

## ***Waqf of Intellectual Property: A Critical Review of Contemporary Literature***

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### ***Abstract:***

*Islam teaches that wealth should be circulated in society to minimize the gap among the units (members) of society. "What Allah has bestowed on his Messenger from the people of the township- belongs to Allah- to His Messenger and to kindred and orphans, The needy and the Wayfarer, in order that it may not make a circuit between the wealthy among you" (Al-Quran). To achieve this goal Islam prescribed too many tools e.g. Zakat, Ushr, Fafarat, Waqf etc. to help mankind. That is why Islam is called a welfare based economic system (Ullah, 2016). Waqf is one of the best tools in minimizing poverty level which played a vital role throughout Islamic History. It is a fact that over the entire history of the world and especially in this modern era new cases of mal (property) are being introduced continuously. Copyright is one of these new cases which has been proved to be a property (Usmani,1988). Application of Ahkam (rulings) like sale & purchase of copyright, its gift and Waqf etc. to such assets are very much challengeable. This study tried and proved the legal status of waqf of copyright. The study proved based on collected data that copyright can be made Mauquf (waqf asset) through Urf (practice) by solving the issue of perpetuity of copyright. It is concluded that it's waqf is permissible with condition of registration and urf of its Waqf according to Hanfi school of thought while according to Jumhoor (Majority Jurists) it's Waqf is permissible without condition of urf. Urf means current practice in society is one of the sources in Islamic Jurisprudence used to*

*make new rules and has great importance in developing legal opinion.*

**Keywords:** *Jumhur, Waqf, Mauquf, Huqooq Copyright, (Fatwa Council).*

## Introduction

*Waqf* (وقف), which means endowment/donation, is a very useful tool in minimizing poverty level, to increase the literacy rate, to decrease unemployment when it is used institutionally or individually in a proper way. It is used for welfare activities from beginning of Islam till present day. The beauty of using the *Waqf* tool is that its benefits to society are multidimensional. There is no limitation of rich and poor, no boundary of religion if *Waqf* is unrestricted. It can be used for the welfare of all humanity.

Poor man can make his property *waqf* as rich. Rich people can benefit from the *Waqf* of the poor and vice versa. The same non-Muslims can also take benefit of a Muslim's *Waqf*. (Ibne Musa ,1320 H). Muslims can take benefit from *Waqf* of a non-Muslim. (Ibne Nujayum,1997). It shows that *Waqf* is a very flexible model; almost each member of society can make his property *Waqf* and can benefit from the *Waqf* of others.

Literally *Waqf* means to stop (Ibne Manzoor,2008). Technically *Waqf* is defined as giving the property in the ownership of Allah such that its benefits are specified for the welfare of society with the preservation of its principal asset".(Al-Margheenani,2016).<sup>1</sup> "Now this property can't be transferred in heritage, can't be sold etc. by *Waqif* (واقف), which means donar. (Al Babarti,1993).<sup>2</sup> "Property in a *Shariah* (شريعة), which means Islamic Law, is a substance which is permissible, utilizable, protectable and tradable". (Al-Zuhayli,2002). Copyright now a days can be preserved

through registration and is considered precious property in the market to be traded.

This study will see Copyright as a movable property, as a *Mauquf* (موقوف), which means Waqf Asset, and permissibility of its *Waqf*. The study is very interesting and challenging, especially according to the Hanfi school of thought due to its temporal nature according to the law of most countries of the world. Because copyright is a right not an object. A brief overview of the basics of *Waqf* is written below.

### ***Pillars of Waqf***

According to *Jumhoor* (جمهور), which means majority schools of thought, there are four pillars of *Waqf*. *Waqif*, *Mauquf*, *Mauquff Alaih* (موقوف عليه), which means Beneficiary, *Sigha* (صيغه), which means Expression. According to the Hanfi school of thought only *Sigha* is a pillar of *Waqf* and the other three are conditions of *Waqf*. Aazami,2010 resolved this difference. He stated that *Sigha* needs speakers, *Mauquf* and *Mauquff Alaih*. So, both opinions are almost the same.

### **Conditions for *Mauqoof***

1. *Mauquf* should be *Mal-e-Mutaqawwim* (مال متقوم), which means valuable property.
2. Specified.
3. *Waqif* should be owner of *Mauquf*.
4. *Mauquf* should be separated.
5. Utilization of benefits of waqf in a way that principle asset must be preserved.
6. *Mauquf* should be immovable or its waqf is carried out in practice this is according to Hanfi school of thought while according to *Jumhur* *Waqf* of both movable and immovable assets is permissible. Contemporary scholars proved that copyright is a valuable property and can be preserved by its registration legally. (Usmani,1988).<sup>3</sup>

### **Knowledge Gap and Rationale**

It is the modern era. The era of invention and annotation. New things are being discovered continuously.

Some of these new things and some already existing things are now considered as property, which were not considered as property in the past. Copyright is one of such objects which is considered as valuable property recommended by contemporary scholars in the last century.

So, to extend the area regarding the ruling of *Waqf* of copyright this study is conducted. Based on collected data it is concluded that copyright can be made *Mauquf* and its *Waqf* is permissible with the condition of current practice of its *Waqf* and registration.

### **Research Problem /Objectives/Questions**

Common practice in *Waqf* is that it carries out in immovable property which is *Ain* (عين), which has physical existence and perpetual in nature. Copyright is considered property, but it is a temporal in nature (its life is limited till 60 y/s after the death of author/inventor). It is right not *Ain* and temporal in nature. Objective of this study is to explore the permissibility of *Waqf* of copyright based on collected data.

The study is exploratory in nature. For this purpose, this study will judge three things. First to explore whether copyright can be considered a movable property. Secondly, to find a solution to resolve the issue of perpetuity for the temporal nature of copyright. Finally, to explore whether *waqf* of copyright is permissible.

### **Critical Review of Literature**

It is thematic literature review of *Waqf* of copyright. It has two parallel themes: *Waqf* and copyright. This chapter has two parts. First part is composed of basics of *Waqf* (definitions of *waqf* in the light of all schools of thought and selection of preferred definition, elements of *Waqf* and its conditions. Second part consists of proof of copyright as movable property and finally researchers tried to judge the status of copyright as *Mauquf*,

temporal nature of *Waqf* copyright and permissibility of *Waqf* of copyright a new issue on basis of existing literature.

### **Basics of *Waqf***

Basics of *Waqf* are definitions of *Waqf* in the light of all schools of thought and selection of preferred definition, elements of *Waqf* and its conditions. There are four elements of *Waqf* according to *Jumhur*. Which are *Waqif*, *Sigha*, *Mauquf*, *Mauquf Alaih*. While according to Hanfi school *Sigha* is the only element *Mauquf*, *Mauquf Alaih* and *Waqif* are conditions of *Waqf*.

### **Definitions of *Waqf***

1. Definition of *Jumhoor* including Imam Yousuf, Imam Muhammad, Imam Shafi, and Imam Ahmad.” the devotion of a thing in the ownership of Allah (SWT) in a way that its usufruct is dedicated to the people”. (Al-Marghieenani,2016).<sup>4</sup> It means that *Waqif* loses ownership of this object forever. Now *Mauquf* can't be sold/gifted/inherited.

2. Definition of Imam Abu Hanifa “keeping the principle object in the ownership of *Waqif* while giving the usufruct in charity”. Definition of Imam Abu Hanifa reveals that *Waqif* can sell *Mauquf* after donating it and it can be inherited after his death. According to him, *Waqif* does not lose the ownership of *Mauquf*.

Definition of Imam Malik “keeping the principle object in the ownership of *Waqif* but it can't be sold and inherited”. (Al-Margheenani,2016).<sup>5</sup> The difference between the definition of Imam Abu Hanifa and Imam Malik is that according to Imam Abu Hanifa *Waqif* can sell *mauquf* and it can be inherited after his death. Whereas according to Imam Malik *Waqif* can't sell *Mauquf* and it can't be inherited although *Waqif* is the owner of *Mauquf*.

Looking to the history of practice of Sahaba i.e. Companion of Prophet Muhammad (May Allah be pleased with them) and their successors was that once anyone declared an asset as *Mauquf* it becomes no more the property of *Waqif* and he could not exercise his legal rights regarding to this asset. “It can be summarized that it is *Ijma-Amali* (definitive consensus) of all Sahaba (may Allah be pleased with them) and their followers hereditary. Therefore, the definition of *Jumhur* is preferred over the definition of Imam Abu Hanifa “. (Ibn al Humam,1993). Also “(There is fatwa on the definition of *Jumhur*)”. (Ibn al Humam,1993). So, the definition of *Jumhur* is preferred due to consensus, *Fatwa* (فتوى), which means legal opinion, is on this definition and it creates consistency (harmony) among all schools of thought which is far better for the current era.

### **Legitimacy of Waqf**

*Waqf* is one of the important and distinctive issues of shariah which is proved through all four sources of *Shariah* (شريعة), which means Islamic Law. “You shall never attain righteousness unless you spend from what you love”. (Al- Quran). This Verse is proof for the permissibility of all sorts of charities including *Waqf*. There are several Hadiths which show the permissibility of *Waqf*. “He said if you wish you can make it an endowment and give (its produce) in charity”. (Al-Muslim). This Hadith is base for permissibility of *Waqf*. It is proof from Nus, which means Quran and Sunnah, the strongest sources of *Sharia*. All Jurists are agreed upon the permissibility of *Waqf* .“There is no conflict among scholars in the permissibility of *Waqf*” ( Kasani,2002)<sup>6</sup> .“There is no contradiction in waqf which is established purely for the will of Allah Almighty like building mosque. All people agreed upon it” (Usmani,1415 H).<sup>7</sup> These evidences show that there is *Ijma*, which means consensus, on the permissibility of waqf.

*Waqf* is analyzed over *Itaq* (عتاق), which means to free the slave from slavery to freedom. When a slave is exonerated the ownership of the exonerator is terminated. “Same in the case of *Waqf Mauquf* is extracted from the ownership of *Waqif* but doesn’t enter in the ownership of another person”. (Aazami,2010).<sup>8</sup> “*Waqf* is not but termination of ownership from mauquf and making it purely for the will of Allah. So, it is the same with *Itaq*. The home and land become a mosque immediately” (Kasani,2002).<sup>9</sup> The rule in *Itaq* is that when the master of a slave once says to his slave that you are free then he becomes free. The ownership of *Waqif* ends. Same is the case in *Waqf* that when *Waqif* donate any property his ownership ends. He becomes no more the master of that property. It is the proof of waqf through Analogy.

### **Ruling (Hukum) of Waqf**

According to the Imam Abu Yousuf and Imam Muhammad *Waqif* after donating an asset becomes no more the owner of *Mauquof*. He cannot sell/gift that property and it can’t be inherited after his death. “The *Waqf* is established immediately. It can neither be made invalid nor inherited. There is *Fatwa* on this opinion”. (Al-Haskfi,1406 H). “Shafi and Hanbali schools of thought also have the same opinion”. (Zafar,2014). *Jumhur* also has the same opinion. Therefore, it is preferred opinion because it is more consistent, and *Fatwa* is also on this opinion as declared by Al-Haskfi. The opinion of Imam Malik is different from the opinion of *Jumhur* with respect to definition. According to him, *Waqif* is the master of *Waqf* property which is against the opinion of *Jumhur*. “According to Imam Malik *Mauquf* remains in the ownership of *Waqif*. But *Waqif* cannot use his ownership’s rights”. (Aazmi,2010).<sup>10</sup> But with respect to exercising rights of ownership Imam Malik has the same opinion as that of *Jumhur*. “*Waqf* land cannot be sold though it becomes deserted. The Remains of the *Awqaf*

(*Awqaf* is plural of *Waqf* of ancestors till now is proof that they did not sell *Waqf* lands' '. (Al-Sawi, nd.). So, it is concluded that almost all the Jurists except Imam Abu Hanifa have the same opinion. Elements of *Waqf*.

According to the Hanfi school of thought element of *Waqf* is *Sigha* only. ``*Sigha* is a set of specific words which demonstrates *Waqf* ". (Al-Jurjani,1997). "According to *Jumhur* elements of *Waqf* are four. *Waqif*, *Mauqoof*, *Mauqoof Aliah* and *Sigha* ". (Al- Shirbeeni ,2014). There is no complexity in resolving the contradiction between two opinions. Because expression needs a speaking person, subject matter which is being waqf and beneficiary. "Ahnaf discusses *Sigha* as an element of *Waqf* while the *waqif*, *Mauqaf* and *Mauqaf Alaih* as conditions of *Waqf*. While *Jumhur* treats all these as elements of *Waqf* as stated above." (Aazami,2010).<sup>11</sup> It shows that both opinions are very much alike.

### Conditions of *waqif*

*Waqf* is the termination of one's own property. So, waqif must be legally competent and is free from other legal restrictions. "A person is legally competent if he is major, sane and sober". (Raji et al,2015).<sup>12</sup> "Legal restrictions mean bankruptcy, insolvency, idiotic or wasteful expenditure, an illness that results in death" (Raji-et al,2015).<sup>13</sup> *Waqif* must be free from all these restrictions. Because *Waqf* is an act of declining ownership, therefore *Waqif* should meet all these conditions. So that he may not harm others and he may not be harmed by others.

### Conditions of *Mauquf* (موقوف، *Waqf Asset*)

First condition of *Mauquf* is that it must be *Mal-e-Mutaqawwim*. *Shariah* allows permissible things to be benefited. "Property can be defined as an object which is in the possession of a person, valuable in *Shariah* and is permissible to be benefited". (Aazami, 2010). If anything is not allowed



in Islam. A Muslim cannot get benefit of that thing himself then how can he donate it for others?

Second condition of *Mauquf* is Specification. *Waqf* is the revocation of a property. Generalization in such types of contracts is not bearable. *Mauquf* must be known and specified. “*Waqf* of unspecified object is not permissible e.g. *Waqf* of unspecified slave/house/weapon is not permissible because *Mauquf* is declination of ownership”. (Aazami,2010). Due to generalization disputes can occur. Islam does not allow such contracts which is disputable.

Third condition of *Mauquf* is ownership (*Waqif* must be the owner of *Mauquf*). *Waqf* is a gratuitous contract in which only one party receives the benefit. Therefore, it needs complete ownership. “*Waqf* is the termination of the property. Therefore, it needs absolute ownership i.e. there should be no option of right for any other person which makes the ownership of *Waqf* incomplete”. (Zafar,2014). Without absolute ownership *Waqf* of any property is not permissible. Fourth condition is *Ifraz* (افراز), which means independent and isolated from other property. In case of graveyards and mosques the *Mauquf* must be independent not communal “*Waqif* must be the only owner of *Mauquf*”. (Aazami,2016). “*Mauquf* must be isolated from other property”. (Zafar, 2014).

These statements show that *Mauquf* should not be common property. It should be an isolated and independent property of *Waqif*. But is it necessary to explain whether *Waqf* of common property for other than mosque or graveyard is permissible or not? Common property is of two types. Indivisible common property and divisible common property. *Waqf* of indivisible common property is permissible. “Imam Abu Yousuf and Imam Muhammad agree on permissibility of *waqf* of indivisible communal

property like hammam i.e. bathroom, well and watermill etc.” (Al-Shami,1406 H).

Therefore, there is no issue in donating indivisible property. There is a contradiction among Jurists about Waqf of divisible common property.

According to Imam Muhammad it is not permissible while according to Imam Abu Yousuf it is permissible. In *Fatawa Kamelia* (فتاوى كاملية): “I was asked about the ruling of common property? The answer is that there is contradiction in it. Imam Abu Yousuf made it permissible while Imam Muhammad forbade it. The descendent jurists gave fatwa on the view of Imam Abu Yousuf that it is permissible and preferred because of the practice of Judges and Muftis on it”. (Al-Trablesi,1320 H). “*Jumhur* including Imam Shafi, Imam Malik and Imam Ahmad have the same opinion as that of Imam Abu Yousuf”. (Aazami,2010). The opinion of Imam Abu Yousuf is consistent because *Jumhur* agreed upon it.

The contradiction between the two opinions is based on two different principles and Analogy. “The condition according to Imam Muhammad for completion of Waqf is possession and the thing through which possession is completed is division in divisible properties. He analyzes waqf in divisible common property over gift which is not permissible in divisible common property without dividing it”. (Al-Sarkhasi,1993). It is logic behind the opinion of Imam Muhammad.

Imam Abu Yousuf analyzed waqf over *Itaq*. “According to Imam Abu Yousuf possession is not necessary for completion of *Waqf*. He analyzed waqf over *Itaq*. Partnership is not hindering *Itaq*. Therefore, partnership is not hindered in *Waqf*. (Al-Margheenani,2016). The basic difference between the two opinions is that possession of administrator or beneficiary is necessary according to Imam Muhammad while it is not necessary according to Imam Abu Yousuf.

It can be concluded that *Ifraz* comes under ownership. *Ifraz* is more specification in ownership that property of *Waqif* should be isolated and independent property not common property in case of mosque and graveyard. In case of other properties which are common and indivisible there is no contradiction in making it *Waqf*. In case of divisible common property. *Waqf* is not permissible according to Imam Muhammad and *Waqf* it is permissible according to Imam Abu Yousuf. The opinion of Abu Yousuf is preferred due to customary practice of Judges and Muftis and is more valid for the current era due to consistency as it is acceptable to all schools of thought.

Condition fifth is *Intefa Ma Baqa el Ain* (انتفاع مع بقاء العين), which means Utilization of *Maquf* in a way that principle asset must be preserved. *Waqf is Sadqa Jaria* (صدقة جاریہ), which means on going charity. So, it is necessary to maintain the benefit of *Ain* (عين), which means an object, perpetually (everlasting) by preserving *Mauquf*. “It is with due consideration in *mauquf* that it should be possible that its benefit must be in perpetuity with the existence of its *Ain* (subject matter or object) as according to the customary practice e.g. by renting *Mauquf*. Because *waqf* needs perpetuity so that it remains *Sadqa Jaria*. Therefore, it is not possible in objects which have no perpetual nature”. (Al-Bahuti,1394 H). So *Mauquf* should be immovable property because it can be preserved. The ideal examples are land, house etc.

Condition for *Mauquf* is that it should be an immovable asset according to the Hanfi school of thought. “*Waqf* of land is permissible whereas *waqf* of movable and transferable object is not permissible”. (Al-Margheenani,2016). *Waqf* is permissible only in immovable property and not permissible in movable property in ordinary conditions.

There are some special cases in which *waqf* of movable objects is permissible. Movable object is subjoined to an immovable object. “Building enters in *Waqf* of land as subjoined (subordinate). So, it can be made *waqf* with land”. (Ibn al Humam,1993). *Waqf* needs permanency and movable assets have temporal nature. So, to attain this feature movable property should be a part of immovable object. It is one of three conditions. Second case is that movable property which is mentioned in *Nus* (نص), which means Quran or Hadith. “*Waqf* of horse and weapon in the way of Allah is permissible. Imam Abu Yousuf also agrees with Imam Muhammad in this issue”. (Al-Margheenani,1406 H). *Waqf* of such property which is mentioned in *Nus* it has preference over other property due to this preference its *Waqf* is permissible.

Third *Waqf* of those movable objects is permissible which are practiced customary. This is the view of Imam Muhammad. while Imam Abu Yousuf does not allow it. “It is narrated from Imam Muhammad that *Waqf* of movable object is permissible if it is practiced customary as axe, shovel, sickle, Quran etc. According to Imam Yousuf it is not permissible” (Al-Margheenani,2016). The difference between the two opinions is based on two different principles. According to Imam Abu Yousuf analogy is left when it is in competition of *Nus* and according to Imam Muhammad analogy is also left when it is in competition with practice as in case of *Isthisna* (استصناع), which means customer sale order, analogy is left due to competition with *Urf* (عرف), which means customary practice”. (Ibn al Humam,1993). “*Fatwa* is on the statement of Imam Muhammad.” (Al-Haskafi,1406 H). Statement of Haskafi strengthens opinion of Imam Muhammad.

Statement of Imam Muhammad can be applicable to the modern means and is perfectly suitable to the current circumstances. “*Waqf* of

movable objects which are used in hospital e.g. stretcher, ambulance, cot, different machines etc. is permissible because today there is practice of Waqf of such objects”. (Aazami,2010). Opinion of Imam Muhammad broadens the scope of Waqf.

### Summary of opinions of Jurists

According to Hanfi school of thought *Waqf* of movable objects is permissible if a movable object is subjoined to immovable object, *Waqf* of movable object is mentioned in *Nus* then *Waqf* of this object is permissible and due to current practice of an object which is being made *Waqf*.

Shafi and Hanbali Jurists don't differentiate between *Waqf* of movable and immovable properties. The opinion based on a principle which is that, “*Mauquf* is benefited with the preservation of its *Ain* perpetually. Therefore, *Waqf* of edible things, flowers are not permissible. *Waqf* of land and movable objects is valid”. (Al-Nwawi,1985).<sup>14</sup> “Malki school of thought has also the same view”. (Aazami,2010). The study shows that the opinion of *Jumhur* is broader than the opinion of Ahnaf.

The whole discussion can be summarized that *Mauquf* should be *Mal-e- Mutaqawwim* (مال متقوم), which means valuable in Sharia. It should be in complete ownership of *Waqif*, isolated from other properties, must be preserved perpetually, preferably immovable, and if the asset is movable there is no issue according to *Jumhur* and is restricted with one of the three conditions according to Ahnaf. It must be subjoined to immovable property / mentioned in *Nus* / there is its current practice.

### Conditions of *Mauquf Aliah* (Beneficiary)

*Mauquf Alaih* means beneficiary to whom *waqf* is established. *Mauquf Aliah* may be specified beneficiary and general beneficiary. “If *Waqf* is for a specified person/s or group/s it should have the capacity to

make the other person owner according to all Jurists”. (Zafar,2014). Means that the beneficiary must be legally competent and free from all sorts of legal restrictions. *Waqf* on unspecified mauqf alaih is permissible with conditions. “For unspecified *Mauquf Alaih* two conditions are necessary. *Mauqoof Aliah* must be known and *Waqf* must be for welfare deed.” (Zafar,2014). There is consensus that *Waqf* cannot be established for evil deeds.

The intention of reward in *Waqf* is a disputable issue. According to Hanfi school, the intention of reward is necessary. “Intention of reward is a necessary condition e.g. *Waqf* merely on rich people is not permissible because *Waqf* only on the rich is not the act of reward. Because *Waqf* from start to end is charity therefore it is necessary to express intention of reward.” (Al-Shami,1406 H). According to *Jumhur* *Waqf* must not be for evil deeds. “Intention of reward (in *Waqf*) is not necessary but necessarily it should not deed of sin. Therefore, according to Malki and Shafi Jurists *Waqf* on rich people is permissible”. (Zafar,2014). The study shows that all the Jurists agreed that *Waqf* must not be at least for evil deeds.

Second condition is perpetuity (permanency) in *Mauquf Alaih* which means that the beneficiary should not unend. “Perpetuity means that the class of the beneficiary (person or group) should be unending, e.g. poor, students, travelers, patients etc.”. (Aazami,2016). It is common observation that these classes of beneficiaries are present in each era and never end. World has never seen the absence of all these classes at once.

*Waqf* is an ongoing charity, therefore perpetuity is necessary in *Mauquf Alaih* just like in *Waqf*. “According to Imam Abu Yousuf expressing of perpetuity in words is not necessary, while Imam Muhammad makes expression of perpetuity necessary in words of *Waqif* during the time of establishing *Waqf* because *Waqf* is charity and charity

may be temporary or permanent therefore expression of permanency is must in *Waqf*". (Al-Margheenani, 2016). "Scholars preferred the opinion of Imam Abu Yousuf " (Al-Shami,1406 H). There is no contradiction in perpetuity. The contradiction is in expression of perpetuity in the words of *Waqif*.

### Conditions of *Sigha*

The words through which *Waqf* is established. "*Sigha* is the set of specific words denoting *Waqf*". (Haq,2012).<sup>15</sup> "Words may be implicit or explicit. Words for *Waqf* are six. Three are explicit and three are implicit. Explicit are *Waqftu*(وقفت),*Habbastu*(حبست), and *Sabbaltu*(سبالت) -When one of these words are uttered then *Waqf* is established immediately because it is practice among people. Custom of *Shariah* also includes it. These words are like words of divorce." (Ibn e Qudama, 1997).<sup>16</sup>

*Waqf* is established immediately with explicit words. Because explicit words need no explanation. Other than the above mentioned three words all words which have probability of meaning of *Waqf* and have other meaning/s. Therefore implicit words need some extra words to express the intention of *Waqif*. "Other words should be added to implicit words such as *Sadqa Mauqofa*(صدقه موقوفه), which means dedicated charity, to the word *Sadqa* (charity) merely or the characteristics of *Waqf* should be added e.g. Charity that cannot be sold/gifted/ inherited or the intention of *Waqf* by *Waqif* from implicit words must be found". (Ibn e Qudama,1997).<sup>17</sup> The addition of words is to remove ambiguity because it may cause conflict any time which is against the teaching of Islam.

The Use of Arabic words are not binding for *Waqf*. "*Waqf* is established in every language. Every custom may have different words for *Waqf* e.g. Any person says I made this place a mosque. *Waqf* is established because there is a concept of *Waqf* in the sentence which is used in

practice”. (Aazami,2010). There is no contradiction of Jurists found in the *Sigha* of *Waqf* whether it is explicit or implicit. It means that *Waqf* is established with both explicit and implicit words of *Waqf* and there is no restriction of any language.

*Waqf* is established by action as well. “Except Shafi school of thought all schools of thought agree on permissibility of *Waqf* by action if this action is known for *Waqf* in practice e.g. If a person builds a mosque and gives permission to people to offer prayer in it. It became *Waqf* though he did not use the word *Waqf*”. (Aazmi,2010). Establishing *Waqf* by action totally depends on customary practice of the current era.

### **Waqf by Writing**

As *Waqf* is established via words the same waqf is established through writing: “When Omer (May Allah be pleased with him ) wrote document of his waqf he invited hafal of Muhajireen and Ansar (Companions of Prophet Mohammad PBUH) and made them witness on it then its news spread”. (Al-Khasaf,1999).<sup>18</sup> This is the proof of *Waqf* by writing. It shows that Islam opens ways for establishing *Waqf* a pure philanthropic deed to help needy and poor people more and more to make a prosperous and peaceful society.

### **Rulings for Sigha of Waqf**

There are three rulings for *Waqf* whether it is established through words or writing. These three rulings are *Jazam* (جزم), which means certainty. *Tanjeez* (تنجيز), which means free from conditions, and Perpetuity. *Jazam* means certainty. “Words of *waqf* must show certainty not mere promise or demonstration of promise. For example, a man says that I have the intention of *waqf*, or I will establish *waqf*”. (Aazami,2010). Because *waqf* is the transfer of property from ownership of *Waqif*. Therefore, *Sigha* should comprise words which show certainty.



*Tanjeez: Waqf* is related to the contract of *Tamleekat* (تمليكات), which means making another person owner of something). “Contracts which are related to the class of *Tamleekat* can neither be suspended over a condition nor can it be assigned to future” .(Aazami,2010) .“When a man suspends a *Waqf* by saying that I will donate my property when 1st day of month comes or a man suspends it with arrival of a specific person. The waqf doesn’t establish. It is according to the preferred statement”. (Al-Nawawi,1985). It means that *Sigha* must comprise words which denote present time not future and are free from suspending *Waqf* to any future event.

Perpetuity: *Sigha* must comprise words which imply that *Waqf* is forever not for a specific time.“ If someone says I donate my property for one year then according to *Jumhur* it is not valid”.( Al- Nawawi,1985). *Waqf* is an ongoing charity that needs continuity . Restriction of time in its units (years, months etc.) is against perpetuity therefore such restrictions of time make *Waqf* null and void.

### Copyright

Copyright is the right of the person who writes/invents/innovates intellectual material for the first time. The same in the case of the trademark, patent etc. “The pioneer is more entitled to this right whoever prays before the Muslim has not proceeded him. Then he is entitled to it”. (Ibn e Qudama,1997). This Hadith gives the right of entitlement to the author/inventor/innovator who writes/ invents/innovates anything.

The reality of copyright and other intellectual properties is that these are rights. But nowadays it is registered in the government institutions and is treated as a real object in practice. “If the right of invention is registered then it becomes legal right and the inventor is given a certificate by the government. Then it is considered a precious property within the practice of the traders. So, it is not far away that it is counted to be a real object. Because

customary practice has a great role in considering an object as property. Reason for this is that the valuation of something is made due to considering it by people as property. After registration this right can be preserved and stored for the time of need. In considering this custom there is no prohibition of any *Nus* of Quran and Sunnah. Only there is contravention with *Qiyas* (قياس), which means analog, and *Qiyas* is left due to practice”. (Usmani,1988).

This explanation proves that copyright is now not merely a right, but it is considered as a real object in the market. Considering copyright as a property is a new issue it needs confirmation of contemporary scholars. “Class of contemporary scholars gave fatwa on selling of this right. These are great scholars of the subcontinent. Maulana Fateh Muhammad, Maulana Mufti Kifayat Ullah, Maulana Nizam-U-Din are especially to be mentioned”. (Usmani,1988).<sup>19</sup> The above-mentioned scholars are worldwide popular scholars and writers of their own *Fatawa* (فتاوى), which means book which is composed of collections of legal opinions.

Copyright fulfills all conditions of being property. “Meaning of *Mal* (مال), which means property, is that the mind inclines towards it and it can be preserved for time of need and must be valuable. Valuation is made by all or certain people”. (Al-Shami,1406 H). All the characteristics of *Mal* are found in copyright as beautifully explained by Usmani. Due to registration it is now treated as real objects in the market.

### **Issues in Waqf Of Copyright**

There is no issue with respect to waqif if the waqif is sane, mature and free from legal restrictions. It can be summarized that any author /inventor/ innovator who has legal competency and wants to donate his copyright for any welfare and noble deed can do it. Almost all kinds of people Muslims and Non-Muslims (beneficiaries) could benefit from waqf.

“Muslim can donate something to Zemmi(ذمی), which means Non-Muslim leaving in a Muslim state.”. (Aazami,2010). There is no issue with respect to the *Mauquf Alaih* if the property is not donated for the purpose of sin. “If the property is donated for the weapons of brigands or for any source of sin the *Waqf* is void”. (Al- Nawawi, 1985). *Waqf* is an act of reward therefore it cannot combine with an act of sin.

Copyright is considered as a valuable movable asset nowadays. “The term movable means any property that can be transferred from one place to another” (Rahmani, 2010).<sup>20</sup> The only issue is in its lifespan, which seems the temporal nature of copyright while *Waqf* needs permanency. There is no issue, according to the Malki school of thought because Malki Jurists allow temporary *Waqf* i.e. *Waqf* with time limitation. So, there is no issue in considering copyright as *Mauquf* according to them.

It is a serious issue for other schools of thought, but it can be resolved with the statement of Al-Zuhali. “The author deserves the benefits of his writing in his life and his heirs after he passes away till sixty years. After sixty years of his death the book will become public property like general *Mauquf* analyzing it on the fixed duration in the right of the *Hikr*. *Hikr*(حكر) means the right of the *Qarar* (قرار), which means stay on the land of *Waqf* for horses or buildings based on long-term lease” (Al-Zuhali,2002). The opinion of Al-Zuhali proves the perpetual nature of copyright. Therefore, there is no issue, according to Shafi and Hanbali schools because they admit *Waqf* of movable assets. *Mauquf* should be an object that is beneficial perpetually. Therefore, *Waqf* of land and movable object is allowed as well.” (Al-Nawawi, 1985). “According to Malki school *Waqf* of movable object is allowed.” (Aazami, 2010).

So *Jumhur* allows *Waqf* of movable objects. According to preferred opinion of Imam Muhammad (Hanfi school) *Waqf* of movable asset is

permissible with three conditions. The first condition is that movable objects should be subjoined to immovable objects. Second condition: *Waqf* of movable objects should be mentioned in *Nus*. Third condition is that there should be practice of the specific object which is being made *Waqf*. So, issues regarding all schools of thought are resolved. If anywhere there is a practice of *Waqf* of copyright, then it should be permissible. Secondly copyright can be considered as subjoined to the book the author has written. The shift from private property to public i.e. After sixty years of the death of author creates problems. Qazi Khan discussed such cases in his *Fatawa*, “If anyone says I donate this land for my fetus, and he has no child yet. *Waqf* is permissible. Its income will be distributed among poor till the birth of baby”. (Awz Jandi,1402 H). It’s the proof that needy public is one of the main objectives of the *Waqf*. In the same context further Qazi Khan writes another example “If baby born then the income of *Waqf* will shift to baby throughout the life of this child. After the death of the child income will transfer to poor people because he said “*Sadaqtun Mauqoofatun*” in sight it is actually from the beginning for poor mentioning of the fetus is for exception”. (Awz Jandi,1402 H)). Here the shift from public property to private and then to the public can easily be noticed.

Public □ Private □ Public

Before the birth of a child (Public) □ after birth (Private) □ after the death of a child (Public). There is necessarily a shift in case of copyright after sixty years of the death of the author but still it will be considered as property.

### **Issues with Respect to *Sigha***

If *Sigha* is composed of words which show permanency explicitly or implicitly in words or in writing, then there is no issue with respect to *Sigha*. Study shows that *Waqf* is permissible even by an action which is

considered the act of *Waqf* in current practice in which waqf is being made. So almost all the issues are resolved regarding *Waqf* of copyright.

### **Overview of Themes (Basics of *Waqf* and Copyright)**

As mentioned before, the literature review is thematic in nature and consists of two parallel themes. Which are Basics of *Waqf* and Copyright.

#### **Basics of *Waqf***

1. *Waqif*, *Mauqoof*, *Sigha* and *Mauquf Alaih* are pillars of *Waqf*. Missing any of these leads the *Waqf* null and void.
2. Consensus upon that *Waqf* is ongoing charity therefore the nature of *Waqf* needs perpetuity so that benefits of *Waqf* may not end. Among four pillars, perpetuity is one of the most important condition. The study explains perpetuity from various angles. The words of *Waqif* must represent the permanency of *Waqf*. Preserving *Mauquf* is the far most duty of the administrator so that *Waqf's* benefit may not be misused. The class or classes of *Mauquf Alaih* should exist forever like poor, patients, travelers, students etc.

*Mauquf* is the most important pillar of *Waqf*. The opinion of Imam Muhammad is very much useful to be used in this era due to two reasons.

(a) *Fatwa* is on this opinion in Hanfi school. So, it is preferred opinion and is more like the opinion of *Jumhur* regarding the waqf of movable assets with the condition of practice. Therefore, consistency is possible among all the schools of thought.

(b) Secondly it is the time of inventions and innovations. New types of properties are coming into existence day-by-day. This opinion helps in resolving newly arising properties regarding *Waqf* by using *Urf* a source in Islamic Jurisprudence.

The opinion of Imam Muhammad is applicable to all kind of newly introduced property as *Mauqoof* of any time or era with condition of current

practice of that time. So according to Imam Muhammad's opinion *Waqf* of immovable property is permissible without condition and *Waqf* of movable property is permissible with one of three conditions discussed above. Copyright (intellectual property) is one of new and challenging assets in this era to be put forward for test as *Mauquf*.

## Copyright

As proved from study that copyright is now considered as a precious property in the market because it contains all property of mal and is accepted by the contemporary Jurists of all schools of thought. So this study can help to change the former view where it is said that Hanfi school does not consider it a property. "Malkawi, Bashir H. (2013), coincides and suggests that all Jurists other than Hanfi school accept IP (Intellectual Property) as a specie of property. It was the former view. This study gave reference to the names of the top-class contemporary scholars which are well known not only in Subcontinent but are very much popular in other continents of the world too. They accept copyright as precious property.

## Overview of Themes (Basics of *Waqf* and Copyright)

As mentioned before, literature review is thematic in nature and it consists of two parallel themes. Which are Basics of *Waqf* and Copyright.

### Basics of *waqf*

1. *Waqif, Mauqoof, sigha and Mauquf Alaih* are pillars of *waqf*. Missing any of these elements leads to the *Waqf* null and void.
2. Consensus on that *Waqf* is ongoing charity therefore nature of *Waqf* needs perpetuity so that *Waqf's* benefits may not end. Among four pillars perpetuity is one of the most important conditions. The study explains perpetuity from various angles. The words of *Waqif* must represent permanence of *Waqf*. Preserving a *Waqf* object is the far most duty of the

administrator so that *Waqf's* benefits may not end. The class or classes of *Mauquf Alaih* should exist forever like poor, patients, travelers, students etc. *Mauquf* is the most important pillar of *Waqf*. The opinion of Imam Muhammad is very much useful to be used in this era due to two reasons. (a) *Fatwa* is on this opinion in Hanfi school. So, it is preferred, and his opinion is more like the opinion of *Jumhur* regarding the *Waqf* of movable assets with the condition of practice, therefore consistency is possible among all the schools of thought. b) Secondly it is the time of inventions and innovations. New types of properties are coming into existence day-by-day.

The opinion of Imam Muhammad is applicable to all kinds of newly introduced property as *Mauquof* of any time or era with condition of current customary practice of that time. So according to Imam Muhammad opinion the *Waqf* of movable and immovable property is permissible. Copyright (Intellectual Property) is one of new and challenging assets in this era to be put forward for test as *Mauquf*.

### **Copyright**

As proved from study that copyright is now considered as a precious property in the market because it contains all property of mal and is accepted by the contemporary Jurists of all schools of thought. So this study can help to change the former view where it is said that Hanfi school does not consider it a property.“ Bashar H (2013) concurs and put forth that with exception of Hanfi school the other three schools Malki, Shafi and Hanbali accept IP (Intellectual Property) as specie of property” .(Raji et al,2015) .It was the former view that this study gave the reference of the names of the top class contemporary scholars which are well known not only in subcontinent very much popular other continents of the world too. They accept copyright as precious property.

## Conclusion (Waqf of Copyright)

The study shows that now all schools of thought agreed that copyright is treated in market as a movable property .According to *Jumhur Waqf* of movable property is permissible.While according to preferred statement of Hanfi school waqf of movable property is permissible with condition of current practice of waqf of the specific property which is being made waqf. So waqf of copyright (an Intellectual Property) which is considered a movable property nowadays in the market is permissible in the light of this study according to *Jumhur* without condition of current practice and with condition of practice of *Waqf* according to Hanfi school of thought.

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