Will

- Wills or bequests or Wasiyat derive their authority and sanctity from the sacred texts of the Quran.
- "It is prescribed to you when death approaches any one of you and that he is to leave any wealth behind, he should bequeath equitably to his parents and kindred." (Q. 2:130)
- “And such of you as feel the approach of death and are to die and leave wives behind shall bequeath for their wives a year's maintenance without requiring them to quit their homes." (Q. 2: 240)
- **Darrul Mukhter**: ‘Will is an assignment of property to take effect after one’s death.’

- **Hedaya:** “Wasiyat means an endowment with the property or anything after death—as if one person should say to another, ‘give this article of mine, after my death, to a particular person.”
- **Tyebji:** -- “The legal declaration of the intention of a Muslim with respect to his property, which he desires to be carried into effect after his death.”

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Capacity to make a Will

- The testator must be:
- (i) In the full possession of his senses at the time. A will made by an insane person is not valid. If he makes it at a time when he was in full senses but again relapses to insanity and that condition lasts for at least six months, the bequest will become invalid, otherwise not.
- (ii) he most be of the age of majority.
- (iii) he must not be indebted to an extent that his debt is equivalent in value to his whole property.
- (iv) he must not be acting under compulsion or under influence or in jest.
- (v) he must be a free person.

whose favor a Will can be made

- A bequest can be only to the extent of a third of the testator’s property but not to any further extent.
- A bequest to any amount exceeding a third of the testator's property is not valid.
- In proof of this is the Hadis as reported by Abu Wakas: “In the year of the Conquest of Mecca, being taken so seriously ill that my life was despaired of, the Prophet of God came to pay me a visit of consolation. I told him that by the blessing of God I had a great estate but no heir except a daughter; I wished to know if I might dispose of it all by will. He replied, 'No' and when I went on asking if I might bequest two-thirds or one-half' he replied again in the negative, but when I asked,” If I do so to the extent of one-third, he answered, 'Yes, you can bequeath one-third of your property by will, and a third part to be disposed of by will is a great portion; and it is better that you should leave your heirs affluent than in a state of poverty which might oblige them to beg of others."

Revocation

- A Will is revocable. It may be revoked at any time even during the last illness of the testator. The revocation may be either express or implied. It is express when the testator revokes it in express terms. It is implied when the testator indicates by his conduct or subsequent acts that he does not intend to maintain the legacy like [an] addition to the subject of the bequest or extinction of the proprietary right of the testator.

A bequest by insolvent persons is void

- If a person is deeply involved in debt and bequeaths any legacies, the bequest is unlawful and of no effect. Debts have a preference to bequests, for the discharge of debt is obligatory while bequests are gratuitous and voluntary. However, if the creditors relinquish their claims, the obstacle is removed and the bequest becomes valid.
- **Usufructuary Wills**
- If a person bequeaths the use of his house either for a definite or indefinite period, such [a] bequest is valid. In that case the house will be consigned to him if it does not exceed one-third of the property of the testator. This is not lawful for the usufructuary legatee [the one having the use or enjoyment of something to whom a legacy is bequeathed] to let it out on hire. If the bequest is for a limited term and the legatee dies before the expiration of the limited term, the article bequeathed in usufruct immediately reverts to the heirs of the testator. In a bequest of the use of an article to one and the substance of it to another, the legatee of usufruct is exclusively entitled to the use during his term. A bequest of the fruit of a garden implies the present fruits only, unless it is expressed in perpetuity.
- **Lapse of a Legacy**
- If the legatee does not survive the testator, the legacy will lapse and form a part of the estate of the testator.

Essentials of a valid will

- Following are the essentials to a valid will under Islamic law.
  (i) Declaration by the testator.
  (ii) Testator must be compentent to declare.
  (iii) The subject of the will must be valid.
  (iv) It must be within limits imposed on the testator. Not more than 1/3 of the entire property of the testetor.
  (v) The legatee must be competent to take the possession of the property.
  (vi) Offer by the testator.
  (vii) Acceptance by the legatee.
- Will can not be made in favor of a heir.

Distinction between will and gift (Basic)

- A will is a mere declaration of an intention, so long as the testator (i.e. person who makes the will) is alive; a declaration that may be revoked or varied according to the variations of his intention; a disposition that requires the testator”s death for its consummation; it is ambulatory and without any fixed effect until the happening of that event.
- On the other hand, a gift is a transfer of property that is voluntary, gratuitous and absolutely conferring immediate rights. Whether it should be a testamentary instrument or a non-testamentary instrument will depend on two well-known tests: whether under the instrument concerned, the disposition takes effect during the lifetime of the executant or whether it takes effect after his demise.
- High Court, Bombay has in the matter of **Bhagchand vs Trimbak Ramchandra AIR 1947 Bom 49** laid down tests to determine whether an instrument is a will or a gift.

Difference between gift and will:

I. As to completion:
Will is aecuted after the death of the testator.
Gift is completed during the life time of the donor.
II. As to condition:
Will is dependent upon a condition i.e. the death of the testator.
Gift is operated immediately.
III. As to revocation:
Will can be revoked at any time before the death of testator.
Gift after the delivery of the possession is usually irrevocable.
IV. As to limitation:
In will the right of making a will is limited in two ways.
In gift the right of donor to gift is unrestricted.
V. As to existence of subject matter:
It is not necessary that subject matter of the will must be exist at the time of making will.
The subject of gift must be in existence at the time of making gift.
VI. As to delivery of possession:
Delivery of possession is not required in the will.
In a gift there must be delivery of the possession of the property to the donee.
VII. As to doctrine of mushaa:
The doctrine of Mushaa has no application in case of will.
The doctrine of Mushaa is applicable in case of gift

Difference between gift and will

- **VIII. As to acceptance:**
  In will acceptance by the legatee in not necessary.
  In gift acceptance by the legatee in necessary.
  IX. As to registration:
  Registration of will is optional.
  Gift must be registered under the registration act.
  X. As to insanity:
  The subsequent insanity of the testator makes the will void.
  Gift after the delivery of the possession is irrevocable on the ground of insanity.
  XI. As to consideration:
  A will is always without consideration.
  In some case there is consideration in gift.
  7. Conclusion:
  To conclude i can say that the gift is the transfer of property which is made immediately and without any exchange by one person to another will is dependent upon a condition lies the death of the testator. the gift and will are two different things under Islamic law.