



Examining Cash Waqf and Its Usage: Divergence from the Waqif's Will as a Use Case

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Abstract: Immovable assets such as land and building, etc., are no more a common asset in creating a Waqf. At present, the practice has progressed from its traditional manner to an innovative method in which the specific purpose (Maqāṣid Khāṣṣah) of Waqf that benefit the Wāqif (endower) and subject matter of Waqf, and general purpose that benefit the society, could be attained easily and successfully. One of the methods repeatedly discussed and applied in contemporary times is the cash Waqf model. The model is a new form of Waqf presenting an innovative and effective tool for the practical delivery of its advantages according to the purpose of Waqf for which it is constituted. Its application in some situations has been perceived as confronting with a number of Sharī'ah and operational issues that need answers. The usage of cash Waqf against the Wāqif's intention as presented in the Waqf deed or Sighah is one of the issues that needs be addressed. Despite the significant role of cash Waqf in socio-economic development, there has been a substantial gap in the literature available due to continuous developments in the area which calls for more academic research. Thus, this study examines the usage of cash Waqf against the Wāqif's will and its reasons. This study is qualitative, in which it employs library research skill as a method of research.

Keywords: Cash Waqf; Wāqif; Waqf Deed; Sighah; Maqāṣid Khāṣṣah; Maqāṣid Āmmah.

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1. Introduction

Waqf, being an engine of growth, has a long history in the Islamic civilization. It has played (and, in most cases, continue to play) a pivotal role for the advancement of socio-economic wellbeing of Muslim community. Many phenomenal architectures as well as countless services, all over the worlds, from the Atlantic to the Pacific, throughout the centuries, have been funded and maintained by *Waqf* (Cizakca, 1998). Al-Azhar University in Egypt, University of Cordova in Spain and Al-Noori Hospital in Damascus are among few public services that were financed by *Waqf* fund. Some *Waqf* institutions have even survived for considerably longer than half of millennium, even more than a millennium for some (Cizakca, 1998).

Despite these overwhelming achievements, the history of *Waqf* has also experienced failures and turbulences. There were vast idle *Waqf* lands, throughout the centuries,

resulting from management and administration failures. Many people, due to lack of understanding the dynamic aspect of *Waqf*, perceive *Waqf* as mostly associated with properties related to religious and educational purposes only. This is for that reason various new measures have been taken to resolve the problems faced by the *Waqf* institutions. One of the mechanisms frequently discoursed and implemented in the recent, even since 15th century is the cash *Waqf* model. Conceptually, cash *Waqf* is "the devotion of an amount of money by a founder and the dedication of its usufruct in perpetuity to the prescript purposes" (Mohsin, 2009). It is also known as the dedication of some money from one's possessions as *Waqf* based on cash amount and contributing it to the benefit of people generally or a community particularly.

Cash *Waqf* over the last few decades—even since centuries—has become a new phenomenon in many jurisdictions. Some countries, like Malaysia, Indonesia, Singapore, etc., have developed cash *Waqf* as an important mechanism for wealth distribution and source of financing. The model is a new generation of *Waqf* offering innovative and effective mechanism for the functional, practical delivery of its benefits in line with the objective of *Waqf* for which it is legislated. Its implementation, however, encounters a number of *Shari'ah* and operational issues that require answers. Thus, an in-depth research is needed to critically examine the conditions of *Wāqif* in cash *Waqf* in various jurisdictions and the issues surrounding its practice. A cursory review of the literature finds that there is a lack of research in this aspect due to the fact that it is a relatively new area which calls for more academic research.

2. Materials and Methods

According to basic principles of Islam, human being is free in what he possesses, in which he spends and the way he spends as long as it is in line of *Shari'ah*. Likewise, an individual has a right to spend his/her property for the righteousness and benevolence upon his/her conditions, such as, donation for the particular students or for the poor and needy from a specific family or tribe. He/she may also specify the type of benefit that is derived from the corpus of the endowment, such as the confinement of the benefit of shops for the sale of Islamic books, etc. Furthermore, they can design the amount of each beneficiary and characters of *Mutawallis* for the management of *Waqf* (Abu Zuhrah, 1972).

This is supported by *Hadith* of 'Umar (R.A) in which he donated for different categories of beneficiaries, such as, for the needy and poor, relatives, etc. Additionally, he allowed *Mutawalli* to take his/her portion as per custom (Al-Tirmidhi, 1975). This act of 'Umar (R.A) demonstrates that conditions of *Wāqif* to be fulfilled as long as these are in line with *Shari'ah*. Otherwise, there is not any benefit to stipulate the conditions by 'Umar (R.A).

Therefore, the majority of *Fuqahā* from all for *Madhab* of school states that conditions of *Wāqif* would be respected as long as it is not in contradiction of *Shari'ah* (Ibn al-Qayyim, n.d; Abu Zuhrah, 1972). This is due to the verse of Qurān "O you who believe, fulfill the contracts" (Al-Quran, 5:1), and due to the *Hadith* of Prophet (PBUH) "Reconciliation is allowed among the Muslims, except for reconciliation that makes the lawful unlawful, or the unlawful lawful. And the Muslims will be held to their conditions, except the conditions that make the lawful unlawful, or the unlawful lawful" (Al-Tirmidhi, 1975)."

In this regard, Al-Wanshrisi from Maliki School says that: "*Mutawalli* has to take into consideration the purpose of the party making the *Waqf* and to abide by these conditions. Hence whatever was specific to this *Waqf* should not be used for any other type of *Waqf*" (Al-Naji, 2006). Furthermore, very famous slogan adopted by classical *Fiqh* "the conditions of the *Wāqif* are similar to the texts of the legislator" demonstrates the value attached to the stipulations of donor of *Waqf* in *Fiqh* (Kahf, 1999).

3.1. Subsection

Importantly, there are three types of conditions which are generally stipulated by *Wāqif* which are as follows:

- a) Conditions which are prohibited by *Sharī'ah* either in *Tanzīhī* way or *Tahrīmī* way. For example, *Wāqif* stipulates that his daughters cannot benefit from subject matter of *Waqf*, if they get marriage, or he stipulates that subject matters of *Waqf* would be repaired from the property of beneficiaries not from *Waqf* properties, or he asks *Imām* or *Muazzin* of mosque (which was donated by him) to leave some *Sunan* of *Ṣalāh* or *Azān*, etc (Ibn Taimiyyah, 1978; Ibn al-Qayyim, n.d).

As per Ibn Taimiyah, this type of conditions is void as per agreement of jurists because this is against the *Hadīth* of Last Prophet (PBUH) in which He said: "What about those people who stipulate conditions which are not in Allah's Laws? Whoever stipulates such conditions as are not in Allah's Laws, then those conditions are invalid even if he stipulated a hundred such conditions²(Al-Tirmidhi, 1975)."

This *Hadīth* clearly demonstrates that conditions which are against Quran and *Sunnah* cannot be accepted, though, it is stipulated thousands of times. Ibn Taimiyah further says that the agreed condition could not be prohibited in itself but it is against the purpose which directed by *Sharī'ah* (Ibn Taimiyah, 1987). And according to Ibn al-Qayyim, only those conditions can be fulfilled which are obedience to Allah (SWT), and which are in favor of human being. Apart from these conditions cannot be fulfilled in *Sharī'ah* (Ibn al-Qayyim, n.d).

- b) Condition which is neither prohibited in *Tanzīhī* way or *Tahrīmī* way nor recommended, and permissible for both the sides. For instance, *Wāqif* has donated for *Madrasah* and stipulated to pray in particular place of this *Madrasah*, which has not a specific reward like mosque. Some jurists considered as void and it should not be acted upon. Likewise, in case where *Wāqif* stipulates valid conditions which are in accordance Islamic law, however, these conditions are very difficult to act upon. These conditions would be considered as void (Ibn Taimiyyah, 1978; Ibn al-Qayyim, n.d).
- c) Conditions which are obedience to Almighty, such as *al-Wājibāt* and *Mustahabbāt* in *Sharī'ah*. This type of conditions should be fulfilled as much as possible. According to Ibn Taimiyah and Ibn al-Qayyim, this type of conditions will be fulfilled (Ibn Taimiyyah, 1978; Ibn al-Qayyim, n.d).

It should be remembered that in the following discussion whenever we talk about the condition of *Wāqif*, we refer to the third section that is the conditions which are obedience to Almighty, or at least, a condition that does not contradict Islamic law or a condition that does not oppose the objective of *Sharī'ah* (*Maqāṣid al-Sharī'ah*) regarding the *Waqf*.

2.2 The General and Specific Objectives of Waqf

Waqf along with its all forms contributes to the realization of its specific purposes that benefit the *Wāqif* and subject matter of *Waqf*, and its general goals that benefit the society, which are as follow;

2.2.1 Specific Objective of Waqf

It is represented in the specific interests of *Wāqif*, which are as follow;

1. It is represented in the interests that benefit *Wāqif* in closeness to Allah (SWT) and obtaining the reward in this world and the hereafter.
2. It is represented in the blessing of Allah (SWT) in the wealth, and the purpose of growth is achieved in the wealth, and it is protected with the facilitation of Allah (SWT).

2.2.2 General Objective of Waqf

It is represented in the general interests that are beneficial to society, which are as follow;

1. **The purpose of solidarity in cooperation between the rich and the needy:** *Waqf* is one of the means that has been established to achieve solidarity among Muslims in financial needs as a voluntary way, along with other means that have been legislated on the obligatory aspect such as zakat, inheritance and etc.
2. **The purpose of justice in spreading the wealth:** *Shari'ah* seeks to achieve the goal of financial justice among the people in the distribution of wealth through various means, including sales, rents and other types of trade, which are means that pervade people's need to achieve the necessities of their daily living.
3. **The five essentials (*al-Dharūriyyāt al-Khamsah*):** This is in terms of developing interests related to religion, self, mind, offspring and wealth in the lives of people. This is achieved through the beneficiaries of the *Waqf*, i.e., spending the *Waqf* funds as stipulated by the *Wāqif*, which vary according to the diversity of their areas of life and their needs. And it should be taken into consideration that moveable property (cash *Waqf*) can contribute towards achieving all these objectives of *Shari'ah* as immovable property (general *Waqf*). Remarkably, these objectives are easily achievable throughout the cash *Waqf* compared to general *Waqf*, as it can be realized in the characteristics of cash *Waqf*.

Regarding the acceptance and breaching the conditions of *Wāqif*, it should be noted that if there is a conflict between general objective of *Waqf* and specific objective of *Waqf*, the first category always will be preferred as it is discussed in the *Maqāṣid al-Shari'ah*.

2.3 Stipulation as per AAOIFI

As per AAOIFI (2020), the endower may stipulate any condition and it should be abided by provided a) the condition is not against *Shari'ah*, b) it does not prevent any the rulings of *Waqf*. The prevailing customs may be observed while understanding the conditions stipulated by the endower. These types of conditions are referred as valid conditions (*Shurūṭ Ṣahīḥa*).

However, as per AAOIFI, it is void to stipulate in the *Waqf* a) a condition which is prohibited (e.g., depositing the *Waqf* proceeds in an interest-bearing account or extending conventional financing to invest cash *Waqf* accounts), b) a condition which adversely interferes with the *Waqf* (e.g., non-removal of the trustee despite any reason), c) a condition which poses as an obstacle to the interest of the *Waqf* (e.g., paying the beneficiary at the cost of necessary repairs).

2.4 Use of *Waqf* against *Wāqif's* Will

It is well known that *Waqf* is perpetual charity (*Ṣadqah Jāriya*) which aims to eliminate or reduce the poverty and flourish the *Ummah* in terms of religious values and socio-economic welfare without looking at the worldly benefit. For the achievement of this purpose and development of *Waqf* Institution, there are many rules and regulations in Islamic Law. Similarly, Islamic jurists have given more concentration to achieve the objectives of this institution rather they respected the conditions of *Wāqif*. Hence, conditions of *Wāqif* which go against this objective, would not be respected, and it will be referred to the objectives of *Sharia* (legislator) (Al-Naji, 2006). Furthermore, the condition of *Wāqif* will not be respected if it goes against the objective of *Shari'ah* regarding the *Waqf*. This is because the objective of *Wāqif* is to get benefit from the subject matter of *Waqf*, and this objective is specific with the *Wāqif*. Hence, the specific objective will not be respected if it goes against the general objective of *Waqf*.

However, some jurists particularly from *Shāfi'ī* school of thought, totally denied violating the conditions of *Wāqif*, though, this harms the *Waqf* property. Importantly, this prevention is not only limited to the immovable property, rather it is extended to movable property, such as animals and other materials (Abu Zuhrah, 1972). In this regard, *Māwardī* says that: "if *Waqf* property is damaged or ruined, neither it is allowed to sale all the property nor any of its portions, because this property is declared as *Waqf*

in which, the ownership transferred to the Almighty” (Al-Naji, 2006). Furthermore, Shirāzī says that: “if someone donated tree of dates, and it got drained..., in this case, jurist have different opinions, a) it is not allowed to sale it due to above-mentioned reasons, b) it is permissible to sale it, because there is no hope to get the benefit from this tree” (Al-Shīrazī, n.d).

Due to this strictness in Shāf’āī school regarding the violation of *Wāqif’s* conditions, Abu Zohra said that: “this type of prevention by some Shāf’āī jurists pertaining to *Istibdāl* (substitution) causes to destroy the role of *Waqf* institution...” (Abu Zuhrah, 1972). Abu Zohra further said “the rulings of Imām Aḥmad were less restrictive and were lenient in selling *Waqf* so other prospects can be substitute them. Hence, substitution way is broader than Mālik and Shāf’āī despite it is not broader than Imām Abu Hanifah’s view on the same (Abu Zuhrah, 1972). In this sence, Imām Karkhī mentions: If property got damaged without having any benefit, it is allowed to sell and buy new item instead of first one. Likewise, if the horse which is donated for the war is incompatible for war, it is allowed to sell and buy new compatible horse” (Ibn Qudāmah, 1968). This statement of Imām Karkhī further elaborated by Ibn Qudāmah that: “in case of damage of *Waqf* property, this declaration allows to sell and buy new item instead of previous weather new one is from same genus and category of previous item or not. This is due to that the objective of *Waqf* is *Manfa’ah* which helps poor and needy, not the genus and category. However, this *Manfa’ah* will be spent for the same objective, which was designated for first *Waqf*, because it not permissible to change the direction of *Waqf* as long as it can be practiced...” (Ibn Qudāmah, 1968).

Ibn Qudāmah further supports this view from the *Hadīth* of Prophet (PBUH) that “A woman said to her husband: Let me perform *Hajj* along with the Messenger of Allah. He said: I have nothing on which I can let you perform *Hajj*. She said: You may perform *Hajj* on your such-and-such camel. He said: That is dedicated to the cause of Allah, the Exalted. He then came to the Messenger of Allah (PBUH) and said: My wife has conveyed her greetings and the blessings of Allah to you. She has asked about performing *Hajj* along with you. She said (to me): Let me perform *Hajj* with the Messenger of Allah. I said (to her): I have nothing upon which I can let you perform *Hajj*. She said: Let me perform *Hajj* on your such-and-such camel. I said: That is dedicated to the cause of Allah, The Exalted. He replied: If you let her perform *Hajj* on it that would be in the cause of Allah”³. (Al-Zailai, 1997).

In this *Hadīth* Prophet (PBUH) changed the direction of *Waqf* from the war to the *Hajj*, though, this change is temporal not perpetual due to the possibility that the camel will be designated for the war as it was in previous, when she comes back from *Hajj*.

Remarkably, Imam Ibn Taimiyyah extended the view of Ibn Qudāmah from need (*Dharūrī*) to necessity (*Hājī*) and also for a known interest (*Maṣlahah Rājiḥa*). He says: “as far as the substitution of *Mnzoor* and *Mawqoof* is concerned to better of them, it will be categorized in two types:

- a) Substitution for need and necessity (*Dharūrī* and *Hājī*), for example, if the horse which is donated for the war is incompatible for it, it would be sale and new compatible horse will be purchased instead of that... because the rule is that “substitution is allowed if the objective cannot be achieved”...
- b) Substitution for known interest, for example, substitution of scarifying animal (*Hady*) to better than it, or substitution of *Masjid* to new *Masjid* which is more suitable for the people of particular city. This type of substitution is permitted by Imam Ahmad and other jurists, due to the case of ‘Umar (R.A) in which he orders to transfer the old *Masjid* of Kūfa to other palace and old *Masjid* was declared as a Market”... (Ibn Taimiyyah, 1987).

Ibn Taimiyyah further argued that “if the substitution of *Waqf* property is more beneficial than its present condition, it is allowed by Abu Thaur and other jurists to

substitute this property to other property which is more suitable for the beneficiaries. And this is also an analogy of the statement of Imām Aḥmad pertaining to the substitution of *Masjid* from one place to other for the known interest" ... (Ibn Taimiyyah, 1987).

This became clear from previous discussion of Ibn Qudāmah and Ibn Taimiyyah that in Ḥanbalī school of thought, *Waqf* along with both movable and immovable categories can be sale for need (*Dharūrat*), necessities (*Ḥājī*) and for known interest (*Maṣlahah Rājihah*). The known interest further includes the situation where present *Waqf* is less beneficial than in case of its substitution. Significantly, in case of substitution, whatever would be purchased instead of first *Waqf*, would be permissible as long as it is beneficial for the beneficiaries, without realizing the genus and category.

This is related to Ḥanbalī's view of substituting the *Waqf* and breaching the condition of *Waqf*. Many of Mālikī in Andalus have no objection if *Wāqif's* conditions are not met in non-masjid asset, if there is a pressing necessity (*Dharūrat Mulji'ah*) or there is known interest (*Maṣlahah Rājihah*) (Al-Naji, 2006).

In this regard, both Imām Mālik and Ibn al-Qāsim are with the opinion that if the horse which is donated for war, got older and there is a fear of being damaged, this is allowed to sell this horse and buy new horse (Mālik, 1994). Qādhi Abd al-Wahhāb explained this statement that "if there is no benefit by remaining of the horse neither in present situation nor in future, there is no advantage to remain it, rather it is destruction of *Waqf* property, which is not allowed is *Sharīah*" ... Additionally, in many cases, Imam Ḥaṭṭāb declared a *Fatwā* over the substituting the direction (*Jihah*) of *Waqf* from one to another due to the *Maṣlahah*, by violating the *Wāqif's* intension. He further argued that there is a custom (*'Urf*) to take away the book (which is donated for a particular *Madrasah*) from *Madrasah* by the teachers, (due to custom, it should be allowed), however, it is stipulated in some books that it is not allowed to take it away from *Madrasah* (Al-Naji, 2006).

Similarly, when Ibn Marzooq from Mālikī school was asked about the land that is donated for the teacher with some conditions which cannot be realized in other, however, there are some students who do not fulfill those conditions, it is allowed to use this land for the students? He declared *Fatwā* to substitute the direction of *Waqf* to other close direction (Al-Naji, 2006).

Furthermore, Sheikh al-Fāsī from Mālikī school declared *Fatwā* over the substitution of toilets of mosque (which were built around the mosque) to be substituted by shops and get benefit from its return. He believed that this deed is recommendable in *Sharī'ah* (*Mandoob and Mustahab*) and to remove the smell and harm from this particular palace is considered as obligatory (*Wājib*). He further explained it by giving the reason that: there are three grounds for substituting the *Waqf*: obligatory (*Wājib*), prohibited (*Mamnū'a*) and disputed (*Mukhtalaf fih*). Obligatory substitution means which will cause harm, if it was left on its condition. Secondly, it is unanimously prohibited to sell what has a utility in its existing condition and it has no harm in same condition. Thirdly, it will be disputed if it has no utility in the present but there will be a utility in the future. There are scholars who permitted its sale based on purpose of the *Waqf*.... Some scholars prohibited sale of such *Waqf* to prevent changing the *Waqf*. As per Qādhi Abu Walīd bin Rushd, it was permitted to sell the *Waqf* asset if it has a benefit if was minimal (Al-Naji, 2006).

To conclude, as per Mālikī conditions of *Wāqif* should be abided and it is not permitted to breach it, even if a *Sharī'ah* interest was not achieved, rather his condition should be respected and honored. However, if there is a necessity (*Ḥājah*) or known interest (*Maṣlahah Rājihah*), then it can be substituting in both categories of *Waqf* (movable and immovable). Also, substitution is allowed in case of *Waqf* assets has less benefit. Though, they insisted to respect and abide the intensions of *Wāqif* in case of substitution, in some cases, it becomes difficult to follow it. Therefore, some of Mālikī scholars opine that it is not necessary to abide the conditions of *Wāqif*, neither in genus

(*Jins*) nor in category (*Na'u*). However, the objective of *Waqf* would be respected which is gaining benefit from *Mawqoof* and getting reward from Allah (SWT).

The school of *Fiqh* which has the widest opinion is Ḥanafī as per Abu Zahrah. He says that this school opened the door of substitution and subsequently got its result in term of success. Even they allowed substitution when *Waqf* assets have less benefit and in case of substitution, it can be increased and developed (Abu Zuhra, 1972). In this regard, Ibn Abidin from Ḥanafī school mentions that: "in many cases, substitution is more profitable and beneficial which allows to substitute the *Waqf* property as per Imām Abu Yūsuf, and this is a *Fatwā* as well, as it is mentioned in *Fatāwā Qārī al-Hidāyah*" (Ibn 'Ābidīn 1992). This statement of Ibn 'Ābidīn is supported by Abu Saud who says that: "it is narrated from Imām Muḥammad that "if the land of *Waqf* became weak in case of producing *Manf'ah*, and *Mutawallī* finds other land which is more beneficial with the same price of *Waqf* land, he has a permission to sell the *Waqf* land and buy other which is more profitable".

Furthermore, al-Tarsusi says in the case where *Wāqif* stipulates that *Waqf* cannot be substituted: "though, there is no report in this regard, the rules of *Ḥanafī Madhab* allow *Qādī* to substitute, if there is *Maṣlahah* in substitution. This is because if *Wāqif* stipulates that neither *Sultān* nor the *Qādhi* has any right in the case of *Waqf*, this stipulation will be considered as void and *Qādhi* will have a right, because in the eyes of *Sharī'ah*, he is more genius than *Wāqif*. And in case of respecting the stipulation *Wāqif*, there is harm for both *Waqf* and its beneficiaries, neither there is any benefit or *Maṣlahah* to accept this condition of *Wāqif*" (Ibn Nujaym, n.d.). Additionally, Ibn 'Ābidīn mentions that: "it seems that for the substitution of *Waqf* assets, it is not required that substituted item must be same genus and category. This is because the objective of *Waqf* is gaining and increasing *Manf'ah* and decreasing the coast..." (Ibn 'Ābidīn 1992).

From the above-mentioned discussion of Ḥanafī school regarding the violation of *Wāqif*, it can be concluded that they have wide range of views in this regard, even Imām Abu Yūsuf allowed the substitution of immovable *Waqf*, provided that it became weak to produce the *Manf'ah*. They further allow the substitution of immovable assets for need (*Dharūrah*), necessity (*Hājah*) and for interest (*Maṣlahah*) without focusing on genus and category in the substituted property. However, they strictly deny substituting the immovable property by movable items due to the fear of being ruined and damaged in movable items.

To summarize the above-mentioned discussion from all for *Madāhib*, following can be elaborated:

1). Similar genus and category in case of immovable property: The majority of Ḥanafī and Ḥanbalī jurists allow the substitution of immovable *Waqf* property for the need, necessity and *Maṣlahah*, with the same genus and category of substituted property (Ibn Taimiyyah, 1987; Abbas, 2019). They support this view by the *Hadith* of Prophet (PBUH) "Were your people not close to the Pre-Islamic Period of ignorance (i.e. they have recently embraced Islam) and were I not afraid that they would dislike it, surely I would have included the (area of the) wall inside the building of the Ka'ba and I would have lowered its gate to the level of the ground⁴ⁿ (Al-Bukhari, 1422).

They say that *Kabah* is most prestigious *Waqf* on the earth, and Prophet (PBUH) wanted to change its shape due to *Maṣlahah*, which is also one type of substitution.

They further support their views by the act of 'Umar (RA) in which he asked to change the location of old mosque of Kufa to save the *Bait al-Māl* and later the place of this old mosque converted to the Market of dates. Importantly, this incident became very famous in Hijāz and Kūfa, and lots of companion witnessed this incidence, however, none of them refused to accept it. This act of 'Umar (RA) allows the permissibility of substitution of immovable property even due to *Maṣlahah* (Ibn Taimiyyah, 1987).

2). Similar genus and category in case of movable property: The substitution is allowed by Ḥanafī, with the same genus and category even for *Maṣlahah* as well. This is also a correct opinion of Mālikī and Ḥanbalī (Abbas, 2019). They supported their view by the *Athar* of ‘Umar (RA) in which he changed the cloth of *Kabah* (*al-Kabah al-Qabaṭī*) which was donated for it, later on, ‘Uthmān (RA) and Mu’aāwiyah (RA) practiced the same, which is continued until the date (Al-Hathami, 1994; Abbas, 2019). They further do *Qiyās* (analogy) of movable assets over the scarifying animal, wherein substitution is allowed for the better animal (Al-Hathami, 1994; Abbas, 2019).

3). Similar genus and different category in both movable and immovable property: The majority of Ḥanafī and Ḥanbalī jurists including Ibn Taimiyyah allow the substitution of both movable and immovable property with the similar genus and different category. They supported their views by the act of ‘Umar (RA) pertaining to the mosque of Kufa, wherein the land of mosque converted to the market. In this act, each land is from similar genus, however, category is different. Also, the *Ḥadīth* of Prophet (PBUH) in regard to changing the shape of *Kabah*, supports this view, in which He wanted to change the category of *Kabah* (Al-Hathami, 1994; Abbas, 2019).

4). Different genus: This is further divided in two categories, 1) substitution of immovable property by movable property. Majority of jurists do not allow this type of substitution due to close the door of destruction of *Waqf* property. This is because there is high possibility of being damaged and destructed of movable property rather immovable property. 2) Substitution of movable property by immovable property, which allowed by the majority of jurists to save the property (Al-Hathami, 1994; Abbas, 2019).

2.5 Use of Cash Waqf against Wāqif's Will

From the previous discussion, it can be realized that jurists of *Fiqh* have discussed the condition of *Wāqif* from all corners in terms of its acceptance and deviation. Ibn Taimiyyah from Ḥanbalī school and Ibn ‘Ābidīn and Ibn Nujaym from Ḥanafī school discussed this matter excessively. Importantly, jurists talked about the substitution of both movable and immovable property, whether *Wāqif* has mentioned the condition of substitution, or he mentioned that this property cannot be substituted, or he did not mention any condition. In this regard, they further mentioned the substitution of immovable property to *Darāhim* and *Danānīr*. Though, they discussed the substitution of movable property by breaching the condition of *Wāqif*, there is no discussion over violating the condition of *Wāqif* in case of cash *Waqf*.

Significantly, as it is well-known that every single rule of *Waqf* is subject to *Ijtihād* and interestingly, there is no single ruling which is unanimously accepted by *Fuqahā* but the basic principle that objective of *Waqf* must be charitable deed (*Birr*). By realizing that, the matter of violating the condition of *Wāqif* pertaining to cash *Waqf*, could be measured with the same rule of breaching the condition of *Wāqif* in immovable property. And the reason for this measurement (*Qiyās*) is that both are common in the objective of *Waqf*, which is to support the *Ummah* in terms of religious activities and socio-economic welfare. Similarly, as previously mentioned that substitution of movable property with the same is allowed in similar genus and category, by breaching the condition of *Wāqif*, it can be permitted in cash *Waqf* as well, due to that both are from movable *Waqf*.

Hence, the rule of movable and immovable property pertaining to the breaching the condition of *Wāqif* would be applied in cash *Waqf* by dividing it in two categories which are as follows:

- 1) **Similar genus and different category:** For example, *Wāqif* stipulated that this cash will be invested in particular project of particular company. To achieve the objective of *Waqf*, *Mutawallī* can invest this cash in different project of same company. Though, in this case, genus (which is a company) is same, category (project B) is different.
- 2) **Different genus:** For example, *Wāqif* stipulated that this cash of *Waqf* would be invested in specific company. However, *Mutawallī* believes that it is more profitable

to invest this amount in other company, in this situation, he is allowed to do so, to make the *Waqf* more profitable for the beneficiaries.

It should be taken into consideration that this last category (different genus) was not allowed by the Majority of jurists, when immovable property is substituted by movable property. This was due to the high risk of being damage and destruction of movable property, this reason, however, cannot be found in case of cash *Waqf*. Therefore, this will be allowed to deviate the condition of *Wāqif* in case of cash *Waqf*, because the *Fiqhī* rule is that the ruling revolves around its underlying legal cause.

2.6 Precautionary Stand in this Field

From the above-mentioned discussion regarding the violation of *Wāqif*, it can be summarized that Ḥanafī school has widest opinion in this regard, even Imām Abū Yusūf allowed the substitution of immovable *Waqf* provided that it became weak to produce the *Manf'ah* and there is more benefit in case of violating the condition of *Wāqif*. They further allow the substitution of immovable assets for need, necessity and for *Maṣlahah* without focusing on genus and category in the substituted property. However, in present era, it is not safe to allow the *Mutawallī* to go against the condition of *Wāqif* as it opens the door for the *Mutawallī* and related authority to encroach the *Waqf* property that can be seen in many countries.

By realizing this matter, Ibn ʿĀbidīn quoted the statement of Ṣadr al-Sharī ah that “we have observed (destruction of *Waqf* property) in the name of substitution that cannot be counted; this is because *Zālim Quzāt* (tyranny Judges) destroyed *Waqf* property in the name of substitution”. Ibn ʿĀbidīn stated that it is better to close the door of substitution in this case. In this vein, Imām abu Zohra mentioned that we have witnessed that many Sultāns encroached the *Waqf* property and *Zālim Quzāt* and liar witness helped them in this encroachment. Due to this fear, majority of Shāf ʿaī *Fuqahā* and Mutakkihrīn Ḥanafī *Fuqahā* denied to go against the will of *Wāqif* in case of *Waqf* property has less benefit than its substitution breaching the condition of *Wāqif*. And this is by realizing the one of the objectives of *Sharī ah* which is *Hifz al-Māl* (protection of wealth).

Therefore, in case of investment of cash *Waqf* against *Wāqif's* will, it is allowed with the permission of court when this investment became weak to produce any benefit and there is confirmed fear that this cash would be destroyed. However, if the investment of this cash in assigned company by *Wāqif* is less profitable, it should not be allowed to invest it in different company by violating the will of *Wāqif*.

3. Conclusion

From the discussion regarding the violation of *Wāqif*, it can be concluded that the majority of *Fuqahā* from all for *Madhab* of school states that conditions of *Wāqif* would be respected as long as it is not in contradiction of *Sharī'ah*. Also, the condition of *Wāqif* would be fulfilled provided that it does not opposes the objective of *Sharī'ah* regarding the *Waqf*. In this regard, the rulings of Imām Aḥmad were less restrictive and were lenient in selling *Waqf* so other prospects can be substitute them. Hence, substitution way is broader than Mālik and Shāf ʿaī despite it is not broader than Imām Abu Hanifah's view on the same. It is found that majority of scholar divided movable and immovable *Waqf* assets in a) Similar genus and category b) similar genus and different category c) different genus. The first to categories are allowed by majority of jurists in case of need (*Dharūrah*), necessity (*Ḥājah*) and for known interest (*Maṣlahah Rājiḥah*). However, the last category is further divided in two categories, 1) substitution of immovable property by movable property, which is not allowed by Majority of jurists due to close the door of destruction of *Waqf* property. 2) Substitution of movable property by immovable property, which allowed by the majority of jurists to save the property. Though, jurists discussed the substitution of movable and immovable property by breaching the condition of *Wāqif*, there is no discussion over violating the condition of *Wāqif* in case of cash *Waqf*. By realizing that, this matter has measured with

the same rule of breaching the condition of *Wāqif* in movable property that is not a cash, by dividing it in two categories which are a) similar genus and different category b) different genus. In both categories, *Mutawallīs* are allowed to breach the condition of *Wāqif* to make the *Waqf* more profitable for the beneficiaries by preferring the *Maqāsid Āmmah* (general objective of *Waqf*) over *Maqāsid Khāṣṣah* (specific objective of *Waqf*). However, in present era, by realizing the objective of *Hifz Māl al-Waqf* (protection of *Waqf* property), *Mutawallī* should not be allowed to go against the condition of *Wāqif* as it opens the door for the *Mutawallī* and related authority to encroach the *Waqf* property that can be seen in many countries. Due to this fear, various countries such as Malaysia and India encouraged that cash *Waqf* should be converted to *Waqf* asset. At least, it should be allowed with the permission of court when this investment became weak to produce any benefit and there is confirmed fear that this cash would be destroyed. However, if the investment of the cash in assigned company by *Wāqif* is less profitable, it should not be allowed to invest it in different company by violating the will of *Wāqif*.

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