtor to whom the gift is made as he already exercises possession over the debt. The basis for *istiḥsān* is that there is a possi-

bility of delivery because the debtor is compelled to pay his debt under the law.

Equity of redemption: It was held by some courts in British India that a gift may be made by a mortgagor of his equity of redemption. Equity of redemption is the right of the mortgagor to redeem his property by paying off the mortgagee and to prevent foreclosure. The correct position appears to be that a gift of equity of redemption is not valid when the property is in the possession of the mortgagee. Constructive possession is not enough for purposes of gift. It is also difficult to hold that possession can be delivered when the right of a third party (*istiḥqāq*) is attached to the property, because this brings into question the unfettered ownership of the donor himself, as stated above. Further, the rules of equity of English common law cannot restrict the rules of Islamic law.

19.5 *The validity of gift of actionable claims or choses in action depends upon the ijtihād of the school*

The permissibility of a gift of debts may lead to the conclusion that actionable claims—like shares, copyrights, patents, trademarks and so on—may also be permitted. The difference between debt and actionable claims is that debt is recognised as wealth by the school whereas actionable claims or "choses in action" as they are called are pure rights that have not been declared valid by the school as yet.

The opinions rendered so far about the legality of actionable claims as property under Islamic law are based not upon reasoning from within the school, but on "picking and choosing" opinions from the other schools and giving rational arguments. Such a methodology is not valid. Further, the arguments advanced by modern scholars based upon such reasoning are flawed. Till such time that the school approves the validity of actionable claims as *māl* (property), gifts of such claims should be considered void.

19.6 *The property must permit physical possession; gift of undivided property (mushā') is not permitted*

Gift of undivided property (*mushā'*) is not allowed in things that can be divided or partitioned. It is allowed in undivided property that is not subject to division or partition, like a horse, a vase and other such things. According to Imām al-Shāfi'ī, it is allowed in both cases.

The prohibtition is based upon traditions and the fact that the essential condition of possession cannot be met to complete the concept of a gift. The permission in those things that cannot be divided is based upon necessity (*ḍarūrah*), but there is no such necessity where the thing can be divided or partitioned. Further, if it was allowed in such things, ownership would stand transferred to the donee, and the nature of a gift would change to one of a contract of liability (*ḍamān*) as the donee would demand division; and if during division the property is destroyed, the donee would have the right to demand compensation. In things not subject to division this problem will not arise.

19.7 The statement that a gift of mushā property is to be treated as an irregular (fāsid) gift is incorrect

It is stated in certain codes made during British times in India that the gift of *mushā'* property that can be partitioned is to be treated as an irregular (*fāsid*) gift till such time that division is undertaken and property delivered, after which it will be deemed to be valid. This statement is incorrect as it ignores the basis of a *fāsid* contract.

Possession is the essential element (*rukn*) of a gift, and when the *rukn* is missing the contract is void. Such a contract cannot be rectified later. The correct position is that the gift is suspended (*mawqūf*) till such time that possession is delivered. The gift is not complete in the state of suspension, that is, title does not pass to the donee till possession is delivered.

19.8 The property must be taken into physical possession by the donee

It is an essential condition that the property gifted be taken into physical possession by the donee. Till such time that the donee takes it into possession the property remains in the ownership of the donor, who may dispose of it as he likes. Imām Mālik (God bless him) said that possession is not a condition for a gift and the donee comes to own it prior to taking possession, as in the case of a sale.

Possession in order to be valid must be taken with the permission of the donor. Possession with the permission of the seller is required even in a sale where the buyer has already become the owner of the sold

property, but in the case of a gift possession is an essential element and the donee is not the owner, therefore, permission is deemed necessary.

Possession must be taken when the property is not "occupied" by other property or something else, for example, in the possession of a house the house should be empty and not filled with the assets of the donor or someone else. In the case of a truck loaded with goods, the goods are to be off loaded when they are not the subject of the gift.

Tenants: In the light of the previous rule, a house in possession of tenants, that is, "occupied" by tenants, cannot be the subject of a gift, unless the tenants agree that they are holding the house on behalf of the donee and agree to pay the rent to the donee.

For possession to be valid, the donee must possess the legal capacity for taking property into possession. Thus, possession by an insane person or a minor who cannot discriminate is not valid. Majority is not a condition, and a discriminating minor is permitted to take possession on the basis of *istiḥsān*, because this is an act that is pure benefit. Gifts for the insane and minors can be taken into possession by the *walī* or by a foster parent.

When the property is already in the possession of the donee, such a possession is not to be renewed and the donee becomes the owner by virtue of the donee's offer alone. Examples of such cases are the bailee, mortgagee, and the borrower by way of *'āriyyah* and *qarḍ* or any other person who is exercising lawful possession over the property. Such possession is also allowed in the case of possession by a usurper of property or one who is in possession due to a *fāsid* contract.

Possession is not necessary when a father makes a gift of property to his minor child. It is necessary when the gift is made to children who are major. According to Abū Yūsuf, justice demands that when a father gives gifts to his children he should treat them equally with respect to gifts and the amount of gifts; giving equally to both males and females. Imām Muḥammad maintains that justice demands the giving of two shares to the male and one to the female, according to the rules of inheritance. The father has the right to deny gifts to some of his children at his discretion, because he is the owner of the property and there is no restriction on him with respect to voluntary donation.