

CONCEPT OF VALID CONTRACT DECLARATION OF WAQF PROPERTY IN ISLAMIC LAW

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Abstract

Waqf plays an important role in improving public welfare in whole Islamic Countries. Therefore, waqf shall be conserved and permanently protected to keep its benefits for the public at all times. In order to develop the waqf property, it should be administered properly. Recognition of ownership on the property by effective contract of declaration is essential. Therefore, this paper focuses on the Islamic Law's perspective regarding effective contract on a binding and valid declaration of waqf property in accordance to Islamic Law and other subsidiary sources as well as academic opinions. This paper also includes formalities of legally binding contract of waqf (waqafiah) on parties, formulated by earliest Muslim jurists. In addition, the detailed discussions on documents of waqf evidencing contractual transactions needed for registration of waqf property are included. The elements of valid and binding declaration of waqf or deeds discussed too. The approach adopted is 'Content Analyses'.

Keywords: *waqf, property, contract, Islamic, concept*

INTRODUCTION

Waqf plays an important role in improving *ummah's* welfare (Kahf, 2012, 1). Therefore, *waqf* shall be conserved and permanently protected to keep its benefits for the *ummah* at all times. In order to develop the *waqf* property, it should be administered properly. Administration of *waqf* property involves asset management including registration of the property as *waqf*, investment and development finance, maintenance and repair, protection and generation of income all the time (Mohammad, 2011). Among all, registration of *waqf* property is essential today because lack of attention to it would be management procrastination and may lead to loss of *waqf* property (Mohiddin, 2013, 25-37).

This paper focuses on the Islamic Law's perspective regarding a binding and valid declaration of *waqf* accordance with *Quran*, *Sunnah* and *Ijtihad* of *mujtahiddin* including *Ijma*, *Qias* and other subsidiary sources such as fatwa by recognized religious authority, judicial precedents and decisions as well as academic opinions Mohammad (Kamali, 1998). This paper will include formalities of legally binding documents of *waqf* (*waqafiah*) on parties, formulated by earliest Muslim jurists (Kamali, 1998. 336). In addition, the detailed discussions on documents of *waqf* evidencing contractual transactions needed for registration of *waqf* property are included (Mohammad, 2011). The elements of valid and binding declaration of *waqf* or deeds are discussed too.

2.0 THE WAQF EVOLUTION

In order to figure out the legal system of *waqf* registration in Islamic law, it is essential to know how *waqf* existed before and how it regulated. *Waqf* existed earlier before the time of Prophet Muhammad (pbuh) in the certain societies (Osman, 1982, 1-9). The earliest known *waqf* was the construction of the Ka'bah, which remained pure and sacred for all-purposes afterwards (Kahf, 2012, 1). In Europe, and in other countries including in Jurusalem, the al-Masjid al-Aqsa, ancient church and others buildings were constructed for economic, religious features and cultural center. All the constructed buildings such as schools, mosques, almshouses, public water supplies and other establishment have similar characteristics to *waqf* where the ownership belongs to the religious community, which are inalienability, collective usage of charity and are not for individual usage. However, there are neither evidences nor books that clearly indicated to prove those were the creation of *waqf* until Prophet Muhammad (pbuh) introduced it through narrated hadith (Sait, 2005, 21; Osman, 1982, 1-9).

There is no specific reference within Quran saying about *waqf* (Mohamood, 2006). However, by Literal Rule which is words must be given their ordinary, literal, grammatical meaning, day to day meaning words it use the language of the ordinary citizen (Pacific, 2003), there are extensive numbers of Quranic verses recommending Muslims to spend money and property in the way of Allah and will be rewarded (Esmaeili, 2010, 10);

لَنْ تَنَالُوا الْبِرَّ حَتَّى تُنْفِقُوا مِمَّا تُحِبُّونَ وَمَا تُنْفِقُوا مِنْ شَيْءٍ فَإِنَّ اللَّهَ بِهِ عَلِيمٌ ۝

“You shall not attain righteousness until you spend out of what you love (in the way of Allah) Allah knows whatever you spend” (Quran 3:92).

بِالَّذِينَ سِرًّا نَهَارًا وَعَلَانِيَةً فَلَهُمْ أَجْرُهُمْ عِنْدَ رَبِّهِمْ . وَلَا خَوْفٌ عَلَيْهِمْ وَلَا هُمْ

الَّذِينَ يُنْفِقُونَ وَالْأَمْوَالُ لَهُمْ يَحْرَتُونَ

“Those who spend their wealth by night and by day, secretly and publicly, will find that their reward is secure with their Lord and that there is no reason for them to entertain any fear or grief” (Quran, 2:274).

Besides, in the hadith reported by Abu Hurairah, narrated by Imam Muslim the Prophet (pbuh) stated;

قال رسول الله صلى الله عليه وسلم : " إذا مات ابن آدم انقطع عمله إلا من ثلاث : صدقة جارية ، أو علم ينتفع به، وأ ولد صالح " يدعو له . ((رواه مسلم)) .

“When a man dies, his deeds come to an end except for three things: Sadaqah Jariyah (ceaseless charity); knowledge which is beneficial; or a virtuous descendant who prays for him (the deceased) (quote by Imam Muslim)” (Riyad As-Salihin, 13: 1383).

The donation or *sadaqah jaariah* in the above hadith is widely understood by the Muslim scholars as *waqf* (Sheikh, 2012). Al-Imam an-Nawawi said *waqf* linked to this hadith, "This hadith is an argumentation that shows legitimate and validity of *waqf* and the ultimate reward from Allah" (Elasrag, 2010).

Besides that, there was an event of *waqf* creation in the time of Prophet Muhammad. At that time, drinking water used to be sold at a high price in Madinah and became difficult for the poor to pay for water. Then, the Prophet (pbuh), called on people to buy the well and make it a *waqf* asset. Uthman ibn Affan bought it and made it free for everyone. Hence, this brought about a wide range of *waqf* as charity to society (Kahf, 2012). Later on, another event at Khaibar, the Prophet (pbuh) advised Umar to assign his land that he obtained from the battle of Khaibar as a *waqf* by making charity out of it in term of giving it to the needy and people who deserved it (Kahf, 2012). Indirectly, this shows that the characteristics of *waqf* are non-transferable which related to the understanding of Muslim Jurists (Asming & Izah, 2011, 16).

Waqf ahli started shortly after the demise of the Prophet (pbuh), during the reign of `Umar ibn Al-Khattab (635-645), the second Caliph. Umar decided to document in writing his *waqf* in Khaibar, he invited some of the Companions of the Prophet (pbuh) to attest to this document. This let many real estate owners to *waqf* their asset of property. Some of those put a condition that part of the fruits and revenues must distributed to their own children and descendants and another part be given to the poor. This kind of *waqf* called posterity or *waqf ahli*. Therefore, *waqf* in Islamic law may also be for one's own family and descendants (Yayasan, 2013).

Subsequently of the events, philanthropy of *waqf* is continuing (Osman, 1982, 17-19). Ibn Khallikan mentioned in his book about the honorable King of Arbela, Al-Muzaffar (645 after Hijra) who donated buildings for charity to the poor, handicapped, jurists of the era, hospital including movable goods such as food and allowance. Then, Ibn Batuttah (703-779 after Hijra) recorded his visit in Damascus,

the city and rulers applied the idea of *waqf* by supplying pavements, roadways including movable assets such as clothing, expenses, and endowments for travelers (Osman, 1982).

There was so much data after the first century of Hijra to superstructure of *waqf* in social, economy and religious aspects among the public. All these can be seen from the generations of the Hadith. For Muslims, they have both the *Quran* and Prophet Muhammad's (pbuh) *Sunnah* and Hadith as the guidance in their life and it is their duty to believe in these two. When *Quran* is silent, hadith is sought. However, when hadith is silent, one shall refer to *Ijma'* of *Ulama* (consensus) followed by *Ijtihad* outlines of Shari'ah. Within this research, most sources referred are *Quran*, *Sunnah* and Hadith. Only few *Ijma*, *Qias*, *Urf* and other source are used. Hadith of *waqf* at Khaibar gives an identification of the existence of *waqf*. However, the implementation of *waqf* is questioned until this present day. This is due to the many interpretations of scholars according until today.

3.0 DEFINITION OF WAQF

Literally, *waqf* derived from the hadith reported by Ibn Umar that contains the word *habs* that is the same as *waqf* (Ashraf, 2007, 64; Kahf, 2003,2; Hamid and Mohammad, 2012,12). The Hadith says:

حَدَّثَنَا يَحْيَى بْنُ يَحْيَى التَّمِيمِيُّ، أَخْبَرَنَا سُلَيْمُ بْنُ عِنخَصَرَ، أَعْوَنَ، ابْنُ عَنَّا، عَنْ نَافِعٍ،
عَنِ ابْنِ عُمَرَ، قَالَ أَصَابَ عُمَرُ أَرْضًا بِخَيْبَرَ فَأَتَى النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ
يَسْتَأْمِرُهُ فِيهَا فَقَالَ يَا رَسُولَ اللَّهِ إِنِّي أَصَبْتُ أَرْضًا بِخَيْبَرَ لَمْ أَصِبْ مَالًا قَطُّ هُوَ أَنفَسُ
عِنْدِي مِنْهُ فَمَا تَأْمُرُنِي بِهِ قَالَ "إِنْ شِئْتَ حَبَسْتُ أَصْلَهَا وَتَصَدَّقْتَ بِهَا".

Umar acquired a land at Khaibar. He came to Allah's Apostle (pbuh) and sought his advice concerning it. He said, Allah's Messenger, I have acquired land in Khaibar. I have never acquired property more valuable for me than this, so what do you command me to do with it? Thereupon he (Allah's Apostle) said: If you like, you **may keep the corpus (habs)** intact and *give its produce as Sadaqa* (Institute, 2012; Sahih Muslim, 26: 4311)

This hadith is widely used by Muslim jurists as a reference to the existence of *waqf* as derived from the Arabic word of *habs* (Hashim, 2007, 64–74; Kahf, 2003,26; Omar, 2013,27). Imam Ahmad Bin Hanbal opined, the existent of *waqf* is derived from the word of *habastu*, *wakaftu*, *sabaltu*, and *tasadaqtu* by the Prophet (pbuh) word of "*habasta*" (Rukmana, 2010,40). *Habs* carries the same meaning as to hold, confine, prohibit, detain, prevent, or restrain (Hamid and Mohammad, 2012, 14). According to [Esmaeili \(2010\)](#), *habs* means 'keeping the property from surrendering the Land Title for separate use for a particular purpose'. It is similarly means 'to protect something, by preventing it from becoming the property of a third person' (Hamid and Mohammad, 2012). *Habs al-asl wa tasbil al-samarehi* is keeping the principle and using the benefit (for the way of Allah) (Esmaeili, 2010).

The hadith further:

قَالَ فَتَصَدَّقَ بِهَا عُمَرُ أَنَّهُ لَا يُبَاعُ أَصْلُهَا وَلَا يُبْتَاغُ وَلَا يُورَثُ وَلَا يُوهَبُ .
قَالَ فَتَصَدَّقَ عُمَرُ فِي الْفُقَرَاءِ وَفِي الْقُرْبَى وَفِي الرِّقَابِ وَفِي سَبِيلِ اللَّهِ وَابْنِ السَّبِيلِ وَالضَّيْفِ لَا
جُنَاحَ عَلَى مَنْ وَلِيهَا أَنْ يَأْكُلَ مِنْهَا بِالْمَعْرُوفِ أَوْ يُطْعِمَ صَدِيقًا غَيْرَ مُتَمَوِّلٍ فِيهِ .
قَالَ فَحَدَّثْتُ بِهِذَا الْحَدِيثِ مُحَمَّدًا فَلَمَّا بَلَغْتُ هَذَا الْمَكَانَ غَيْرَ مُتَمَوِّلٍ فِيهِ .
قَالَ مُحَمَّدٌ غَيْرَ مُتَأَثِّلٍ مَالًا . قَالَ ابْنُ عَوْنٍ وَأَنْبَأَنِي مَنْ قَرَأَ هَذَا الْكِتَابَ أَنَّ فِيهِ غَيْرَ مُتَأَثِّلٍ مَالًا .

'Umar gave it as *Sadaqa* declaring that property must not be sold or inherited or given away as gift. Moreover, Umar devoted it to the poor, to the nearest kin, and to the emancipation of slaves, aired in the way of Allah and guests. There is no sin for one, who administers it if he eats something from it in a reasonable manner or if he feeds his friends and does not hoard up goods (for himself). He (the narrator) said: I narrated this hadith to Muhammad, but as I reached the (words) "without hoarding (for himself) out of it." he (Muhammad) said: "without storing the property with a view to becoming rich." Ibn 'Aun said, He who read this book (pertaining to *waqf*) informed me that in it (the words are) "without storing the property with a view to becoming rich" (Institute, 2012: Sahih Muslim, 26: 4311).

Generally, from the hadith, Umar did not transfer his property by inheritance or any mode of transaction to anyone else but he distributed the benefits of the property in a way that was blessed by Allah. Hence, this has shown that the *waqf* is non-transferable, inheritable or inalienable where the Land Title is for perpetuity and there is no sign of revocable of the *waqf* by the deed of Umar in the narrated hadith. Thus, it shows that the concept of *waqf* is inalienable, irrevocable and perpetuity (Osman, 2008, 348; Mohammad, 2011, 22)

However, the four famous Muslim jurists opined more specifically the legal definition of *waqf*. According to Abu Hanifah (Hanafi), *waqf* is the appropriation of property that belongs to the *waqif* who shall be entitled to the benefits of it. The ownership of the property vested in the *waqif*. However, the benefits or usufruct of the property devoted for charity (Osman, 1982, 22; Ashub, 1915,8; Zahrah, 1959,48). Besides that, Abu Hanifah also thought the subject of the property is like '*ariyah*' or loan (Rukmana, 2010,38; Osman, 1982, 23). Its profit or usufruct of the property belongs to the possessor/borrower as long it remains in his/her possession. However, some Hanafi jurists opined, the *waqf* shall be dedicated to the poor and be permanent. According to two disciples of Abu Hanifah, Abu Yusuf and Imam Muhammad (Mohammad bin Hassan al-Shaibani), *waqf* is transfers *waqif's* right of his/her property to Allah. Thus, the property belongs to Allah while the benefits or outcome given to beneficiaries. Hence, it cannot be sold, given as gift or inherited. Abu Yusuf thought it is protected by declaration and shall be in perpetuity and cannot be revoked or be temporary while (Imam Mohammad al-Shaibani adds) manager or '*Mutawalli*' to be appointed and its possession of *mawquf* being delivered (Osman, 1982, 22-25).

Just like Abu Hanifah, Maliki also had a similar thought that was the ownership of property belonged to the *waqif*. Based on Maliki School, *waqf* may be limited to certain time and expiry of time and it may revert to the ownership of the *waqif* or to his heirs (Osman, 1982, 25; Anderson, 1951, 293). Syafie and Abu Yusuf (Hanafi School) opined whenever the beneficiary does not exist, the usufruct would be reverted to *waqif's* heirs. In Syafie School, Ibn Hajar al-Haytami expanded, that after the beneficiaries died, it shall continue to the nearest relatives who are poor, if there is no poorer, the rulers of the country shall give it to Muslim community of the town and it is agree by Hanbali (Osman, 1982, 27; Qudamah, 1947, 567-68). However, for mosques; cemeteries and water supplies could be to the rich as well. In summary, the majority agrees that the further relatives of the *waqif* have rights to the usufruct too after the poor.

As mentioned earlier, there are no specific guidelines about *waqf*. Therefore, from the existed resources like the hadith and *Sunnah*, the Muslim jurists have formulated guidelines, opinions and thoughts about *waqf*. Generally, most of Muslim scholars agree *waqf* is a property that shall be spend to charity and in the way of Allah and on the execution of *waqf*, it shall be preserved and indirectly means irrevocable, perpetuity and inalienable (Ali, 2009, 11).

4.0 THE EFFECTS OF WAQF AND ITS CONSTITUENTS

According to Sharia', any contract including *waqf* declaration deeds could be divided into three legal effect such as Figure 1, which are enforceable such as *sahih*, *nafiz*, *lazim*, *munjiz*, *ghair lazim* or *ja'iz* (Mahmood, 2014). Second, defective contract divided as *batil*, *fasid* and *ghayru sahih*. Third, suspended contracts are *mauquf*, *muallaq* and *mustaqbali*. Each meaning of the effects is as below:

- i. *Sahih* defines as a perfectly contract that comply with the element or pillars (rukun) and condition require in *Shariah* and there are no doubt the element and nature that can consider out of the law. This contract is valid and taken into effect immediately upon completion of the offer and acceptance (*ijab* and *qabul*).
- ii. *Nafiz* defines as a contract arising from a qualified and authorized person to do so. This is legal contract issuing an immediate effect as soon as it made, without being subject to the approval or consent of any person.
- iii. *Lazim* defines as a contract does not allow one of the parties who signed the contract cancel without consent of the other party such as rental, sell, and buy purchaser.
- iv. *Munjiz* defines as a contract made with the clear expression that is not suspended on any condition and not contingency with future events or execution. This contract effect immediately as soon as it is declared.
- v. *Ja'iz* defines as a contract that allows either party to cancel the contract without the consent of the other party as *wakalah*.

- vi. *Batil* defines as an imperfect contract because not comply with its condition and element or pillars (*rukun*) according to *Shariah*. Such as contract, is invalid and does not produce any effect whatsoever.
- vii. *Fasid* defines as a contract is exist on the legal containing intrinsic or extrinsic cause as attribute in the contract which could be remove, hence, the contract not necessarily become void. Either defected party may revoke the contract but once the cause of irregularity removed, the contract is valid. Hanafi divide contracts into three categories of valid (*Sahih*), voidable/defective (*Fasid*) and void (*Batil*). Thus, they divide the void contracts into defective/irregular (*Fasid*) and invalid categories
- viii. *Ghayru sahih*; Hanafi jurists are defining invalid (*ghayru sahih*) contract which is between the *batil* and *fasid*. Owner must has authority over the object and authority of disposition, besides that, the contracting party must also have the approval of the owner so then, the relationship between contracting party and the object would be effectively enforced.
- ix. *Mauquf* defines as a contract arising from a person who is entitles to do so but he does not qualified yet to do so such as children who *mumaiyiz* because there is a risk of profit and loss. This contract cannot produce any effect except by the approval of authorities' owner otherwise, it become void.
- x. *Muallaq* defines as a contract existed depending on the existence of something else to occur. Without the occurrence of the specified matter, the contract does not exist. For example, A says to B, "If I were out of the country then you shall be my deputy." Such a contract not formed unless the conditions associated it.
- xi. *Mustaqbali* defines as a contract made by the pronouncement of acceptance relied upon in the future. The contract law it will happen or formed immediately, but the effect does not exist except at the designated time, ie the time the lien is valid.

5.0 ELEMENTS OF VALID WAQF

Generally, *waqf* is valid and binding on five elements (*sighah*, *waqif*, *mawquf*, *mawquf alaihi* and *Nazir*) (Mohammad, 2011). Consequently, every element requires certainty to consider as valid elements. Somehow, every element may be enforceable; defects or suspended which is depending on varies possibilities. Thereof, the earliest jurists had predicted and thought on legal effects on every possibility on every element to be happened. Thus, the legal effects of every possibility on *waqf* elements are prescribe as below:

5.1 Declaration (*Sighah*)

Sighah means *ijab* (offer) and *qabul* (acceptance). Just like any other contract, *waqf* contract is created when *waqif* declare his intention to create *waqf* (orally or in writing). According to Syafie's law, the acceptance of beneficiaries is needed and if

beneficiaries refuse at first place, he/she may accept it later (*nafiz*) otherwise it will be void (*batil*). However, Maliki opined even if the specified beneficiaries refuse, the declaration of *waqf* is binding (*nafiz*), but the subject matter of *waqf* given to the next beneficiaries or to the poor (Hamid and Mohammad, 2012, 16). According to Maliki, Ahmad ibn Hanbal and Syafie, delivery of possession is not a necessary (*nafiz/ghair lazim/jaiz*) (Osman, 1982, 128; Khassaf, 1904, 113).

Accordance to Syafie, for valid and immediately enforceable *waqf* (*sahih/nafiz*), the *waqif* shall use clear words such as '*waqaftu*', '*habastu*', '*sabbaltu*' or other phrases that signify his attention to create *waqf* (*munjiz*) (Ali, 2009; Osman, 1982, 217, 227). Otherwise, the property will result as *sadaqah*. Besides, according to Hanbali, the *waqif* shall state the name of beneficiaries and purpose of *waqf*. All four Sunni School of laws agree that the property shall constitute "*waqf khairi*" or "*waqf ahli*" (Osman, 1982, 28; Buxbaum, 1968, 206). For example, "I made this *waqf* in favor of my children" or "in favor of Ahmad and his decedents" or similar to this and no more. However, the word or language used by *waqif* might be confusing, ambiguous or bring a couple of meanings (Osman, 1982, 217, 227). Thereof, according to the majority, except Syafie thought, the action and conduct of *waqif* to religious purpose could constitute a proof of *waqif* intention to create *waqf*. For instance, according to Abu Yusuf by Golden Rule which is using choice of meanings as a presumption that a meaning which produces an absurd (Pacific, 2003). The *waqif* has buried one dead body at the land, or has appointed an imam as *Mutawalli* or lead prayers in the mosque considered the intention of *waqif* to create *waqf* (Osman, 1982, 137-140). Maliki, Ahmad ibn Hanbal and Syafie school support the view by delivery of possession is not a necessary (*nafiz/ghair lazim/jaiz*) (Osman, 1982, 128; Khassaf, 1904, 113).

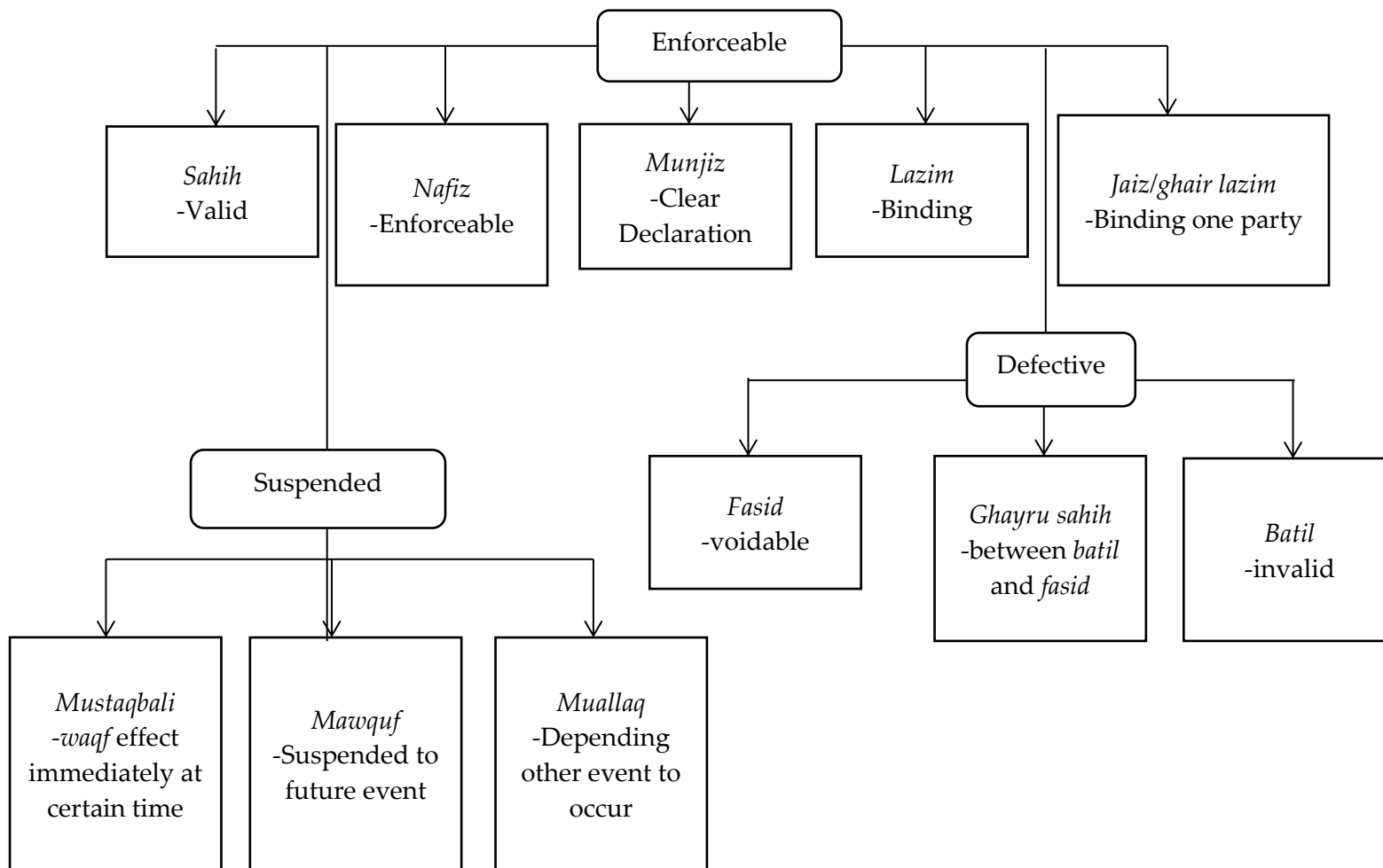


Figure 1: Legal Effect of Contract

However, if a dedication offering prayers, some scholars opined it should be *adhan* (call for prayer) and *iqamah* (necessary of genuflections). Then, sufficient the *muadhdhin* (people who called for prayer) and *imam* (person who leads the prayers) prays in it (*nafiz*) (Osman, 1982, 128; Khassaf, 1904, 113). Second, evidence of written documents or a contract of *waqf* -deed will definitely support the intention of *waqif* to create a *waqf* property (*sahih/nafiz/munjiz*) (Mohammad, 2011, 11). As discussed earlier by majority jurists, after the *waqif* declared his/her property as *waqf*, he/she cannot deny or revoke his/her declaration (Mohammad, 2011, 28). Overall, every possibility within element and legal effects of *sighah* is in Figure 2.

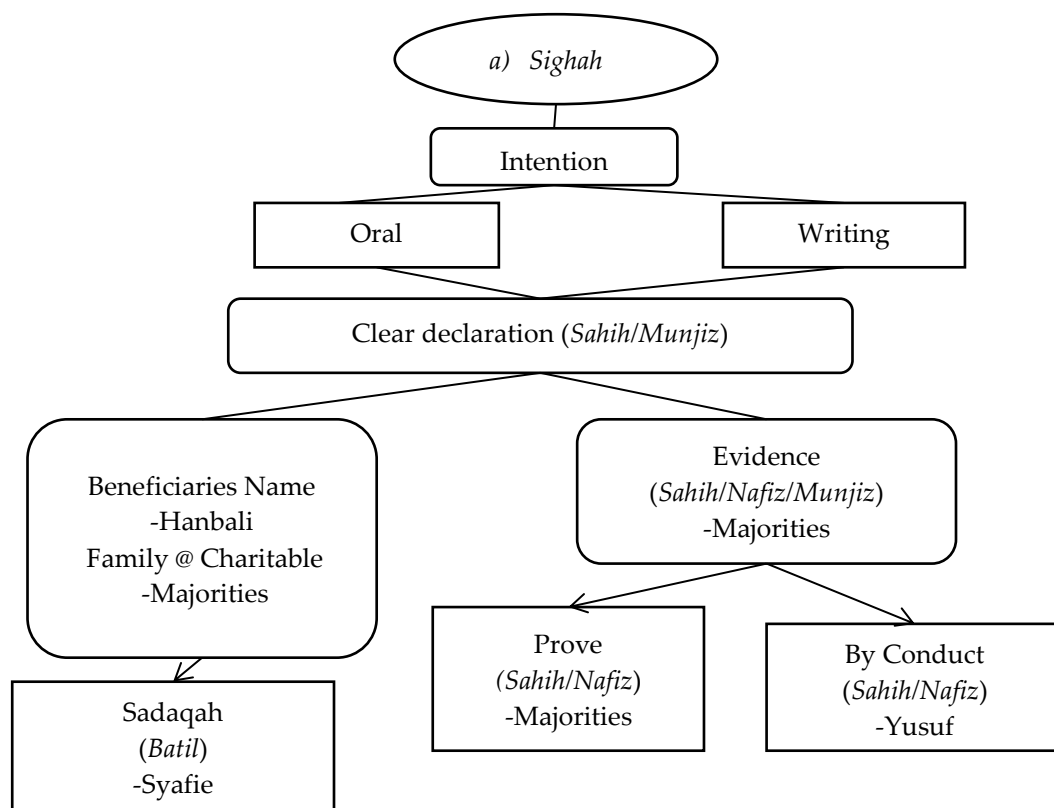


Figure 2: Condition of *Sighah* Elements

5.2 Donor/Founder (*waqif*)

Donor or *waqif* is someone who donates his property as *waqf*. The existence of *waqif* is one of the main elements that constitute a valid *waqf* (*sahih/nafiz*) (Hamid & Mohammad, 2012, 14; Husain, 2014). For a contract or the deed of *waqf* to be binding or enforceable immediately (*nafiz/lazim*), it requires the *waqif* to be qualified, that is he/she must be of full age (*aqil baligh*), sane and capable of declaring his/her will or has obtained faculty of disposition over his property, otherwise it will be invalidated (*ghair sahih/batil*) (Ali, 2009,10).

In Syafie's School, he/she must not be under any interdiction either the property or himself from any debt otherwise, the *waqf* shall be set aside but the remainder property will be *waqf* (Osman, 1982,41; Nawawi, 1914,230). Hanafis is having similar opinion, the *waqif* must have composite capacity as

on his own property (*nafiz*) otherwise, *waqf* is in suspense if the *waqf* were made before the property was possessed (*ghyru sahih*) until he pays and possesses the property but if he dies before it, the *waqf* is void (*batil*) (Husain, 2014; Osman, 1982,50; Baillie, 1965,562). If the property subject to lease, the *waqf* is valid (*nafiz*) and shall be reverted to the purpose it is been dedicated after the expiration of the term. Similarly, if the pledger die, the *waqf* is obligatory until the time redeemed (Osman, 1982,50; Baillie, 1965,563f).

Besides that, the *waqif* shall be free and not a slave, matured and there is no act of fraud such as under influence or being forced to create the *waqf* (Hamid & Mohammad, 2012,19; Husain, 2014; Ali, 2009, p.10; Osman, 1982, p.49). If he/she is under age, a guardian on behalf of the minor cannot donate the property as *waqf*. The *waqif* must have good health and should not be suffering from deathbed illness, because in that case, he cannot dedicate more than a third of his estate unless the heirs give their consent otherwise it would be voidable (*fasid*). However, if some of heirs agree, it is valid according to their share (*nafiz*). This consent does not need expression (*munjiz*) but it may be implied (Husain, 2014).

Accordance to Syafies and Hanbalis, a non-Muslim may create a *waqf* as long as the Muslim Rulers of the state approved that he/she does not act of disobedience or unpleasing *ma'siyah* to Allah (*batil*). Even though, it must be approved by Muslim ruler. Hanafis agree and add the thought, as long as it is for '*qurbah*' or approach to Allah it is valid (*nafiz*). However, Maliki have different thought that is the non-Muslim cannot create *waqf*, because there is no merit or reward from Allah to him/her since he/she is not believer to the religion of Islam (*batil*). Certainly, neither an apostate nor unbeliever is subject to Muslim rulers because they are strongly against Islam unless if he/she reverts to Islam the *waqf* shall operate again (*marwquf*). As a whole, majority of jurists agrees *waqf* from non-Muslim depends on its purpose; it is unlawful (*batil*) to construct churches, temple or any worship house; but it is lawful if in favor of charitable objects (*nafiz*) such as school, hospital and mosque. Figure 3 show overall picture of Donor (*waqif*) qualified conditions to create *waqf* and legal effects of every defects conditions.

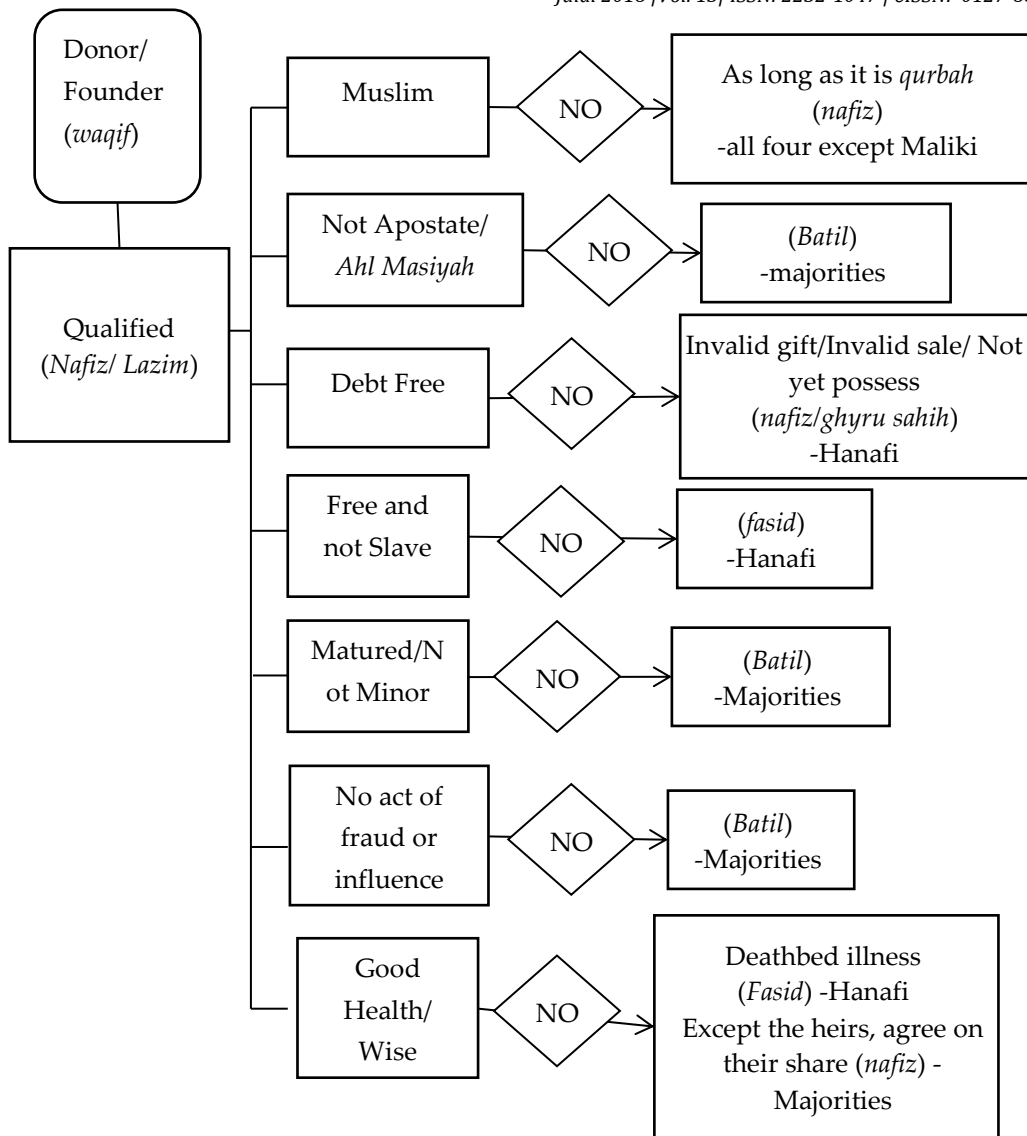


Figure 3: Condition of Donor/Founder (waqif) Elements

5.3 Object of waqf (mawquf alayh)

According to Osman, (1982) object (*mawquf alayh*) brings two meanings, which is purpose of *waqf* and the person who benefit from the *waqf*.

5.3.1 Purpose of waqf

According to Syafie's School and Imam Mohammad al-Shaibani, *waqf* without purpose is void (*batil*) (Osman, 1982; Ramli, 1938, 370; Qudamah, 1947, 567-68). Purpose of *waqf* may or not with pious intention and in favor of poor and rich and it is intended to be charitable. The subject of *waqf* varies such as wedding gift to girls whose families were unable to provide them, freeing prisoners, endowment for travellers of goods, clothing and expenses, paving streets, building mosque or religious houses, colleges and mausoleums. It also could be tons of bread, good food, buildings and guesthouse (Osman, 1982,

17-19). Indeed, all Muslim jurists agree the purpose of *waqf* in 'qurbah' or approach to Allah (Quran, 2: 273; 10: 60). To be more precise, the purpose of *waqf* could be divided into family support, religious and social/economic purpose such as:

- a. Family Support (*waqf ahli*) - There are extensive verses of *Quran* in Surah Al-Baqarah, verse 215 and Surah al-Isra, verse 26 and few hadith by the Prophet (pbuh) encouraging donation and support to the family member (Osman, 1982,85; Ramli, 1938, 370f). *Waqf* for *waqif's* family established among the entire jurist as a clear case of 'Ijma' consensus by an absolute unanimity opinion (Osman, 1982, 115; Rahim, 1911.306). Thus, *waqif* could donate the *waqf* property to his family (*waqf ahli*) (A. Ahmed & Oloyede, 2013, 22). The Hanafi School, Abu Hanifah, Mohammad al-Shaibani and Abu Yusuf insisted the *waqif* must express the ultimate dedication to the poor or other charitable objects (*munjiz*) and if the declaration is implicit, the *waqf* shall goes to the nearest kin and the greatest need and the ultimate beneficiaries are the poor if there is nothing inconsistent with the *waqif* expression (*nafiz*) (Osman, 1982; Qudamah, 1947, 567-68; Ramli, 1938, 370). Syafie and three views of Hanbali scholars agree *waqf* shall proceeds to the nearest relative with the greatest need, poor or Muslim treasury (*bayt al- mal*) (Osman, 1982, 84; Qudamah, 1947, 567-69).
- b. Religious (*waqf khairi* and *waqf khas*)- In the early era of Prophet's (pbuh) companions and many centuries later, most natural form of public benefactions is the religious charity like mosques, cemetery, and contribution to holy war 'jihad' (Osman, 1982,16; Schacht, 1953,451). Generally, mosque and cemetery are the religious *waqf* property donated until today. It is important to stress the mosque or religious *waqf* is to worship Allah alone. According to Abu Hanifah, Mohammad al-Shaibani, Abu Yusuf and most jurists, the religious property of *waqf* is valid (*nafiz*) and irrevocable if there is a declaration with evidence or witness by showing single person or *waqif* himself has used it (*munjiz*).

Close to the mosque, there could be a pathway indicated as the dedication of *waqf*. Besides that, Mohammad al-Shaibani holds it valid (*nafiz*) to set a property as a mosque in private building or his house that is not for public (Osman, 1982,127, 132). However, Abu Yusuf opined it is unlawful (*fasid*) to bequeathed property for mosque unless he/she says to expend on the mosque. If the mosque is ruined, *Qadi* can direct to another mosque or supply them for benefit of Muslim (Osman, 1982; Haytami, 1938, 225). Majority jurists except Abu Hanifah opine when *waqf* is formed (*nafiz*), where people used or buried in the cemetery, *waqif's* property such

as cemeteries, caravan serials, aqueducts, inns, etc. is diminishes. However, it is not proper to use the land to bury the death if there is another space to become cemetery although the owner dug grave for himself on the land (*fasid*). Once it buried it in the land, the land cannot be exhumed, sold and it is unlawful to sow the cemetery land although it is no traces of bones or the land gone to decay (*nafiz*) (Osman, 1982). However, if the land usurped, under the right of pre-emption or nobody desires to bury their dead in it hence, purchaser may remove a dead body in it (*batil*).

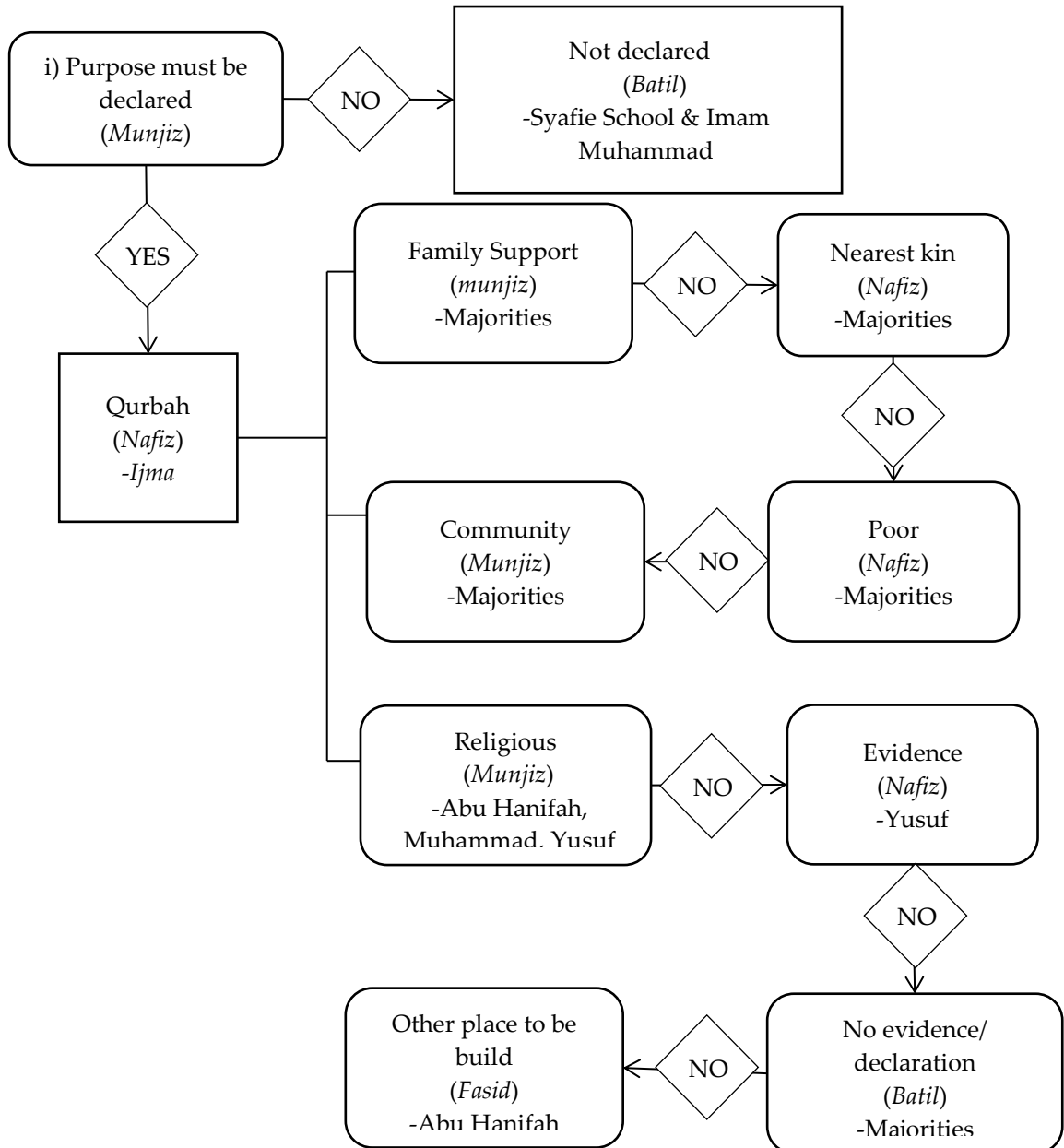


Figure 4: Condition of Purpose in waqf (Mawquf Alaihi)

- c. Social/Economy (*waqf khairi* and *waqf am*) - Property of *waqf* shall be in the purpose to please Allah no matter for religious, economic, family etc (*sahih*). However, Islam has nothing to do with tainted property; charity will not cover the taint (*batil*) (*Quran*, 2: 11, 267). According to Syafie law books (Osman, 1982,30. 31; Baillie, 1875), *waqf* property utilized to rich or poor (mosque and cemetery) but other property (generating income) shall go to necessitous and the property development. The property shall be earned in a way of honorable in Islam and have a value to use and suitable in life no matter in economic or social use (*sahih*). Figure 4 illustrated the condition of purpose in *waqf* to be valid and and legal effects of any defects of conditions.

5.3.2 Person Benefiting

Person benefiting or the beneficiary can also be the object (*mawquf alaih*) of *waqf*. As mentioned earlier, according to the majority of jurists and Syafie, the beneficiary of the *waqf* property known or named (*sahih*); otherwise, it is void (*batil*) (Osman, 1982; Nawawi, 1914). According to the law by Hanafi and Maliki, beneficiaries must be alive or exist at the time the *waqf* (*sahih*) taking effect otherwise; it will be returned to the *waqif* (Osman, 1982, 85). If the beneficiaries numbers is not mentioned, according to Imam Mohammad al-Shaibani the number of the beneficiaries must be at least ten and Abu Yusuf says hundred while there are others says it forty or eighty. Thus, the number of beneficiaries is not something essential to be counted and uncertain which is depends to the *Qadi* to decide it. The beneficiaries could be the *waqif's* children and his offspring (*nasl*), kindred or '*qarabah*' through common ancestor, neighbour (*jiran*), and in favour of one's house (*ahl al-bayt*) connected to the *waqif* by ancestry or Islam (Osman, 1982, 92-110). The beneficiary could be a certain individual/group or society such as:

- a) Individual/Group is a *waqf* property given to certain individual or group. Syafie opine the *waqf*, which the beneficiary cannot possess, is not valid (*batil*) (Osman, 1982; Nawawi, 1914). According to Syafie Law, in case *waqf* given to two people, if one of them dies, it shall revert to another person entitled (survivors) and the benefits will go to poor after the beneficiary cease according to Abu Yusuf who accepted Hanafi view (Osman, 1982; Nawawi, 1914).

It is important to stress out, the ownership of the *waqf* property belongs to Allah and only the usufruct belongs to beneficiary (Osman, 1982,47, 214; Haytami, op.cit, pp.272,85). Thus, the right of beneficiary is to the income and proceeds not to administer the *waqf* property (*ghair lazim/jaiz*). Hence, there is

a problem weather the *waqif* could be the beneficiary and administrator to the *waqf* property or not. According to Syafie and Hanbali, *waqif* s cannot be the beneficiaries who accept the benefits of *waqf*. This thought has been supported by majority jurists' later (*munjiz/nafiz*). However, Abu Hanifah, Mohammad al-Shaibani and Abu Yusuf thought the *waqif* may declare him to be benefited from the *waqf* and he may have the right to stay in it as he is also one of the *ummah* who deserve the property (*sahih/munjiz*). Therefore, it is with Malikis who recognized temporary *waqf*. Hence, the benefits of *waqf* could be returned to the *waqif* which also means, they *waqif* may accept the benefits of the property too (*sahih/munjiz*).

- b) Society- All persons qualified to be entitled to *waqf khairi (nafiz)*. Therefore, law does not insist the poor proved as poor whenever the purpose of *waqf* to specific beneficiary is fails; it is relief to the poor as the ultimate beneficiaries of the *waqf (nafiz)*. Subject to the approval of ruler, beneficiary may be non-Muslim which involve no act of disobedience or *ma'siyah* to Allah; it prohibited for the apostate or unbeliever who is against Islam (*batil*). This opined by Syafie School (Osman, 1982, 42). Another *waqf* for public use named as *Hawz*, which is *waqf*, possess by Ruler donated by the owner (*munjiz/nafiz*). However, the owner is unable to cultivate or pay tax on it but the annual profits surrendered to the Ruler and the Ruler may use it for public use (*ghair lazim/jaiz*) (Osman, 1982, 5; Ahmed and Oloyede, 2013, 25). Overall, the conditions of beneficiaries are such as Figure 5.

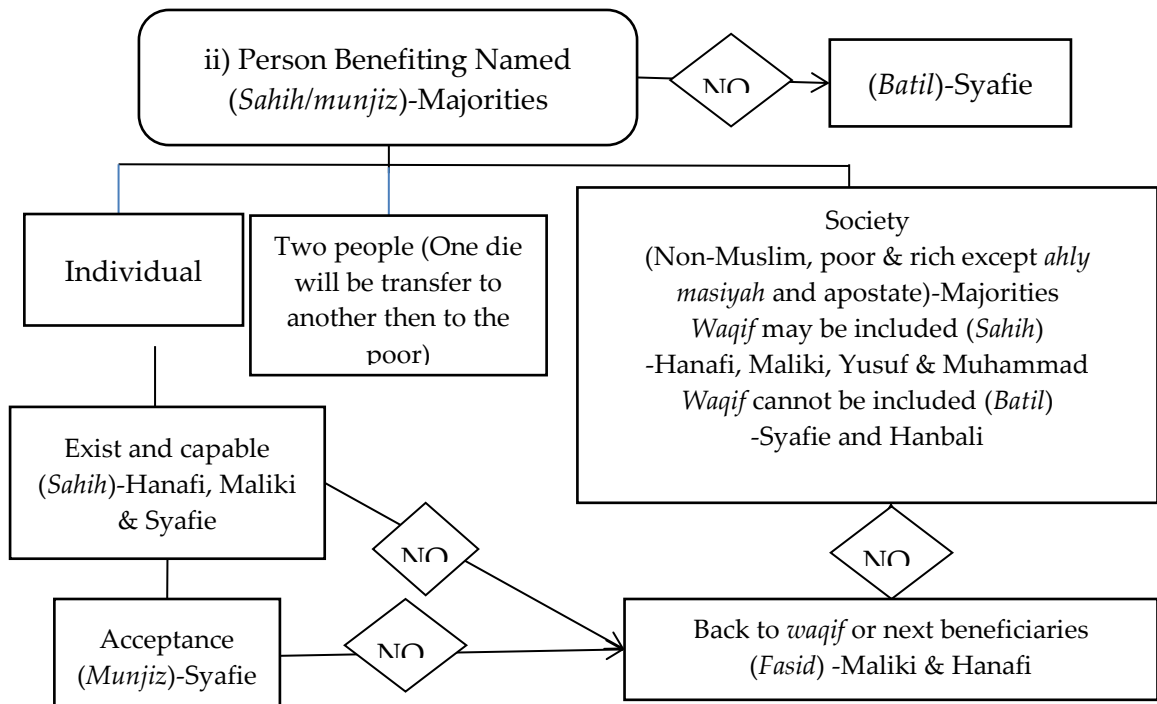


Figure 5: Condition of Beneficiaries (*mawquf alayh*)

5.4 Property/ Subject matter (*maqf*)

The subject matter of *maqf* is defined as something valuable, useful, helpful and not to be harmful to the beneficiaries (*sahih*) (Osman, 1982, 29). It is possible to be money or property either movable or immovable (Osman, 1982, 55; Shafie, 1961, 59; Khassaf, 1904, 34-35). Besides that, the motive of *maqif* in doing *maqf* is to the approach to Allah (*qurbah*) (Osman, 1982, 30; Quran, 2: 273; 10: 60).

The *maqf* property shall be tangible. All jurists agree on validity of immovable property as the subject matter of *maqf*, such as lands, fields, gardens or mansion (Osman, 1982, 55; Shafie, 1961, 59). On the validity of declaration of *maqf*, when movable property the subject matter of it various opinions of jurists reported: To Imam Abu Hanifah a declaration of *maqf* can be valid (*sahih*) if only immovable property could be its subject matter. However, it is also lawful to make movable property the subject matter of *maqf*, with a condition that it shall last for long time and can used repeatedly by using analogy (*qiyas*). Mohammad al-Shaibani reported it is valid (*sahih*) if the property is recognized by '*ta'aruf*' and '*urf*' (custom and usage) in case of '*istisna*' as it is abandoned the force of analogy (*qiyas*) of perpetuity based on what the Prophet said 'Whatever is good in the sight of Muslims is good in sight of Allah' (Osman, 1982, 57).

In this case the condition of perpetuity for valid *maqf* (*sahih*) is abandoned, due to hadith that Khalid ibn al-Walid made a *maqf* of armor he had (Osman, 1982, 58). The majority of jurists adopt Mohammad al-Shaibani's view. Supported by Syafie, Malik and Ahmad ibn Hanbal, all immovable and movable (except consumed in use such as food, scented plants) could be *maqf* that the usufruct is renewable and could be on sale (*sahih*) (Osman, 1982, 59; Marghinani, 1936, 55).

Generally, to Syafie, Maliki and Ahmad ibn Hanbal the proceeds of *maqf* derived from the process of destruction are invalid (*batil*) such gold (mining), silver (amalgamation), eatables and drinkables (food processing) (Osman, 1982,60; Qudamah, 1947, 583f). Generally, dirhams and dinars is invalid *maqf* by using original analogy '*asl al -qiyas*' as it is does not perpetuity. However, al-Mukhtar shows perpetuity is existed because value one dirham is same as another one-dirham. Ramli (1938), gives preference by *Ijma'* (*consensus*) and besides, there being no '*nass*' against (*ma'ruf*) validity of *maqf* dinars and dirhams (Osman, 1982, 63). From those opinions, there are no conflict about dirham and dinars to be property of *maqf*. Besides, a declaration of *maqf* can be valid (*sahih*) and enforceable if gold and silver (dirham or dinar including ornaments) is the custom (*urf*) of the community. This is the same as wheat, which can be lent to the poor to be cultivated, and later the quantity lent to be returned (Osman, 1982, 61; Tarabulsi, 1908, 22).

Waqf of *musha'* or undivided property which is incapable to being specified is valid (*sahih*) according to all jurists but undivided share which is capable of partition is invalid (*batil*) since the property is not fully possess by *waqif* according to Imam Mohammad al-Shaibani (Osman, 1982,77; Qudamah, 1947, 857). *Waqf* as joint ownership is valid (*sahih*) and it does not need divided because it did not bind the other party to *waqf* by both agreements (*musharakah bayn al-ithnayn*). However, where one of them is dead, according to Abu Hanifah, it is (*nafiz*) not necessary to be divided but according to Mohammad al-Shaibani and Yusuf, his executor or purchaser should make a division (Osman, 1982, 78; Marghinani, 1936, 13). If one makes a will of *waqf* to a group of individuals, it is valid (*sahih*), perpetuity and shall be consigned same *Mutawalli* to the trust. It is also valid (*sahih*) to dedicate same land to multipurpose without partition on one *Mutawalli* according to Mohammad al-Shaibani and Yusuf (Osman, 1982, 79; Tarabulsi, 1908, 26).

In a nutshell, *waqf* is property that has a legal value (*mal al-mutaqawwin*), movable and immoveable property has been accepted as the subject matter of *waqf* (*sahih*), the former being dependent on the practice of a given country or place and time according to Imam Mohammad al-Shaibani which is adopted by majority jurists.

Accessories attached to immoveable property are also valid (*sahih*) as *waqf* according to Abu Yusuf and Imam Mohammad al-Shaibani. Thus, the idea movable and immovable property for public benefits (*maslahah*) in Maliki legal writings and frequently used (*ta'amul*) is valid (*sahih*) as long as it is relevant with local authority (*ta'aruf* and *urf*) (Osman, 1982, 71; Coulson, 2011, 143). By using Mischief Rule that requires looking to what the law was before the statute was passed in order to discover what gap or mischief the statute was intended to cover. The court is then required to interpret the statute in such a way to ensure that the gap is covered (University, 2014). Otherwise, sanction from *Qadi* obtained (Osman, 1982, 231, 232). Overall, the conditions of property to be *waqf* illustrated in Figure 6.

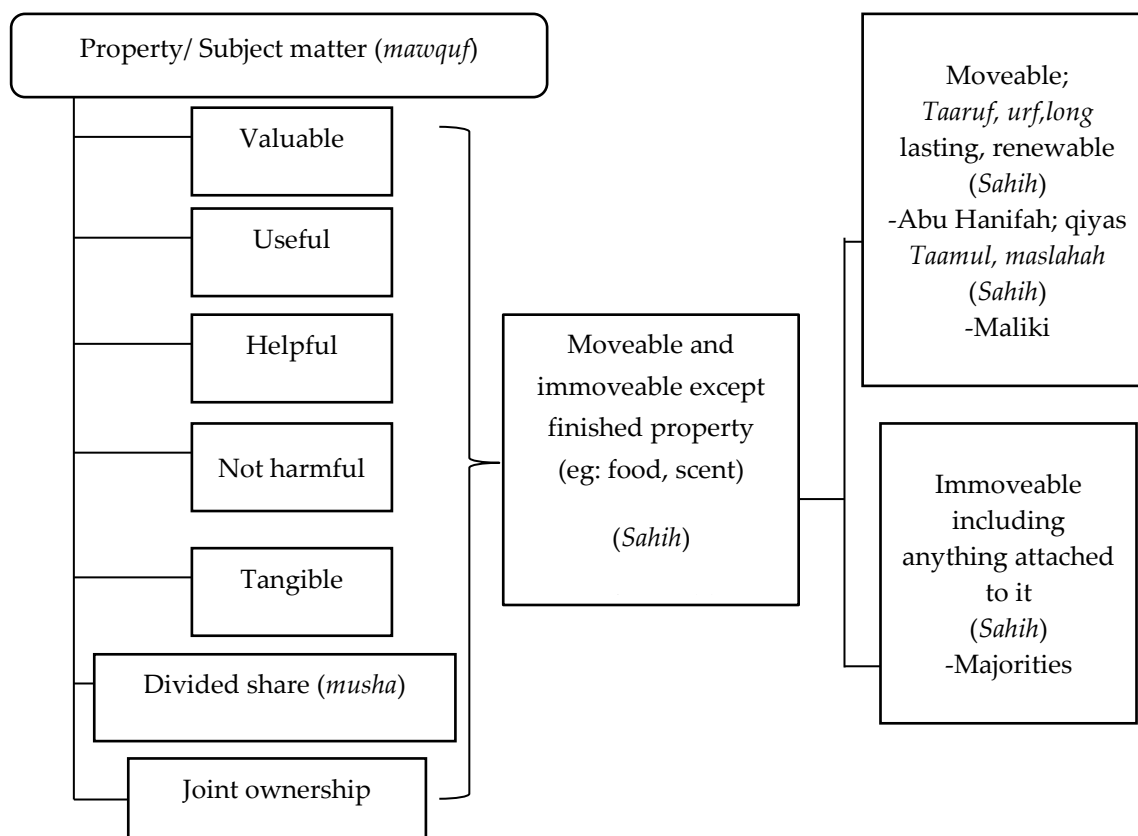


Figure 6: Condition of Property/ Subject matter to be valid *waqf* (*mawquf*)

5.5 The Powers of Manager (*Nazir*) and Court to change the terms of deed

The administration of *waqf* is in the hand of manager who could be one or more people. All Sunni schools '*Ijma*' (agree consensually) that *Mutawalli* must be of a genuine character and competent to fulfill the duties of the office (Osman, 1982, 169). Literal Rule is words be given by their ordinary, literal, grammatical meaning, day to day meaning words it use the language of the ordinary citizen (Pacific, 2003). By applying Literal Rule, the words manager is synonym to *Nazir*, *qayyim*, *Mutawalli* or administrator. Mischief Rule is looking to what the law was before the statute was passed in order to discover what gap or mischief the statute was intended to cover. The court is then required to interpret the statute in such a way to ensure that the gap is covered (University, 2014). However, by Mischief Rule word of '*Nazir*' often used as supervisor of *Mutawalli* and *Nazir* has no power of disbursement. *Nazir* is usually among the government servant (state authority) whereas *Mutawalli* is usually among family or relative to *waqif*.

Words of *waqif* are words of the laws. Therefore, *waqif* has power to decide the purpose of his *waqf* property, which shall followed by *Nazir* (Hamid and Mohammad, 2012, 16). However, for sake of economic growth

for society and *waqf* itself, the court or *Nazir* may ignore the condition of the *waqif*, if the condition is contrary to the interest of *waqf* or the beneficiaries. For example, the conditions are:

- i) Inconsistent or less advantageous (*nafiz/fasid*) such as the condition subject the land to be cultivation land but it developed to building land (Hamid and Mohammad, 2012, 17). *Qadi* or assigned *Mutawalli* may override certain condition inconsistent with nature or make a development according to the nature of *waqf* itself such as make a *waqf* for shops and made it more profitable to investment as yielding larger income there are no restriction to dispose of *waqf* property and invest on the same character or nature as the *waqf* property (Osman, 1982, 209-213)
- ii) less productive, against the Sharia or interest of beneficiary such as the beneficiary cannot be married (Hamid and Mohammad, 2012, 17; Osman, 1982, 209-213),
- iii) not paralleled to objective of *waqif* such as the characteristic of beneficiaries is not similar to *waqif* condition such as the individual named as imam but he cannot lead prayers (Osman, 1982, 209-213; Hamid and Mohammad, 2012, 17)
- iv) Depending upon contingency such as *Muallaq* and *Mustaqbali* declaration, this may never occur. *Muallaq* and *Mustaqbali* declaration is invalid according to Syafie School and according to Imam Mohammad al-Shaibani, is invalid except subjected to the rule of *wasiyyah*. (Osman, 1982, 44).

While the others condition written with no evidence of contradiction to Sharia' and nature of *waqf* shall be followed (*sahih*) and irrevocable (Osman, 1982, 211-213; Ashub, 54). For example, according to Abu Yusuf, the *waqf* of mosque will be lawful but the bad condition will be void (*fasid*) (Osman, 1982, 39; Mohammad, 2011, 11). The *Nazir* also may lease the property. *Mutawalli* may lease or rent *waqf* for three years (agriculture land) with the value of market price with the similar property. However, it seems less effective, thus, with the sanction of *Qadi*, *Mutawalli* may lease it exceed three years. According to Maliki, it could be two years or more in case of necessity while Syafie's law opined *waqf* is terminable if there are offers of better terms (Osman, 1982, 152-158). Therefore, by changing the condition shall bring potential to the *waqf* property development economically and socially. Even though, the conditions

could only change by *Nazir* only with sanction from *Qadi* and in case of difficulties the case shall be referred to court (Islam, 1998).

Most of the changes in the condition should be referred back to *Qadi* such as property exchanged unless according to Abu Yusuf and Mohammad al-Shaibani, if *Nazir* authorized by *waqif* in declaration. Mortgage or sale of *waqf* property is illegal in Islamic Law because the concept of inalienability destroyed unless it is for emergency (ie: income is insufficient). Thus, it shall be replaced by similar property with same value to conserve its concept of perpetuity. According to Abu Yusuf, the property could be exchanged for development; it is agrees by majority jurists later and becoming fatwa by Khassaf and Hilal in *Ahkam al-waqf*. Maliki and Syafie opine *waqf* cannot be sold (exchanged). While, Hanbali opine *waqf* could be exchanged in case of necessity. Mosque is strictly prohibited to be exchanged or sold by the four jurists unless for another ground for a mosque according to Ahmad Ibn Hanbal (Osman, 1982, 161-165). *Qadi* will authorize to do so as safeguard of *waqf* property abuse (Osman, 1982, 161-165). Besides that, *Qadi* may also mortgage or sell full or part of the property for repairs, and pay debts and taxes when there is no other income to be used to pay (Osman, 1982, 158-160

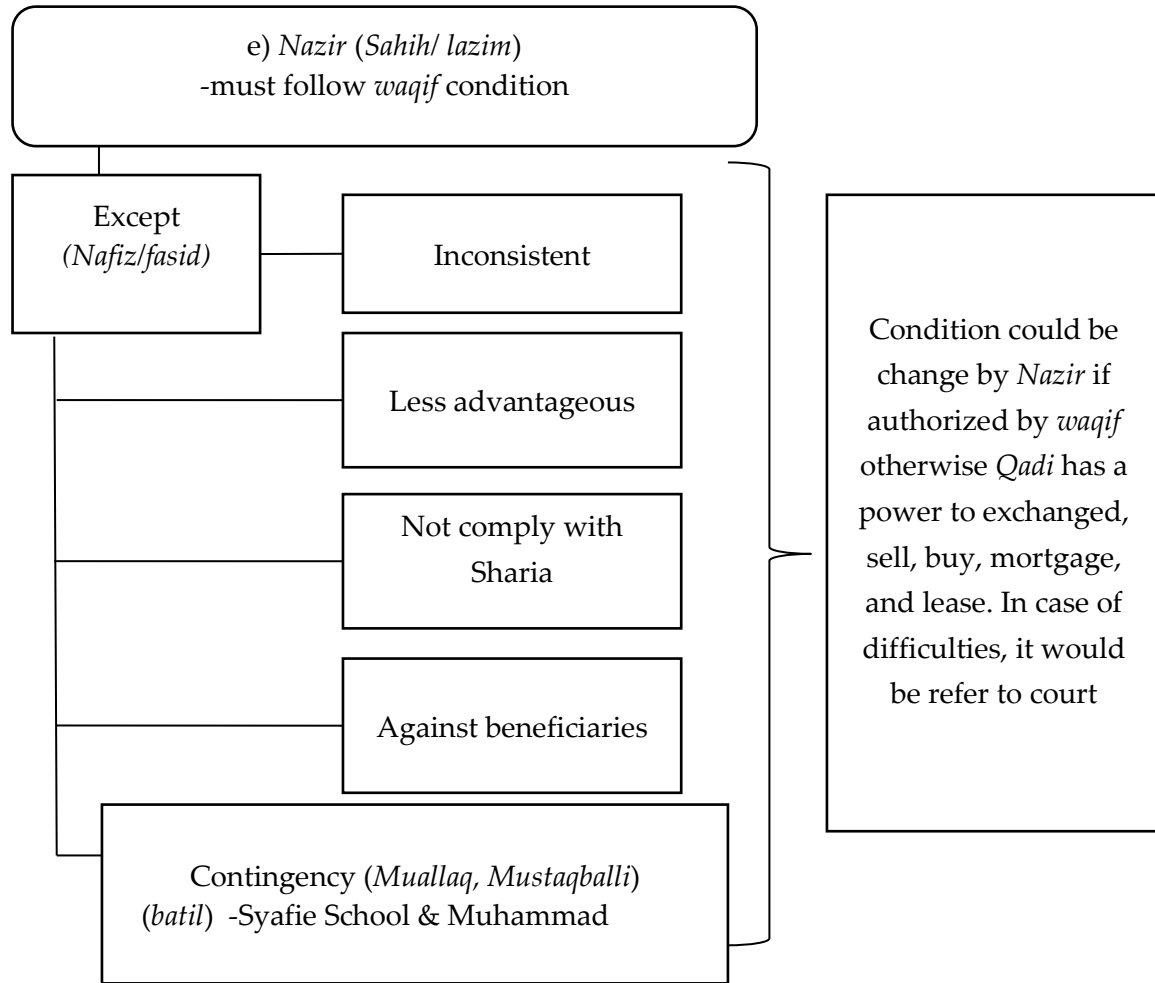


Figure 7: Condition of Manager (Nazir) Elements

6.0 CONCLUSION

According to Muslim Jurists, *waqf* could be enforceable in law when *waqif* expresses his/her intention to donate his property as *waqf*. The intention of the *waqif* enforced if the person has fulfilled all elements with specific conditions of a valid *waqf* declaration like the one discussed above. For Hanafis, valid declaration is completed when *ijab* and *qabul* are made. To other jurists a valid deed concluded if there is valid declaration (*sighah*), a qualified donor (*waqif*), qualified beneficiary (*mawquf alaih*), permissible subject matter (*mawquf*) and manager (*Nazir*) appointment as illustrated in Figure 8. A *waqf* deed can be effective if each of the elements fulfills the required conditions of valid *waqf*. As discussed earlier, Muslim jurists regard *waqf* as a contract that is unilateral in nature. However, for it to be effectively binding and valid, the declaration of *waqf* shall include the conditions as mentioned accordingly. The conditions to determine the validity of the contract shown in Figure 2, Figure 3, Figure 4, Figure 5, Figure 6 and Figure 7. Overall, the validity of *waqf* deeds shall include the elements as depicted in Figure 8.

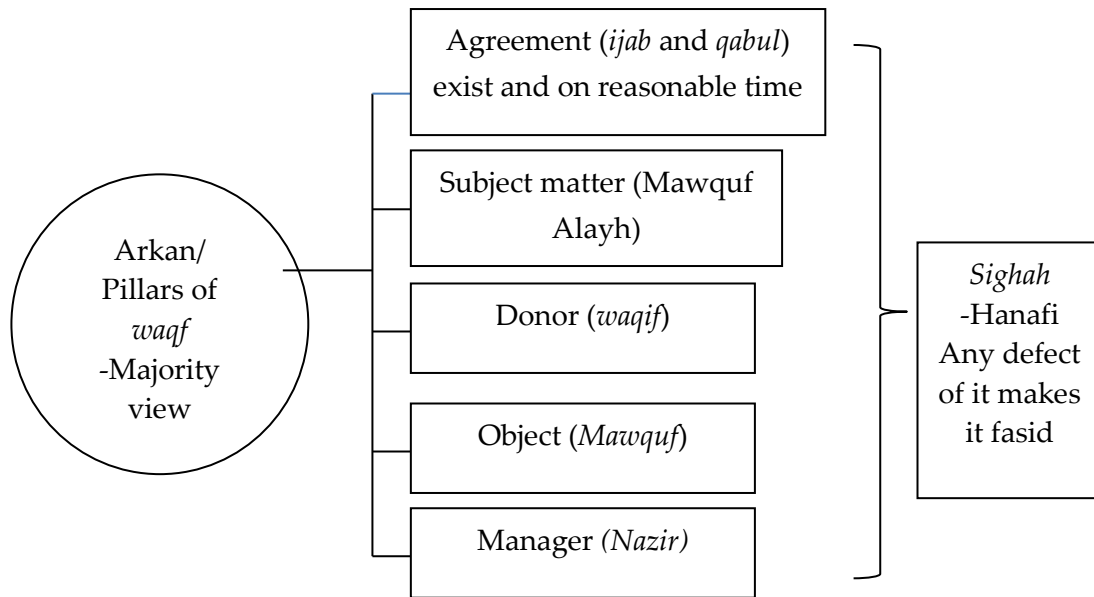


Figure 8: Elements of Valid (*Sahih*) Waqf

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Penafian

Pandangan yang dinyatakan dalam artikel ini adalah pandangan penulis. Jurnal Pengurusan dan Penyelidikan Fatwa tidak akan bertanggungjawab atas apa-apa kerugian, kerosakan atau lain-lain liabiliti yang disebabkan oleh / timbul daripada penggunaan kandungan artikel ini.