

Investigating Conditions of Sale of Waqf Property (Endowment Sale) in Perspective of Law and Jurisprudence

Abstract

Waqf (Endowment) as an institution that keeps charity alive, has been a common deed among different nations since the very beginning. However, its importance has been added in Islam because of the emphasis on helping the poor and the necessity of charity within Muslims in the Quran and Sunnah. It has been said that the general rule in Iran's jurisprudence and law sources is that the Waqf Property cannot be sold. In other words, any legal action that leads to the transfer of the Waqf Property is not permitted. However, sometimes in some conditions, there is no other choice than to sell the Waqf Property to protect the Waqf institution and the benefits of the beneficiary. Thus, some cases have been mentioned in the sources of jurisprudence that show the Sale of Waqf Property is permitted, including damages to the Waqf property, wear of the Waqf property, the benefits of the beneficiary, the extreme need of the beneficiary, and the dispute among the beneficiaries. In addition, according to the civil code of Iran, the sale of Waqf Property is permitted in some cases such as when the Waqf Property is damaged or when disputes may arise among the beneficiaries.

Keywords: *Waqf, Sale, Sale of Waqf Property, the Waqf Property*

Nahid Ghasemi*, Rahim Mohammadi Ilami

*Graduated, Master of Theology and Islamic Studies majoring in Jurisprudence and Fundamentals of Islamic Law, Azad Islamic University, Ilam Branch, Iran
nahidghasemi151@gmail.com
Supervisor of the Theology Department, Islamic Azad University of Tehran*

Introduction

Waqf, in the Arabic language, means hold, confinement, or prohibition¹. By definition, it is a donation contract according to which the owner permanently holds his/her certain property². (An endowment consists in the surrender of the property and the devotion of its profits to some good purpose³, Article 55 of the Civil Code⁴).

In general, the jurists have defined sale in four ways. The most acceptable definition is: sale is the exchange of tangible property for another thing of value. In the case of waqf, particular conditions have been considered one of which is the sale of waqf is not permitted. For example, an object of sale should be talaq (free of ownership or waqf) so that it can be sold but if it is endowed so it is not permitted to be sold. Of course, the generality of the condition (meaning the inaccuracy of the sale in what belongs to another's right) has been challenged, except in cases such as waqf property to which the attachment of another's right contradicts the sale. In the civil code, the first chapter of the third part of the Civil code addresses the definition, attributes, and conditions of the sale contract. Moreover, articles 338 and 348 have explained the conditions necessary for the object of the sale, including, the

object of sale should have value, it should be tangible, and it should be submitted, offered, and accepted.

In various narrations of Islamic good tradition, waqf has been referred to as "ongoing charity" (Sadaqah Jariyah). The word "waqf" has not been used in particular but in general, people have been encouraged to charities. Here, we present some narration in this regard as examples: "The Messenger of Allah, peace, and blessings be upon him, said, "When the human being dies, his deeds end except for three: ongoing charity, beneficial knowledge, or a righteous child who prays for him"⁵. "Ali (AS), said, "Charity and hold are two treasures. Keep them for their time". Considering what is told above, this study aims at investigating the conditions of the sale of waqf property from the perspective of law and jurisprudence⁶.

Sale of waqf property from a jurisprudential perspective

One of the main topics in discussion on waqf is "changing for the better" along with permitting or not permitting the sale of waqf property. As Shaykh Tusi has put it: "according to the Imamiyyah, the sale of waqf property is permissible in three cases"⁷. Ibn Zohreh wrote: "the sale of waqf property is permitted in three cases as a result of the intention of the benefactor in favor of the beneficiary"⁸.

¹ Ansari, Masoud and Taheri, Mohammad Ali. **Encyclopedia of Private Law**. Vol 3

² Katouzian, Nasser. **Civil Law in the Current Legal order**. page 290

³ Jafari Langroudi, Mohammad Jaafar. **Comprehensive in Legal Terminology**. Vol. 5, p. 3819, no. 14684

⁴ Article 55 of civil code: "Waqf means that the property is hold and its benefits are given"

⁵ Al-Hurr al-'Alami, Muhammad Bin Hassan. **Wasa'il al-Shia**

⁶ Nouri, Hossein bin Mohammad Taqi. **Mostadrak al-Wasail**. vol. 2, p. 511

⁷ Tusi, Muhammad bin Hassan. **Al-Mabsoot**. vol. 3, p. 287

⁸ Anjavinejad, Seyyed Mehdi. **Argumentative Fiqh**. vol. 1, p. 382

Given Sunnah, it has been narrated from Ali ibn Mahziar: “ I wrote to Imam Jawad (AS) that so and so has bought a piece of land, endowed it, and calculated your share of khums with it. Now his/her question is can he/she sell your share from the land and can he/she set a price for himself with the amount he bought or not, your share is a part of the endowment?”

Imam Jawad (AS) wrote in response: “Tell so and so that my order is to sell my share and give the price to me. Inshallah, it is my opinion. Or if it is better for him/her, he/she can sell it at the same price that he /she has bought it⁹”. Thus, it can be concluded from this narration that the sale of waqf property is permitted if it is better to sell it.

In view of wisdom, if it is expedient to sell waqf property, not to permit selling is equal to Tabzir (wasting of wealth and finances) and it is not allowed. If there is expedience in selling waqf property, not to permit selling or changing can cause a violation of the intention of the benefactor. The reason is that we can see in tanghih e manat (denunciation of criterion) that the benefactor intends to benefit but not to permit selling or changing is neither for the benefit of the benefactor nor for the benefit of the beneficiary. Even if not selling a waqf property is of little benefit, sometimes the expedience is to sell that because getting little benefit is traditionally as same as getting no benefit. It is expected that a certain benefit can be gained from any capital. For example, a profit of ten million obtained from capital equal to one billion is a loss. The discussions presented in the books of the noble jurists are related to the cases where survival has no loss. An example is land. In the present situation, endowed lands cost heavy amounts every year, and endowment departments are forced to bear these losses. Thus, if waqf property does not have any benefit, the jurists permit its sale. If the property has a loss, the priority is to sell it.

The conditions of the Sale of Waqf Property

Most jurists and lawyers believe that the sale of Waqf Property is permitted under certain conditions. However, there is a disagreement among the jurists in this regard. Even in the civil code of Iran, certain and limited conditions have been considered but some jurists have listed more conditions. In view of some experts, the legislator shall explicitly include all conditions of the sale of waqf property in Islamic jurisprudence in the civil code to avoid this disagreement and to conform such conditions to the civil code of Iran¹⁰.

The most obvious reason Mohaghegh Shirazi on the invalidity of the condition of the sale of waqf property by the benefactor is that it is against the requirements of the waqf contract. The same reason has been discussed by many other jurists in “Al-mabsoot fi feqh al-Imamyia¹¹”, “Mokhtalef - ul - Shia¹²” and “Jameol Maghased¹³”. Thus, criticizing and responding to this reason means rejecting many believers in the invalidity of the condition of the sale of waqf property.

The claim of consensus is one of the reasons believers in the invalidity of the condition of sale of waqf property. Some of the nobles have wanted to argue by consensus on it. Ibn Idris quoted the words of Seyyed Morteza and wrote: “And we consider the validity of the conditions according to the consensus that there”

Since many of the great jurists have considered the above condition to be valid, it can be said that such a consensus has a problem. The second point is this consensus has been quoted. Thus, it is not clear whether an infallible Imam has said it or not.

One of the reasons for the invalidity of the condition of sale of waqf property is that is against Sunnah. The reason is that there are narrations that have prevented this condition. The writer of the “Wasa'il al-Shia” has written a chapter on “the non-permissibility of selling waqf property and the ruling of cases where there is a strong dispute between the beneficiaries which can lead to great loss¹⁴”.

After reviewing the reasons of those who consider the condition of the sale of waqf property to be invalid, now we turn our attention towards reviewing the reasons of those who consider the condition of the sale of waqf property to be valid. Not all reasons of the advocates have been given directly but some can be found in the contents of their discussion, including:

1. Book

One of the reasons for the validity of the conditions is Ayat¹⁵. Mohaghegh Hali says in this regard that God said: Keep your promises¹⁶.

One reason (for the validity of the condition of the sale of waqf property) is God says: “O believers! Fulfil your contract obligations”. The same point had been declared

⁹ Har Amili, Muhammad Ibn Hasan. *Vasal al-Shi'ah*. vol. 13, p. 3.

¹⁰ Abhari , Aliabad Hamid; Razian, Abdullah. **The necessity of conformity of the cases of permitted conditions of the sale of the endowed tangible property in Iranian civil law to Islamic jurisprudence**. p. 30

¹¹ Tusi, Mohammad Hassan. **Mabsoot**. vol. 3, p. 30

¹² Hali, Hasan bin Yusuf. **Mokhtalef al-Shia**. vol. 6, p. 255

¹³ Karki, Ali Ibn Hussein Ameli (Mohaghegh Thani). **Jami al-maqasid**. Vol.9, p.72

¹⁴ Wasa'il al-Shia

¹⁵ Hali, Hasan bin Yusuf. **Mokhtalef al-Shia**. vol. 6, p.254.

¹⁶ Al-Ma'idah(1)

by the nobles like ash-Shahīd ath-Thānī in Masalik¹⁷. This Ayah indicates that you should fulfill your contracts. Waqf or its conditions is a type of contract so you should not breach it.

2. Influence of the conditions

One of the other reasons is the necessity of loyalty to the condition. Allameh Hali says about the validity of this condition: “To me, a condition is valid according to what Sheikh has said in Sharh Nahayat. As Muhammad (PBUH) told: the believers should keep their promises¹⁸”

His remarks indicate that it is obligatory to abide by the contract or condition. Sheikh Ansari interpreted this sentence in this way: “the jurists agree on this point that to fulfill a condition is a Shari'a obligation because the prophet said: The Muslims should keep their promises¹⁹. Ayatollah Khomeini has interpreted the same sentence in the same way²⁰”.

Thus, when it has been proved that a condition is permitted because it is not against the requirements of the contract and the Sunnah- to fulfill the conditions or even non-primary conditions(which is a proviso) is obligatory. Thus, the influence of the conditions is universal in this case and as a result, its validity is proven.

3. The rule of “the endowed properties are endowed based on the condition stipulated by certain people”

4. Shia narrations

The most important reason for the validity of the condition of the sale of waqf property by the benefactor is narrations like what has been narrated by Abd al-Rahman al-Hojaj: “What I have written here (in this will) about my properties is an obligatory charity (waqf). Hasan Ibn Ali (AS) executes and supervises it. A part of it belongs to him and he is permitted to spend it to solve a problem. Thus, he can decide to sell a part of it to pay a debt²¹”

It is a long narration and what was told above is sufficient to prove the validity of the condition. Although the narration is not directly pointed to the permitted conditions to sell the waqf property, it has been narrated and as a result, it is not allowed to interpret regardless of the content.

If it is objected that the narration is about the waqf in general (public endowment) but not in particular(special endowment) and the sale is permitted for part of it not all of it, the answer is: both claims have no particularity. Thus, here the denunciation of the criterion is that the narration has pointed to the special endowment and all parts of it. It means that in this narration, the sale of waqf property is permitted.

The sale of waqf property in civil code

Thirty-six articles of the Civil code (Articles 55-91) are dedicated to the rules of the endowment. However, in none of them, the validity or invalidity of the conditions of the endowment has directly or explicitly been addressed. Some phrases in Article 90 may prove its validity. To make this matter clear and the comparative discussion in Islamic jurisprudence and the civil code of the Islamic Republic of Iran, the conditions of the sale of waqf property in law are investigated in two parts: determining the condition and not determining the condition from the view of the benefactor.

The first case is the damage to the waqf property. The Jurists have different opinions about the damage and the permission to sell. Imami has put it this way: “If a part of the waqf property is damaged partially or completely so that it is not possible to use it or benefit from it, the damaged part can be sold. The undamaged part can be kept unless the damage is in the way that the whole property cannot be used or there is nobody to buy it. The reason is that the waqf property is a whole and it is impossible to be separated. For example, it may be a bathhouse with several private rooms, and the pump and cistern are damaged. If the damaged part is sold the rooms cannot be used or sold. Thus, the sale of the whole bathhouse is permitted²².”

What some jurists mean by damage is actual failures. In Article 88 of the civil code(on the permission to sell waqf property in case of damage), they believe that the damage shall be such that the maintenance of it, is impossible, or that no one can be found to undertake it. One example is selling a mosque that is worn in such a way that it is impossible to repair it. If the building of the mosque is damaged, it remains a mosque because the worshipper can worship in it thus it is not subject to Article 88²³.

The second case is when the waqf property is worn. Two reasons in this regard can be used in the civil code of Iran. It can be said that the cases permitting the sale of waqf property are exceptional. In Articles 88 and 349 of the Civil Code, it has been stipulated that the wear of the waqf property cannot be explicitly considered as cases where the sale is permitted. In this case, the sale is not permitted.

The third case is the benefits (or expediency) of the beneficiaries. Although this case has not been stipulated in the civil code as the case where the sale of waqf property is permitted, it is one of the conditions of the sale if the intention of the benefactor and jurisprudential sources are considered. It is even one of the suggestions addressed in the research of

¹⁷ (Shahid Thani), Masalak al-Afham, Vol.1

¹⁸ Hali, Hasan bin Yusuf. **Mokhtalef al-Shia**. vol. 6, p.255

¹⁹ Ansari, Morteza. **Makasib**. p. 283

²⁰ Documentary of Al-Arwa Al-Waghti, Kitab al-Ijarah, p. 464

²¹ Al-Hurr al- 'Alami, Muhammad Bin Hassan. **Wasa'il al-Shia**.

²² Imami, Seyyed Hassan, **Civil law**, vol. 1, p. 91

²³ Jafari Langroudi, Mohammad Jafar. **Law of properties**. p. 248

Abhari Ali Abad and Razian entitled “the necessity of conformity of the cases of permitted conditions of the sale of the endowed tangible property in Iranian civil law to Islamic jurisprudence”.

The fourth case is the need of the beneficiary. No details have been mentioned in the civil code in this regard.

The fifth case is the dispute between the beneficiaries. Similar to Article 88, it has been stipulated in Article 349: “The sale of property that is a religious endowment is not valid unless there is a dispute among the beneficiary in such a way that a bloodshed may happen or the endowed property may damage²⁴”

According to the above Article, wasting the property is not the only condition for the sale. The dispute between the beneficiary in such a way that bloodshed may happen or the endowed property may damage are other conditions.

Conclusion

There are important statements of the jurists about the condition of the waqf property: the validity of the conditions, the invalidity of the conditions, and the invalidity of the conditions and of the waqf property itself. Many jurists are of this belief that whether we consider the waqf property as the property of the beneficiaries, of the God, or even of no owner, the condition of the sale is valid. Most Sunni jurists consider the condition of the sale of waqf property to be invalid. Some jurists believe that the sale of waqf property is not permitted under any conditions. However, some others believe that it is permitted in some conditions such as damage or when it has no benefit. In their view, in these conditions, what the benefactor has endowed is not considered waqf property and its sale is permitted. Some others consider not benefitting from the waqf property as one of the examples of its damages, as a result, they say that the sale is permitted.

In the civil code of Iran, the sale of waqf property is permitted based on certain conditions in only two cases. The first case is when the property is damaged or there is a fear of its damage given that the damage is in such a way that it is not possible to benefit from the property and nobody is ready to repair it. Otherwise, the sale is not permitted. For example, if the waqf property is damaged but someone is ready to repair it, it shall not be sold. The second case there is when a severe dispute between the beneficiaries occurs in such a way that bloodshed may happen or the waqf property may damage. Thus, the mere dispute is not enough condition for the sale. The dispute should be severe in such a way that the bloodshed or slaughter of one of the beneficiaries or damage to waqf property is possible. In Islamic jurisprudence, in addition to the two cases mentioned above, the sale of waqf property is permitted in some other cases. For example, for the benefit and interests of the

beneficiaries, waqf property can be sold. In other words, if the beneficiaries gain more benefits by selling waqf property, the sale is permitted. Moreover, if the beneficiaries need to change waqf property, the sale is permitted. In the case of wear of waqf property, the sale is permitted. The content of the civil code of Iran related to waqf is based on Islamic jurisprudence.

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²⁴ Katouzian, Nasser. **Civil law.** p. 246

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