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## **Waqf, Its Substitution (*Istibdāl*), and Selected Resolutions of Islāmic Fiqh Academy India: A Maqāṣid al-Sharī'ah Perspective**

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**Abstract:** *Waqf* is a charity in which corpus is maintained and the usufruct is given to the beneficiaries. The continuity of the usufruct depends on the maintenance and management of the corpus. One of the modes used both in classical and modern times to maintain *waqf*-properties is substitution of one *waqf*-property with another known as *istibdāl*. This paper reads into *Istibdāl*, selected resolutions of Fiqh Academy India and scrutinizes them under the *Sharī'ah* objectives of *waqf* and *tabarru'āt* (donation). The finding shows that modes of *Istibdāl* permitted by Islāmic law realize the *Sharī'ah* objectives of *waqf* concomitantly. Modes which were not permitted oppose the objectives of the *Sharī'ah*. This work is a potential guide for institutions and committees involved with the development of *waqf*-properties using innovative financing modes.

**Keywords:** *Istibdāl* (substitution), *badl* (replacement) perpetual charity, everlasting benefits, *Maqāṣid al-Sharī'ah*

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**Abstrak:** Waqf ialah badan amal dimana korpusnya perlu dipelihara dan usufuk diberikan kepada penerima manfaat. Kesinambungan pemberian usufuk bergantung kepada pengurusan dan pentadbiran korpus. Salah satu mod yang sentiasa digunakan untuk mengekalkan harta-harta waqf ialah penggantian hartanah waqf dengan hartanah biasa yang dikenali sebagai *Istibdāl*. Kajian ini akan membincangkan *Istibdāl*, resolusi yang dipilih oleh Akademi Fiqh Islām India serta menelitinya dibawah objektif waqf *Sharī'ah* dan *tabarru'āt* (derma). Kajian ini menunjukkan mod *Istibdāl* dibenarkan dalam undang-undang Islām dan mempunyai persamaan dengan objektif waqf *Sharī'ah*. Mod yang tidak dibenarkan menentang objektif *Sharī'ah*. Kajian ini berpotensi sebagai panduan kepada institusi dan jawatankuasa yang terlibat dengan pembangunan hartanah waqf menggunakan mod kewangan yang inovatif.

**Kata Kunci:** *Istibdāl* (pengganti), *badl* (penggantian) badan amal, faedah abadi, *Maqāsid al-Sharī'ah*

## INTRODUCTION

The reality is that everything is prone to decay. Constant repairing and development for the upkeep is required. This applies to *waqf*-properties or corpus (*mawqūf*) either moveable or non-moveable. This is because *waqf* serves the purpose of providing benefits to the beneficiaries through its corpus. The corpus not only has to be restrained with the management, but its form and function have to be maintained through continuous development. If the corpus (form and function) is not maintained, the benefit for the beneficiaries will be unsatisfactory. The benefit generated from such corpus will be non-everlasting and non-economic. The classical period of Islām has seen various solutions for up-keeping the corpus, such as substitution of the corpus (*istibdāl*), long-lease of the corpus (*hikr*), investing the corpus (especially the waqf money) in manufacturing contract (*istisna'*), and so on (Madga Ismail Abdel Mohsin 2016, 8).

Islāmīc Fiqh Academy India (IFA) steered by the late Mujahidul Islām Qasmi conducted a seminar on waqf dated 24-27 October 1997 at Mumbai Haj House. 12 Pre-seminar questions were sent to the various scholars and institutions in India. Responses to these questions were presented and discussed in the seminar. Some of the questions

the seminar responded to were directly or indirectly enquiring about the up keeping and maintenance of waqf properties in India. Later in 1999 followed by 2012 the responses, discussions, and resolutions were published by IFA with the title “*Awqaf Ahkam wa Masa'il*.” This paper focuses on responses to question no. 1 with its sub-three cases from this work on *Istibdāl* and scrutinizes it under the Sharī'ah objectives of *waqf* and donation (*tabarru'āt*). The study aims to find whether the *istibdāl* being a measure initiated by humans (*Maqāsid al-mukallaḥ*) fulfils the objectives of the *waqf* set by the Sharī'ah or not. Before we embark on discussing the *istibdāl* related responses and scrutinizing them, defining *waqf*, and pinpointing its general and particular objectives are dealt with respectively.

### **WAQF ACCORDING TO THE DEFINITIONS**

Waqf (pl. *awqāf*) in its primitive sense means “to prevent or to restrain” (*al-man'u* or *al-ḥabs*). The Arabs say: “*waqaftu al-dār waqfan, habastuhu fi sabilillahi* (I barred or restrained the house for the cause of Allāh).” (Abdul Wadūd Mohammad Al-Saraiti 1997, 161) In technical sense the definition of *waqf* can be construed into three: the first definition is held by Abu Hanifah, the second by the majority jurists consisting of two companions of Abu Hanifah, the Shāfi'ī and the Hanabali Schools and the third definition belongs to the Maliki School.

To Abu Hanifah, *waqf* is to restrain the possession (*milk*) of a particular thing and give away its advantage for some charitable purpose. According to this definition the possession of the *waqf*-subject (*mawqūf*) remains with the owner which gives him the right to retract the *waqf* whenever he intends. He has the right to sell or gift the *waqf*-subject and if he dies, the *waqf*-subject will become estate for his inheritors. This reckons that according to Abu Hanifah, *waqf* is not of an absolute nature. The owner's (*wāqif's*) right of property remains intact. According to Abu Hanifah, if *waqf* is combined with a *qādi's* decree, or if the owner stipulates the commencement of *waqf* upon his death then the possession of the owner will be extinguished (Wahbah al-Zuhayli 2007, vol. 10, 7599 & Al-Kasani n.d., vol. 5, 326).

The majority of the jurists (Two companions of Abu Hanifah, Shāfi'ī, and Hanabali Schools) define *waqf* as to restrain a property/wealth from its owner and expend its yields to a legitimate cause or charitable and righteous purpose with the intention to get closer to

Almighty Allāh. This definition in contra to Abu Hanifah's definition concludes that in *waqf* the possession of a property or possession of portion of a wealth no longer remains with the owner. The possession is considered to be transferred to Almighty Allāh. Based on this, selling or gifting of a *waqf*-subject becomes illegal (Wahbah al-Zuhayli 2007, vol. 10, 7601).

The third definition as held by the Maliki School which says: *Waqf* is to assign the benefits owned (*mamlūkah*) by the owner for a deserving person with special pronouncement for a time period decided by the owner (*wāqif*). According to this definition, the owner restrains the asset from any of his disposal rights (*taṣarruf tamlīkī*) and donates the benefits for righteous purposes for a time period he prefers. Even though the ownership of the asset in this period remains with the owner, but his right of disposal is suspended during the period of *waqf* (Wahbah al-Zuhayli 2007, vol. 10, 7602). "Benefits owned" in the aforementioned definition also denotes to giving the rental money as *waqf* to a recipient instead of the corpus.

The point of departure in these definitions is whether the possession and the right of disposal remain with the owner (*wāqif*) or not. The majority of the jurists opine that the possession and the right of disposal no longer belong to the owner of the substance. In principle the possession of the asset belongs to Almighty Allāh. This means after allocating an asset for *waqf* the owner cannot sell or gift it, or after the owner's death the *waqf*-asset cannot be distributed amongst the inheritors. To Imam Abu Hanifah the possession remains with the owner, unless a judge decrees the asset to be *waqf* or the owner stipulates the commencement of the *waqf* upon his death. These two conditions will deem *waqf* as binding (*lāzim*), otherwise the owner can retract his *waqf* whenever he likes. Without these conditions, *waqf* to Abu Hanifah is a non-binding act resembling the act of borrowing (*'āriyah*) (Wahbah al-Zuhayli 2007, vol. 10, 7599). The Maliki School maintains that the possession and right of disposal stays with the owner. However, the right of disposal is suspended till the asset is within the time period of the *waqf*. The uniqueness of Maliki School is in limiting the *waqf* for a specific time period. After the time period expires, the owner can take his asset back and cancel the *waqf*.



Despite the points of departure, the aforementioned definitions amalgamate with each other on the point that *waqf* retains the substance and gives away its usufruct for charitable purposes. Charity (*tabarru 'āt*) in general sense such as paying *Zakāh* and giving *ṣadaqah* was already an integral part of Islām. What was common in these charitable conducts was that the corpus ( *'aīn*) itself was given to the recipients who would reap benefit from it in whatever way they desired. On the other hand, *waqf* because of its special feature to hold back the corpus and only hand out its yield to the recipients was an introduction to a new type of charity. This special feature of *waqf* is supported by the *Ḥadīth* which is also the basis of its legality. Ibn 'Umar reported that:

“His father 'Umar Ibn al-Khaṭṭāb got some land in Khaybar and he went to the Prophet (SAW) to consult about it, saying, “O Allāh’s Messenger I got some land in Khaybar better than which I never had, what do you command me to do with it?” The Prophet (SAW) said, “If you like you can hold back the land and give its usufruct in charity.” 'Umar abiding this suggestion gave the land in charity with the condition that the land would not be sold, nor given as gift, and neither would it be inherited. And its yield would be given to the poor, to the kith and kin, given for the purpose of freeing slaves, given in the cause of Allāh, and given to the wayfarers and guests. He added that there would be no harm if the guardian of the land ate from the yield righteously and fed others without making himself wealthy.” (*Sahih al-Bukhari*, Ḥadīth no. 2737)

The special feature of *waqf* can be understood by the suggestion Prophet Muhammad (SAW) made to 'Umar. The suggestion clearly shows that this was a new type of charity the Prophet introduced for the *ummah*. The pagans in Prophet’s time never heard of *waqf*. In other forms of charity, the rich donates for a group of needy people. The needy enjoy the donation until the given amount is exhausted. After exhaustion, the recipient-needy-group and the future needy group is left with nothing to fulfil their needs. To overcome this type of predicaments, the Prophet (SAW) introduced a new type of charity in which the corpus will remain intact while the usufruct will be spent on the needy. A charity with these features definitely withholds more benefit (*maṣlahah*) for the people compared to other forms of charity (Sa‘īd Aḥmad Palan Puri n.d., vol. 4, 620-621). Also, on the basis of this *Ḥadīth* the majority of the jurists legalize *waqf*. They derive from it the principle that the

possession (*milk*) of the asset given in *waqf* transfers to Almighty Allāh. And because of this principle they legalize selling and gifting of the *waqf*-subject (Badr al-Dīn al-'aīni 2008, vol. 14, 394).

### **WAQF RETROSPECTIVE TO SHARĪ'AH-OBJECTIVES OF TABARRU'ĀT**

*Waqf* is one of the contracts of *tabarru'āt*. This dictates that it will serve the objectives of the *tabarru'āt* as laid down by the *Sharī'ah*. We will highlight some of these objectives, and then look into applied *waqf*, that comes with conditions and maxims. These conditions and maxims sometimes become hurdles between *waqf* and achieving the objectives of *tabarru'āt*.

#### **Higher Sharī'ah Objectives of Tabarru'āt Served by Waqf**

As we have mentioned in the previous paragraph that *waqf* was a new type of charity (*tabarru'*), introduced by Prophet Muhammad (SAW) to the Muslims. Now we shall take a step further in explaining the *sharī'ah* objectives this new type of charity is designed to realize. The higher objective of legislating *tabarru'āt* is providing mutual help (*muwasāt*) to each other. Mutual help amongst the people can pursue individual and social wellbeing. *Waqf* given its special features to retain the substance and give the usufruct, provides mutual help for the people in the utmost manner. *Waqf* gives birth to social solidarity, friendship (*mawaddah*), and brotherhood (*ukhuwwah*) amongst the people. It is reported that the Prophet (SAW) said that “the likeness of the believers in their mutual love, mercy and compassion is that of body; when one part of it is in pain, the rest of the body joins it in restlessness and fever.” (Muḥy al-Dīn Abī Zakariya b. Sharf al-Nawawī 2004, vol. 8, 355)

Economical and financial crisis of both individuals and communities is similar to fever and restlessness of a body. Muslims both on individual and community level have to show concern and spring to assist each other. This is the proposition of this *Hadīth*. *Waqf* with other *tabarru'āt* contracts, plays a significant role in inducing love, mercy, and compassion in members of the society. It can boost the economy of a society irrespective of whether the people are poor or rich. *Waqf* can furnish those needs which might be difficult for individuals or small communities to execute. For instance, *waqf* hospitals and *waqf* schools offer medical and education services to every member of the society. It might take years for an individual to accumulate wealth and build

a hospital compared to pooling in *waqf* fund, investing and building public institutions like hospitals and schools.

The aforementioned *Ḥadīth* calls for brotherhood, solidarity, social and humanitarian cooperation. To achieve these virtuous principles, mutual assistance of human for human out of altruism and love is important. Display of human liability for each other can be achieved by *waqf*. Liability for each other takes part in enrichment of the human society such as making *waqf* schools, libraries, buildings, hotels, farms, and *masjids*. It advances social and economic developments. Same as the Wills (*waṣīyah*) and giveaways (*hibah*) work on salvaging the human lives, assist relatives without heirs. *Waqf* resembles giveaways, charity (*Ṣadaqah*), and alms (*zakāh*) in linking kinship, maintaining family bonds, and eradicating poverty, misery and begging. *Waqf* with its other sister donations can be employed in the charitable social, economic and philanthropic works such as building shelters for orphans, homeless, and disables (Jamīl Ḥamdāwī, 2014).

In another allegory, the Prophet (SAW) portrayed the believers as one structure. Abu Musa narrated that the Messenger of Allāh (SAW) said: “the believers for each other are like a structure, parts of which support other parts.” (Muḥy al-Dīn Abī Zakariya b. Sharf al-Nawawī 2004, Ḥadīth no. 2585)

Each brick in a wall is a source of strength for the other brick. Muslims in their day to day life have to behave in this manner. Here again individuals and organizations can support their co-humans through *waqf* projects. *Waqf* projects can create job opportunities and eradicate poverty. Adding onto curbing economic challenges, *waqf* also has the potential to provide resources for environmental issues. For instance, planting mangroves for protection from tsunami, planting trees to prevent soil erosion, dredging rivers to avoid flash floods, building dams for water and electricity, and you may continue naming it, all are manageable and achievable by *waqf*. All in all, these are projections of the *Ḥadīth* we quoted which pursue the higher objective of *sharī'ah* in one way or the other.

### **Specific *Sharī'ah* Objectives of *Tabarru'āt* Served by *Waqf***

Ibn 'Ashur (2006, 303) wrote the specific objectives of *tabarru'āt* to be four, namely:

- (i) Proliferating donations and gifts;
- (ii) Donations to be made voluntarily;
- (iii) Providing rooms to the terms held by the benefactors;
- (iv) And avoid making donation an instrument to violate property of others.

*Waqf* projects have to comply with these objectives. The first and utmost *sharī'ah* objective of *tabarru'at* is proliferation (*takthīr*). *Waqf* like other sister concepts under *tabarru'āt* is legalized to provide benefit to the people. This implies that proliferation of *waqf* is equally necessary as the application of *waqf*. This is fairly logical, because scarcity of *tabarru'āt* and *waqf* properties will decrease the benefits for the mankind. Human covetousness (*shuh*) as stated in verse nine of chapter al-Ḥashr (59: 9) is of the worst obstacles that oppose the proliferation. Adding onto this, the masses should be educated about the 1001 benefits *waqf* can provide to the people. The lack of education has led people to believe that *waqf* is only valid if it is applied as similar to regulated types of charities such as giving alms (*Zakāh*). When paying the obligatory charities, the focus is to exonerate the donor's due. In order to avoid pending dues, the donor has to be vigilant in terms of the amount due on him, time of payment, and the qualified recipients. The nature of *waqf* is not similar to obligatory charities, but in practice a large number of Muslims do treat *waqf* like the former. This marginalizes the application of *waqf*. Instead of letting *waqf* offer a wide range of services, they limit it to religious services like building *masjids*, religious schools, and their likes only. Services which apparently do not look religious are ignored due to lack of knowledge. In consequence, they abandon numerous social welfare services. A simple scenario is worth mentioning here is that within Petaling Jaya, Kuala Lumpur there are infinite welfare houses for the destitute, homeless, and old people. These houses are provided by non-Muslim individuals and organizations. Muslims through *waqf* could have offered these services in a better and affective way.

### **The Particular Sharī'ah-Objectives (*al-maqāsid al-juz'iyah*) of *Waqf***

The special feature of *waqf* we discussed above indicates to two particular objectives of *waqf*. One of the particular objectives of restraining the corpus and donating the yield is to provide benefit to the recipients

and rewards for the donor in perpetuity. In other modes of charity and donation, the needy and destitute receive assistance be it in money or be it in kind within the life time of the donor, or when the donor has the means. So the benefit rendered to the recipients is on short term basis. In *waqf* the donor allocates his assets for the needy which will generate benefits even after his death. Or the donor allocates his assets for the needy when he has the means, which will provide a continuous assistance to the needy even when the donor is in his rainy days. This objective is supported by the *Ḥadīth* reported by Abu Hurayrah that the Prophet (SAW) said: “When a person dies his deeds come to an end except three: everlasting-charity (*ṣadaqah jāriyah*), or beneficial knowledge, or pious children who could pray for him.” Scholars opine that the word “*ṣadaqah jāriyah*” in this *Ḥadīth* denotes to *waqf* which can continue benefiting others even after the donor dies. In this way, the donor will earn the rewards of his charitable act in perpetuity (Zafar Ahmad al-‘Uthmāni 2006, vol. 13, 97). And on the other hand the benefit generated by the corpus for the needy is everlasting. Jamāl al-Dīn Al-Zayla‘ī (d. 1360) while elaborating the conditions set by ‘Umar Ibn al-Khaṭṭāb in the aforementioned *Ḥadīth* “the land would not be sold, nor given as gift, and neither would it be inherited” wrote that these conditions set by ‘Umar were to assure the perpetuity of his *waqf* and continuous reward for him (Al-Zayla‘ī 2002, vol. 3, 733).

The second particular objective of *waqf* indicated by its special feature i.e. to restrain the corpus and donate the yield is to provide benefits to *ummah* as a whole instead of individuals. Most of the *Ḥadīth* on *waqf* underlines this point that the benefit generated from the restrained corpus was meant for the entire *ummah*. This is substantiated by the *Ḥadīth* in relation to a well in Medina called Rūmah. The migrants from Makah bought water from the owner of the well for their consumptions. Upon encouragement by the Prophet (SAW) ‘Uthmān Ibn ‘Affān voluntarily bought the well and came to the Prophet (SAW) saying that “you can do whatever you desire with it.” The Prophet (SAW) replied: “Yes make it a water source for Muslims and its reward (*ajar*) for you” (Al-Zayla‘ī 2002, vol. 3, 734). Here we can see that the benefit rendered by the well was endowed for the Muslims in general. Similarly, other *Ḥadīths* reported in relation to *waqf* carry the similar idea of extending benefit and support to the entire *ummah*. The generations yet to come will have their rights to enjoy the yield of a *waqf* project endowed centuries ago.

## HUMAN OBJECTIVES

Following onto the aforementioned discussion, the particular objective of *waqf* was realized through projects of certain nature. The classical projects depicted from the *Ḥadīth* text were *masjids*, houses, wells, guest houses, farms, lands, animals, etc. These projects generated income and harvests as revenues for the recipients in the case of lands and farms. On the other hand, some *waqf* projects served the recipients directly by providing a place to take shelter in the case of houses and guest-houses or water in the case of well. Projects in the case of *masjids*, provided a place of worshiping and learning. Under the rubric of human objectives (*maqāṣid al-mukallifīn*) people utilized *waqf* to cater their social, economic and spiritual needs. They either tuned the *waqf* into service-providing projects such as schools providing free education, hospitals with free or discounted treatment and so on. Or they designed the *waqf* into income-generating projects such as the leasing of *waqf*-land and property. The rental income of these projects was then invested for fulfilling the needs of the *ummah*. The contemporary projects are not much different in nature, but the form of services has taken a new shape in response to the contemporary era. These services are considered legal as far as the changes in *waqf* born out of human objectives does not oppose the objectives set by the *Sharī'ah*. Al-Shatibi in his *al-Muwafaqat* stated that the intent (*qasd*) of the humans and the law-giver (*Sharī'*) both have to be in harmony (al-Shatibi, 429). The *waqf* is a legal-means (*wasa'il al-Shar'iyyah*) designed by the *Sharī'ah* to achieve certain objectives such as welfare and wellbeing in the case of *waqf*. These are *waqf*'s essential objectives. When people apply *waqf* for service or income generating projects, they have to ensure not to compromise on the essential objectives aimed by the *Sharī'ah*.

### **Maintenance of Waqf Properties: Replacement (*Badl*) and Substitution (*Istibdāl*)**

The preliminary discussion on *Sharī'ah* objectives of *waqf* pointed that as a new form of charity it was meant to offer perpetual benefit to people. This is considered as a particular *Sharī'ah* objective of *waqf* (*Maqāṣid juz'iyyah*). This objective also distinguishes *waqf* from other forms of charity especially *zakāh* (alm-giving) and *sadaqah fitr* for both are limited time wise. The *waqf* in order to serve its particular objective is guided by terms and conditions. Since these terms are the means to

obtain the latter objective, they are known as the mediums (*wasa'il*) in *Maqāṣid* discourse. One of the conditions in relation to the object given in *waqf* (*mawqūf*) is that it should be a durable object that can give benefit while maintaining its corpus. Objects such as food and drink cannot be made *waqf* because it has to be consumed (*istihlak*) in order to give benefit. The benefit generating from such objects will be for once only upon its consumption, whereas *waqf* is supposed to generate perpetual benefit. The four scholars have stipulated this condition. However, the Hanafi and Maliki Schools according to one opinion have given permission for food (such as wheat), Dirhams, and Dinars in *waqf* provided that these are given on the basis of future sale and replacing deal. They permitted *waqf* of these items because the latter could be replaced by the beneficiaries (*mawqūf 'alayhim*) who took the Dinar and Dirham for investment or took the wheat for farming for instance from the *waqf* authority. The returning back of the items by the beneficiaries replaces the given items maintaining it for the next service. And in this manner the corpus remains and the benefits perpetuate. However if these items are made the object of the *waqf* directly, it will not be permitted because the nature of these items are not durable to generate benefit continuously (*Al-Mawsu'ah al-Fiqhiyyah* 2006, vol. 44, 166).

The condition set by the major Legal Schools to only accept durable items for *waqf* and an exception to the rule for non-durable items that can be replaced by future sale or any other deal that requires returning of the given items supports our deliberation that the particular *Sharī'ah* objective of *waqf* is to perpetuate the benefit from the corpus for the people. Through this particular objective, the *waqf* will be able to serve the higher objective of *Sharī'ah* such as mutual help, individual and social wellbeing, brotherhood, solidarity, economic growth and stability, poverty alleviation, education, medical services, and so on. The *Sharī'ah* did not only depend on the ongoing condition to realize these objectives. It also took some other measures such as giving priority to the maintenance (*al-'imarah*) of the corpus over the distribution of the benefits to the beneficiaries.

In order to discuss the maintenance of the *waqf*-corpus, we are commencing with Islāmic *Fiqh* Academy India's resolutions in relation to *istibdāl* (substitution) and *badl* (replacement). The resolutions highlight situations and circumstances where the former two maintenance concepts are applied with certain conditions.

### Question and Responses of IFA

Question no. 1 posed by IFA to scholars can be summarized as: The 1947 India-Pakistan separation saw many *waqf*-properties abandoned and isolated. Punjab, Haryana, and Delhi, the migration of Muslims to Pakistan from these areas saw vast Muslim habitant areas vacated leaving behind under-utilized *waqf*-properties. Due to absence of Muslim residents, *waqf*-properties such as Muslim cemeteries, *madrasahs*, *khanqas*, and etc., could not be utilized according to the original purpose of establishment.

- (a) Can these *waqf*-properties be sold and new *waqf*-properties be erected according to the original establishment purposes in areas where Muslim residents are dominant?
- (b) Can such isolated *waqf*-properties be given to government or any individual in order to acquire any other land and building in which the *waqf* could be reinstated according to the original objectives?
- (c) Can these abandoned *waqf*-properties be sold and its money utilized for Muslim welfare, education purpose, or any other pious purpose?

In response to (a), most of the responding scholars agreed with the substitution of abandoned *waqf*-properties that no longer can serve the original *waqf* objectives. Due to under-utilization, there is danger that the government and non-Muslim parties will try to seize these abandoned *waqf*-properties. The scholars opined that such *waqf*-properties could be sold and using that money another *waqf*-property could be established in line with original objectives set by the endower (*wāqif*). The reason behind this permission is the realization of the particular objective of *waqf* which is benefit (*nafa'*). Since in substitution, the new *waqf*-project is still serving the objectives set up by the endower, the benefit for the beneficiaries is intact. The scholars referred to *al-Baḥr al-Rā'iq* of Ibn Nujaym (vol. 5, 219): “When the *waqf* is in a state that it cannot benefit the needy (*masākin*), then the Qadi can sell it and with its price buy another property for *waqf*. Only the *Qadi* has this right.” (Mujahid al-Islām Qasimi 2012, 35)

Some of the scholars referred to the terms and conditions set by Ibn ‘Ābidīn al-Shāmi in order to apply substitution and replacement. The most important conditions are:



1. Land-*waqf* should not be sold for lower than the market price.
2. Special responsible and just management members should be appointed for the substitution of *waqf* or at least the management should consult the scholars on every stage of substitution.

In the light of the above, the scholars also permitted the replacement (*badl*) proposal in case (b). The abandoned and under-utilized *waqf*-property can be given to the government or individual for another property that will serve the same *waqf* objectives set by the original *waqf* endower. (Mujahid al-Islām Qasimi 2012, 36)

However, in reference to case (c), most of the scholars did not permit selling the abandoned *waqf*-property and using the money for welfare and education of Muslims. Their main concern was not taking into consideration the original objectives set by the *wāqif* (endower). These scholars referred to Ibn 'Ābidīn al-Shāmi's statement that (vol. 4, 445) "scholars have stipulated consideration of endower's objectives as obligatory (*wājib*).” On the other hand some scholars considered the perimeter of endower's objectives wide enough to include objectives he did not stipulate. Education system which offers both religious and worldly education and other good deeds are part of the endower's objectives. For them, selling the abandoned *waqf*-property and using the money for new *waqf* other than the objectives stipulated by the endower is permitted. (Mujahid al-Islām Qasimi 2012, 36)

## CONCLUSION

This study is limited to discussion of *waqf*-properties other than the masjids. The *waqf* for masjid is a special type of *waqf* which cannot be discussed under substitution and replacement of *waqf*-properties.

We have seen in the ongoing discussion that *waqf* is part of *tabarru'āt*—Islāmīc philanthropy. However, *waqf* was introduced by the Prophet as a new type of charity. Other types of charity, the rich donates and the beneficiaries enjoy the benefit until the donated amount or goods are exhausted or consumed. In case of *waqf*, the corpus remains and the usufruct are spent or distributed. By this token, *waqf* withholds greater interests (*maṣlahah*) for the people.

*Waqf* serves the three higher objectives of Sharī'ah:

- (i) *Muwāsāt* (mutual help). This pursues individual and social wellbeing.

(ii) *Mawaddah* (Social solidarity)

(iii) *Ukhuwwah* (brotherhood)

These higher objectives are expressed in a Ḥadīth reported in *Sahih Muslim* (Ḥadīth no. 2586): “The likeness of the believers in their mutual love, mercy and compassion is that of a body: When one part of it is in pain, the rest of the body joins it in restlessness and fever.”

Often people see *waqf* as a rigid concept which does not have flexibility in terms of management and distribution of its usufruct. The reason for this misunderstanding is conceiving the *waqf* only on the surface level and ignoring in the inner dimensions that assist the *waqf* to function in order to serve the higher objectives we mentioned above.

*Waqf* is supposed to serve the specific *Sharī‘ah* objectives of *tabarru‘āt*. In the discussion we listed down four specific objectives. The most important objective is proliferation of *waqf*. Unless the two particular objectives of *waqf* are secured, *waqf* will fail to serve the four objectives of *tabarru‘āt*. The two particular objectives are:

- (i) Providing benefit in perpetuity. This is supported by the *sadaqah jāriyah* Ḥadīth which explains that charity is on two types. Continuous and non-continuous charity. The *waqf* is a continuous type of charity that will contribute to the good deeds of a person even after his death. Similarly, ‘Umar Ibn Khattāb’s two conditions for the *waqf* (1) the *waqf*-land will not be sold (2) nor given as gift and (3) will not be inherited.
- (ii) Provide benefits to the *Ummah* both on individual and societal level such as hospital, well, school, cemetery, education, etc.

The concept of substitution (*istibdāl*) and replacement (*badl*) is meant to manage the corpus and the usufruct of the *waqf*. Like the nature of human that is limited to time and space, *waqf*-properties are also limited. The corpus of the *waqf* that is supposed to generate perpetual benefit can decay because of internal or external factors. In case of *waqf*-properties in India, we saw that places where *waqf* was established were deserted due to migration of 1947. In other cases which were only discussed in theory was the situation where the corpus decays and no longer can generate benefit due to internal factors such as the building falling apart or land can no longer produce harvest. In all these cases,

*Sharī'ah* has given permission to sell the *waqf*-property and use the money to buy another property to establish a new *waqf* that will serve the same purpose set by the original endower or replace the non-functional *waqf*-property with another property. We saw in the resolution of the Islāmic Fiqh Academy India that they gave permission to substitution and replacement with one backbone-factor. All the references they cited pointed to the factor that the original purpose stipulated by the endower will not be compromised. Substitution and replacement is only permitted if both concepts will continue the purpose of the endower. Cases where after substitution and replacement, completely a new *waqf* is established that does not realise the purpose stipulated by the original endower, majority scholars disallow it. Those minority who permit such practice considered the implication of endower's stipulation as general inclusive of all types of good deeds whether the endower stipulated it or not.

Ignoring the endower's stipulation will have a direct impact on the specific *Maqāsid* of philanthropy. People will be discouraged to donate their property for charitable purposes when they will see the management not respecting their terms and conditions. This will affect volunteerism and proliferation of *waqf*.

This study shows us that functionality of a *waqf*-project can be evaluated by looking at the degree of *Maqāsid al-Sharī'ah* achieved on various levels. Starting from the particular *Maqāsid* of *waqf*, if perpetual benefit is generated for the community or the community is able to enjoy the benefit generated by corpus of the *waqf* then such *waqf*-property is considered to be functioning. This will also allow the *waqf* to achieve four specific objectives of donation in Islām and the three higher objectives of the *Sharī'ah*.

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