Classical waqf, juristic analogy and framework of *awqāf* doctrines

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Abstract

Purpose – This paper aims to analyse the Sharīʿah premises of waqf (Islamic endowment), followed by dilating on the nature of argumentation among the classical jurists on its rules and principles. The paper critically analyses the edifice of the applied juristic analogy of different early jurists in deriving various waqf doctrines. The objective of analysing the jurisprudential framework of waqf in its classical mould is to conceptualise the methods, mechanism and nature of juristic analogies in deriving the waqf principles. This analysis is critical to understand the scope of jurisprudential flexibility in modern *awqāf*.

Design/methodology/approach – The paper is an outcome of a library-based research. It uses the classical jurisprudential treatises of waqf with an aim to analyse the Sharīʿah basis of the institution, the premises of its key principles and the applied juristic analogy to derive the same. The paper covers the classical waqf books and treatises from the four Sunni schools of jurisprudence and uses a textual analysis method.

Findings – The paper finds that in its initial phase, the conceptual framework of waqf was not unanimously agreed by all jurists, rather its Sharīʿah permissibility remained critically disputed among them for a while. Though, the opinion of those jurists who approved the Sharīʿah-validity of waqf was to prevail in the later stage, disagreement persisted with reference to its necessary features and defining criteria. It is found that in the classical waqf literature, two most disputed aspects of waqf jurisprudence constituted the requirements for completion of a waqf and its ownership status.

Research limitations/implications – This study neither covers the historical contribution of waqf among the Muslim societies nor touches on the empirical aspects of modern waqf. Rather, the focus of the study is limited to analysing the classical jurisprudential discourse of waqf and distillation process of its rulings.

Practical implications – The objective of analysing the classical juristic discourse of waqf is to underline the premises of classical juristic analogy in determining the framework of *fiqh al-awqāf* (jurisprudence of waqf) in its classical permutations and to learn how to adopt a similar approach for deduction of new waqf rulings.

Originality/value – This paper adds original value to the body of waqf literature for analysing the classical waqf rulings distillation process along with examining the methods and mechanism of juristic analogy.

Keywords Waqf, Sharīʿah, Endowment, Fiqh, Ṣadaqah, Islamic jurisprudence

Paper type Research paper

Introduction

In the classical jurisprudential discourse, the Sharīʿah basis of waqf has been delineated by jurists as rigorously as its ancillary principles. The nature of argumentation on the Sharīʿah validity of waqf, as preserved in the classical *fiqh* (Islamic jurisprudence) literature, exhibits that in its initial phase the conceptual framework of waqf could not receive unanimous agreement from all jurists (Al-Shāfiʿī, 1990; Al-Shaybānī, 1997). Though the opinion of those jurists who approved of the Sharīʿah validity of waqf was to prevail in the later stage, disagreement persisted with reference to its necessary features and defining criteria. In this context, determining the essential requirements for completion of a waqf and deciding on its ownership status constituted the most disputed aspects of waqf jurisprudence (Abbasi, 2012).

Interestingly, the practice of waqf preceded the evolution of its own conceptual and theoretical framework. In other words, most of the famous early waqfs were established even prior to the determination of waqf with its jurisprudential characteristics (Abdullah, 2015). For example, the endowment of Bayrūḥā orchard by Abū Ṭalḥah (R.A.), as well as the waqf of the well of Rūmah by ʿUthmān were created prior to the development of waqf-specific rulings (Abdullah, 2020). Thus, it is argued that the defining parameters of waqf and the related criteria were, apparently, not known to those early *wāqifs* (endowers) in the first few years after the *hijrah* (the migration of the Prophet from Makkah to Madīnah, which occurred in 622 CE). It was in later years that these early waqfs were identified with the then evolved jurisprudential framework of waqf (Mahdi, 2010). One of the obvious implications of this phenomenon was that the later jurists encountered a general confusion over the legal status of many charitable contributions of the Ṣaḥābah (companions of the Prophet). For example, jurists could not concretely decide on the legal status of a house left by the first Caliph Abū Bakr (R.A.) in Makkah as *ṣadaqah* (charity), which was inhabited by his visiting descendants and progeny. The point which induced jurists to consider this house as waqf was that the descendants of Abū Bakr (R.A.) did not make this house subject to inheritance among them and left it in its original construct (Al-Khaṣṣāf, 1904). Similarly, whether the *ṣadaqah* of the famous orchard by the companion Abū Ṭalḥah (R.A.) is to be termed waqf was disputed later by some jurists (Ibn Ḥajar, 2001). It is also beyond confirmation whether or not the *ṣadaqah* of the seven orchards left by the companion Mukhayrīq to the Prophet (peace be upon him) was an instance of waqf (Al-Khaṣṣāf, 1904).

The institutional character of waqf remained somewhat blurred until its recognition by the majority of jurists in the subsequent century (Hennigan, 2004). However, once the institution established its conceptual and jurisprudential location in the juristic discourse by the 8th century CE, the pertinent rulings evolved in alignment with the distinctive nature of waqf (Al-Mawsūʿah al-Fiqhiyyah, 2006).

Thus, arguably, a complete jurisprudential framework of waqf with its detailed characteristics evolved only decades later. Perhaps, by the time the jurists such as al-Khaṣṣāf (d. 261H) and al-Hilāl (d. 245H) prepared their encyclopaedic treatises on the jurisprudence of waqf in the third century A.H., the *awqāf* (pl. of waqf) of many companions of the Prophet (peace be upon him) were already famous enough to serve as the source for the waqf principles. In addition, the *ḥadīth* (saying) of Jabir (R.A.) that "every companion who could afford to make waqf did so", indicates that a vast number of companions endowed their properties as waqf (Al-Khaṣṣāf, 1904). The actions and examples of these companions must have worked as a catalyst in proving the Sharīʿah legitimacy of waqf for the early generations of jurists. To this effect, scholars such as Mālik, al-Shāfiʿī, al-Shaybānī, al-Khaṣṣāf and al-Hilāl repeatedly referred to the fact that the *awqāf* of the companions were so famous that any doubt in Sharīʿah permissibility of waqf would be tantamount to rejection of *ijmāʿ* (juristic consensus) (Al-Khaṣṣāf, 1904). Despite this, since the provisions of

many companions' waqf were scarcely known and hardly discussed in the available corpus of *fiqh*, they provided little lead for the development of ancillary waqf jurisprudence.

The concept and mechanism of waqf acquired its Sharīʿah legitimacy through implicit Sharīʿah evidence rather than having its basis in the explicit terms of either the Qurʾān or Sunnah (Othman, 1983). This phenomenon may be gauged by asserting that both these primary sources of Sharīʿah are silent on the 'term' waqf. They neither mentioned the term 'waqf' nor defined its theoretical, functional and operational parameters in categorical terms (Ghanim, 2009). Evidently, the omission of the theoretical framework of waqf in the primary sources did have a great bearing on the indeterminate legal status of waqf. Determining this aspect of waqf thus remained its most disputed facet among the early Islamic jurists. Perhaps it was due to this indeterminate nature of waqf in the primary sources that the need for analogical reasoning and over-interpretation of certain pertinent evidences arose among the classical jurists (Ghanim, 2009).

In the last few decades, the literature on waqf has grown many-fold. Most of the contemporary studies on waqf discuss socio-economic roles and impacts of waqf in a historical context (Cizakca, 1998; Sadeq, 2002; Hasan, 2015; Abdullah, 2018a). Also, a significant portion of the available literature delineates the jurisprudential framework of waqf and its principles in a somewhat descriptive manner (Sabrina, 2014; Suleiman, 2016; Mazen, 2017; Abdullah, 2019). There is a considerable amount of contemporary literature which argues for innovation and further development of *fiqh al-awqāf* (waqf principles) in order to contextualize the relevance of the institution (Kuran, 2001; White, 2006; Abdullah, 2018b; Abdullah, 2020). However, there is a noted dearth of literature, particularly in English, on how the framework of waqf jurisprudence evolved in its early phase, and what were the sources, mechanism, methods and tools of analogy that the early jurists applied in deriving the fundamental principles of waqf. This study attempts to fill this gap in the literature by conducting a critical analysis of the process by which waqf doctrines were derived in its early phase and by evaluating the means and methods of juristic analogy as applied by the classical jurists.

This paper aims to analyse the basis of waqf in Sharīʿah, and it endeavours to critically examine the premises and building blocks of classical waqf doctrines (*fiqh al-awqāf*). The objective of the study is to learn how to maintain coherence with the classical mechanism of deriving waqf rulings in the modern era. It is envisaged that this study will provide a solid platform to the stakeholders of waqf to understand the classical process of juristic analogy in developing *fiqh al-awqāf*. Understanding the pitch and pattern of juristic analogy is critical for the waqf-stakeholders to be equipped with the necessary tools to innovate and contextualise waqf application in the contemporary context. For the purpose of analysing the representative opinions of Ḥanafī, Mālikī, Shāfiʿī and Ḥanbalī schools of *fiqh*, the paper explores the *fiqh* literature of these schools. To this end, the books that are repeatedly referred to are as follows:

- *Sharḥ Kitāb al-Siyar al-Kabīr* by Muḥammad ibn al-Ḥasan al-Shaybānī (d. 189 AH);
- *Al-Mudawwanah al-Kubrā* by Saḥnūn ibn Saʿīd al-Tanūkhī (d. 240 AH);
- *Kitāb al-Umm* by Muḥammad ibn Idrīs al-Shāfiʿī (d. 204 AH); and
- *Al-Mughnī* by Ibn Qudāmah (d. 620 H/1223 CE).

The paper commences with an introduction of the study and proceeds to delve into the available literature on the conceptual premises and legal basis of waqf in Sharīʿah. In the subsequent section, the paper moves on to critically analyse the foundations of waqf jurisprudence and delineates the nature of classical jurisprudential analogy and argumentations among the Islamic jurists. Finally, the study sums up the crux of the analysis with a proposal for innovation in the framework of modern waqf doctrines in line with the mechanism of classical juristic analogy.

Framework of classical waqf doctrines: literature review

There are a few studies in the contemporary waqf literature that delve into the origins of waqf and its doctrines. Of special significance in this regard are works of Thomas (1949), Schacht (1953), Othman (1983), Gil (1998), Hennigan (2004), Ghanim (2009), Abbasi (2012), Oberauer (2013), Sabrina (2014), Suleiman (2016), Mazen (2017), Abdullah (2018b) and Abdullah (2019). Thomas (1949) attempts to touch upon the genesis of jurisprudential principles of waqf; however, his research seems restricted to a narrow discussion of the premises on which the jurisprudence of waqf lies rather than contemplating the process by which waqf principles developed. Schacht (1953) may have been inspired by Thomas's study in his endeavours to dilate upon the origin of waqf and its doctrines. According to Schacht (1953), the institution of waqf represents an amalgam of components borrowed from various pre-existing similar institutions in pre-Islamic era. To a certain extent, Othman (1983) and Gil (1998) seem to support this contention of Schacht (1953).

The coverage of theory and principles of waqf in Schacht's work is overshadowed by a comparison of opinions advanced by the founders of different Sunni jurisprudential schools. In comparison, the study of Othman (1983) deals with both the origin of the institution of waqf and the underlying theory of Sharīʿah which sanctifies its principles. In addition, Othman's study creates a link between the practice of waqf and its theoretical underpinnings in Sharīʿah. However, seemingly, his work lacks consistency in presenting the Sharīʿah basis of different jurisprudential doctrines of waqf.

The research of Gil (1998) is distinctive in the sense that it digs into some early manuals to trace the jurisprudential basis of waqf. For instance, the Ṣaḥīfah (manual) of ʿAbd Allāh ibn ʿAmr ibn al-ʿĀṣ (R.A.), which consists of jurisprudential rulings on property, family wealth, inheritance, etc., as dictated by the Prophet (peace be upon him), is noted by Gil (1998) as one of the most accurate manuals on the origin of waqf and its principles. However, Gil's (1998) research lacks a systematised scheme of presentation and is marred by occasional incoherence because of shifting the focus on the sources of the Prophet's (peace be upon him) income and rules of booty distribution in Islam.

The research by Ghanim (2009) provides a comparatively holistic view on the evolution of waqf as a civil society institution and also covers the developmental stages of its principles. He divides the historical phases in which the jurisprudence of waqf was formulated into three. According to Ghanim (2009, p. 16), the first phase of waqf jurisprudence "started after the death of the Prophet (PBUH) in the tenth year A.H., and continued till the end of the third century A.H.". The second phase for the development of waqf rulings, according to Ghanim (2009), ranged from the fourth century A.H. to the thirteenth century. According to him, this period is best described as a "period of branching and elaboration", in which jurists based their reasoning on the existing methodologies of specific jurisprudential schools (Ghanim, 2009, p. 18). The third phase in which jurisprudence of waqf witnessed further evolution spanned from the fourteenth century A.H. to the modern day. In the last stage, "the codification of the Sharīʿah and administrative regulations of waqf" was introduced in certain Arab countries (Ghanim, 2009, p. 20). Though Ghanim's study meticulously covers the evolutionary phases of waqf principles in chronological order, it does not venture into examining the legal basis of the institution and its jurisprudential principles in Sharīʿah.

The development of waqf and its jurisprudential principles in the early period of Islam have been delineated by Abbasi (2012) and Oberauer (2013). Whereas Abbasi (2012) attempts to examine the relationship of waqf doctrines with the rules of gift, charity and inheritance, Oberauer (2013) endeavours to assert that the rules of waqf evolved from the pre-existing device of ʿumrā (life estate) in the Arabian society. This theory was previously advanced by Schacht (1953), and Oberauer (2013) apparently builds upon it. While the focus

of Abbasi's (2012) study is mainly analysis of the opinions of Ḥanafī jurists, Oberauer (2013)'s work is primarily based upon the opinions of Mālikī and Ibāḍī jurists. Though these two works provide an insight into the development of waqf jurisprudence, they do not comprehensively encompass the relationship between the Sharīʿah injunctions as documented in the primary sources and the jurisprudential principles of waqf as formulated by early jurists. Analysing the instrumental building blocks of classical waqf jurisprudence, Hennigan (2004) discusses the topic at length. Though his research is devoted to examining works of al-Hilāl (1355 AH) and Al-Khaṣṣāf (1904), he provides a scholarly analysis of waqf-related *ḥadīths* (Prophetic traditions) as well.

Sabrina (2014) examines the role of waqf among Muslim societies and the perceptions of waqf among Muslims scholars by conducting an analysis of online fatwas and waqf discussions. The study mainly relies on the available literature on waqf in English, and its scope is limited to providing a historical narrative of waqf and its socio-economic activities in Muslim societies. Compared to this, Suleiman (2016) explores the foundational structure of waqf, its flexibility and viability. The objective of Suleiman's (2016) study is to defend the fundamental principles of waqf and their feasibility in the modern context. Mazen (2017) provides an overview of waqf and its key principles in a descriptive manner. His work encompasses the key components of a waqf, its categories and the general framework of its rulings. Abdullah (2018a, 2018b) covers the evolutionary process of waqf and its many manifestations in the modern context. Another study by Abdullah (2019) compares and contrasts the framework of waqf *vis-à-vis* English trust, aiming to identify the similarities versus differences between the two institutions in their rules and principles. However, these works neither claim to provide a comprehensive critique of classical juristic analogy on waqf principles nor do they apply the method of comparative analytical approach in evaluating the opinions of classical jurists on the concept and framework of waqf.

Analysing the legal basis of waqf in Sharīʿah

The classical discourse on waqf is mainly composed of discussions on two dimensions. Firstly, discussion on the Sharīʿah sources that validate the concept of waqf dominates the discourse. Secondly, the premises and precepts upon which the jurisprudential structure of waqf relies remain the focal point of discussion among the classical jurists (Gil, 1998). Thus, the classical waqf treatises indicate that prior to dealing with the sources of its ancillary jurisprudential doctrines, the jurists needed to procure sufficient Sharīʿah evidence to establish the permissibility of waqf in Sharīʿah (Al-Hilāl,1355AH; Al-Khaṣṣāf, 1904; Al-Shāfiʿī, 1990). Apparently, the primary concern of jurists was that the concept of waqf should not contradict the rules of Sharīʿah related to *mawārīth* (inheritance), *ṣadaqah* (charity) and *ḥibah* (gift), among others. For those jurists who validated the concept of waqf early on, the premises of its Sharīʿah validity were located in a composite of prophetic actions, statements and endorsements. They found additional reinforcement for it in the practices and opinions of the Prophet's companions. Although the story of ʿUmar (R.A.) endowing his property at Khayber is identified as the main axis around which the whole structure of the institution revolves, some early jurists have identified the origin of waqf in the practice of the Prophet (peace be upon him) himself (Amin, 1994).

Although the early waqf literature contains the names of numerous companions who made waqf, with a few exceptions, the subject matter and terms of their *awqāf* have generally not been mentioned (al-Hilāl, 1355 AH; Al-Khaṣṣāf, 1904). Broadly, despite availability of discussion on waqf of numerous companions, it is not confirmed whether the companions had understood and treated the concept of waqf in similar terms as it was understood by the jurists at a later stage. Notwithstanding this, it is safe to assume that the

concept of waqf provided some unique features to the companions in terms of fulfilling a blend of spiritual and material objectives which were not attainable through other forms of *ṣadaqah*.

According to jurists such as Abū Yūsuf and Qurṭubī, a consensus was achieved at a later stage regarding the Sharīʿah permissibility of waqf (Al-Khaṣṣāf, 1904; Ibn Ḥajar, 2001). However, initially, there were instances of disagreement among some jurists on its concept. A certain amount of early disagreement is reflected in the oft-cited dissent of Abū Ḥanīfah and Shurayḥ on the validity of *ḥabs* (an alternative term for waqf) in Sharīʿah. It has frequently been mentioned that Qāḍī Shurayḥ disputed the legitimacy of waqf in view of the Prophetic tradition that "the Prophet came to release *ḥabs*" (Al-Shāfiʿī, 1990: 4/52) and "there is no scope for *ḥabs* after the revelation of the inheritance rules prescribed by Allah" (Al-Shāfiʿī, 1990: 4/58). Based upon this prophetic tradition, it is argued that Qāḍī Shurayḥ and Imam Abū Ḥanīfah initially had some reservations on the Sharīʿah validity of *ḥabs*, which later came to be known as waqf.

The Sharīʿah legitimacy of waqf was presumably questioned by these two jurists for two reasons. According to a statement attributed to Abū Yūsuf, the most probable cause of their reservation on waqf was that they had not received any pertinent authentic report on its Sharīʿah acceptability (Ibn Ḥajar, 2001; Al-Mawṣilī, 2005). According to Al-Shāfiʿī (1990), they disputed the concept because, according to them, it was an institution of Jāhiliyyah (the pre-Islamic Era of Ignorance). A third possibility is that it was due to a combination of these two reasons. Be that as it may, the whole discussion is complicated by the fact that, despite repeated claims about Abū Ḥanīfah's reservation on Sharīʿah validity of waqf, there are opinions attributed to him on the ancillary rulings of waqf. That raises a question: If Abū Ḥanīfah had expressed reservation on the very concept of waqf, why would he issue opinions on its different jurisprudential aspects? This provides ground for a counter-explanation: that Abū Ḥanīfah differed on the definition of waqf and not with the concept as a whole. It is argued that, according to Abū Ḥanīfah, waqf has its parallel in *ʿāriyah* (a benevolent loan of a valuable), and it is not necessarily irrevocable (Ibn al-Humām, 2003).

Development of jurisprudential framework of waqf

The idea of waqf, as understood through the prism of its definition (as having a perpetual nature), scarcely finds its jurisprudential framework in the primary sources of Sharīʿah. The understanding that there is a distinctive form of Sharīʿah-prescribed charitable institution that is perpetual in its original construct (i.e. waqf) underwent evolution among early jurists. Presumably, in the initial phase waqf would have appeared to Islamic jurists as an alternative legal instrument that would effectively fill in the existing gap between the jurisprudential intricacies of absolute *ṣadaqah* and *ʿāriyah*. In this sense, waqf fulfilled the need for a legal device that could intermediate between the two instruments. Also, only waqf had the technical features that could serve the purpose of recurring charity. Al-Mawṣilī (2005, 3/46) notes the significance of the irrevocability feature (*luzūm*) in waqf that guarantees its perpetuity. In other words, while analysing the concept of *ṣadaqah jāriyah* (perpetual charity), for the early jurists it was only the framework of waqf that would match the practical needs of such a concept. Waqf, as per its classical definition, practically embodied the attributes of a perpetual institution and technically complied with the concept of an intermediate property-conveyance tool (Al-Khaṣṣāf, 1904).

In relation to the definition of waqf, the technical difficulty which absorbed much effort of jurists was to determine the legal status of its subject matter. The issue of ownership of waqf in this discussion appears to have overshadowed other pertinent jurisprudential principles in the early waqf literature (Al-Hilāl,1355AH; Al-Khaṣṣāf, 1904). If a perpetual

form of charity (as embodied by waqf) was to be meant by the concept of *ṣadaqah jāriyah*, the ownership of such a *ṣadaqah* must be surrendered forever. This is so because, without suspending the absolute ownership rights from the given subject matter, the perpetual nature of such a charity (waqf) would rely on precarious foundations. To this end, the technical construct of waqf conformed to this essential criterion of ownership-suspension.

Ownership status of waqf: juristic analogy
One of the critical challenges that classical jurists encountered in regard to waqf was to determine who owns a waqf property. Jurists exerted themselves to locate the Sharīʿah references which may validate the legitimacy of suspending the ownership of an endowed property (Amin, 1994; Ghanim, 2009). In this regard, the classical jurists could not find any explicit evidence to support the contention of suspending ownership rights from a waqf property. It was at this juncture that the opinions of jurists such as Abū Ḥanīfah and Shurayḥ diverged from others. Contrary to the common belief, the permissibility of waqf (in its charitable and religious nature) may not have been disputed by these jurists; rather, it was the issue of suspending its ownership that was the bone of contention (Al-Sarakhsī, 1993; Al-Marghīnānī, 2010; Ibn al-Humām, 2011). Abū Ḥanīfah held the view that, in principle, the *wāqif*'s ownership of his waqf does not cease. In this regard, the opinion of Imam Mālik converges with that of Abū Ḥanīfah, as he too was of the opinion that the ownership of waqf remains with the *wāqif*. Similarly, Aḥmad ibn Ḥanbal also rejected the suspension of ownership of a waqf, arguing instead that the ownership transfers to and lies with the beneficiaries of a given waqf (Amin, 1994).

As per the established Islamic legal theory, if the ownership of any object is divested or transferred, it must move to the given transferee (Amin, 1994). However, this is not the case with waqf, as its conceptual framework defies association of its ownership with any individual or entity. This phenomenon apparently posed a dilemma for classical jurists. Thus, if the waqf was to be reconciled with the existing framework of other *ṣadaqāt*, which demand transferring ownership to the beneficiaries, its peculiar nature would be at stake. If waqf was to be regarded as an exceptional case, pertinent Sharīʿah evidence was needed to support this proposition.

To this effect, the following statement of Abū Yūsuf, Abū Ḥanīfah's disciple, explicates the nature of the jurisprudential dilemma and how it was surmounted by the classical jurists. Abū Yūsuf argues:

> As per the rules of analogy, waqf of any property should not be allowed. This is because waqf technically requires divestment of its ownership without transferring it to another party. However, since Sharīʿah has suspended our ownership from mosques for the purpose of *qurbah* (nearness to Allah) [. . .] we have permitted waqf of other properties as well (Al-Shaybānī, 1997, p. 267).

Interestingly, the contention of Abū Yūsuf that "Sharīʿah has suspended our ownership from mosques" itself lacks a solid Sharīʿah evidence. Rather, this opinion is deduced from indicative evidence rather than being declared in any explicit text (Saleh, 2000). To this end, the *Qurʾānic* verse "And the mosques are for Allah" (72:18), has been cited by the jurists as the evidence of suspending ownership rights from the endower of a mosque (Al-Qurṭubī, 2003). However, an objective examination of Ḥanafī jurists' discussion on mosques would reveal that the ownership of a mosque too remains with the *wāqif*, though not in absolute terms. This proposition becomes evident in two specific situations. For example, according to Al-Shaybānī (1997), if the locality in which a mosque sits becomes deserted and the mosque becomes dilapidated, its ownership returns back to the *wāqif*. Similarly, according to the opinion of the Ḥanafī jurists, if a *wāqif* apostates after making a waqf for a mosque,

the given waqf becomes null and void and returns to the *wāqif's* legal heirs (Ibn ʿĀbidīn, 2010; Ibn Nujaym, 2010; Ibn al-Humām, 2011). These two samples of jurists' opinions reflect an underlying association of a waqf with the *wāqif*. Thus, the opinions of al-Shaybānī and other Ḥanafī jurists imply that the ownership of even a mosque remains inextricably attached to the *wāqif*, though in a somewhat blurred manner. Since it is arguable whether the premises upon which Abū Yūsuf relies are sufficiently strong in themselves (that the ownership of mosque is suspended forever), the status of its dependent rulings (that waqf of all properties is valid) would be inevitably weaker.

In treating the issue of waqf, the jurisprudential dilemma for the early jurists was that they could not find a middle way between a complete transfer of ownership through *hibah*, and *ʿaṭiyah* on the one hand and a temporary transfer of usufructuary rights through *ʿāriyah* and *manīḥah* (temporary usufructuary gift) on the other (Schacht, 1953). Thus, the technical status of waqf effectively filled this gap between the two kinds of property-conveyance devices (Oberauer, 2013). A waqf falls between these two types of property-conveyance tools, as it requires suspension of ownership from the *wāqif* but without its transfer to the beneficiary.

In this context, to rationalize the scope of analogy, the legal status of waqf was equated by al-Shāfiʿī and Abū Yūsuf with a manumitted slave. For Abū Yūsuf, the parallel between a waqf and a manumitted slave is in their legal status; i.e. they are both free from ownership (Ibn al-Humām, 2011). For al-Shāfiʿī, the parallel between them is in the sense that they both entail usufruct, but without being owned. Furthermore, in the view of al-Shāfiʿī, there are similarities between a manumitted slave and waqf in terms of their not being subject to sale, gift or inheritance (Al-Shāfiʿī, 1990, p. 105). Despite all the equations and analogies drawn between waqf and other similar institutions, theories soliciting the permanent suspension of ownership of waqf could not be established, at least not in an undisputed manner.

For al-Shāfiʿī, the case of waqf is exceptional as, unlike other forms of property dispositions, the ownership of a waqf is released from the *wāqif* but vests with no one. However, al-Shāfiʿī argues that the requirement of transferring the complete ownership is substituted in a waqf through transferring the ownership of usufruct (*manfaʿah*) to the beneficiaries (Al-Shāfiʿī, 1990).

In a nutshell, neither the waqf of a piece of land (in its perpetual nature) nor the permanent suspension of ownership from mosques could be established through the two primary sources of Sharīʿah. Whatever evidence was supplied in this regard was subject to disputation among the jurists. Notwithstanding this, later on, a juristic consensus was achieved in two stages on the suspension of ownership from waqf property. At the first stage, the jurists agreed on the argument that Sharīʿah requires alienability of mosques from the ownership of the *wāqif*. And in the second stage they decided to take the case of mosque as the basis of analogy (*maqīs ʿalayhi*) for validating suspension of other variants of waqf as well (Ibn Ḥajar, 2001).

Completion criteria of waqf: juristic analogy

The second most disputed aspect of waqf among the early jurists was the issue of its completion and culmination (*itmām*). Whether a waqf is completed by mere pronouncement of the *wāqif* or requires transfer of the corpus to the designated *mutawallī* (trustee) is vigorously disputed. For Mālik and al-Shaybānī, transfer of possession is mandatory for a waqf to take legal effect (Ibn al-Humām, 2011). The premise of this opinion is analogy (*qiyās*) and not an explicit textual ruling (*naṣṣ*), as this opinion is consistent with the general theory of charitable giving in Sharīʿah, which requires transfer of possession as a prerequisite for completion of all unilateral giving such a *ṣadaqah* or *hibah* (Amin, 1994). However, al-Shāfiʿī disputes this opinion and argues that waqf culminates even without transferring the

possession of the given property. In this regard, the point of divergence for al-Shāfiʿī is marked by the fact that he considers waqf as a peculiar property-conveyance device compared to other forms of unilateral giving. In this regard too, Al-Shāfiʿī (1990) applies the theory of similarity between manumitting a slave and making a waqf. According to this theory, both manumission of a slave and a waqf culminate without requirement of acceptance from their respective beneficiaries.

As an explanatory note in his *magnum opus Kitāb al-Umm*, al-Shāfiʿī considers waqf under the broad definition of ʿatāyā (singular ʿaṭiyah: charitable giving). ʿAtāyā, according to him, are divided into two categories. The first category, he argues, culminates in the donor's lifetime by taking immediate legal effect. The second category completes only in the aftermath of the giver's demise. Al-Shāfiʿī divides the first category into *ḥabs* and other forms of giving; i.e. *ṣadaqah*, *hibah* and *niḥal* (gift). *Ḥabs*, according to him, culminates with mere pronouncement by the *wāqif* and does not require transfer of title/possession for its completion. In comparison, the other three branches of the first category, *ṣadaqah*, *hibah* and *niḥal*, require the transfer of possession coupled with acceptance from the recipient to take a legal effect. Apart from this, the second category of ʿaṭiyah (which culminates only in the aftermath of the death of the donor) constitutes a *waṣiyah* (Islamic will), which is revocable during the lifetime of the donor (Al-Shāfiʿī, 1990). Figure 1 explains this categorisation of ʿatāyā by al-Shāfiʿī.

The point which al-Shāfiʿī endeavoured to make through dissecting the different variants of charitable giving is encapsulated in his conviction of the peculiarity of *ḥabs* (waqf) *vis-à-vis* other forms of charity. In contrast, Mālik and al-Shaybānī dispute any peculiarity of waqf over other ʿatāyā, at least, in terms of its jurisprudential requirements for completion; i.e. transfer of possession and acceptance from the
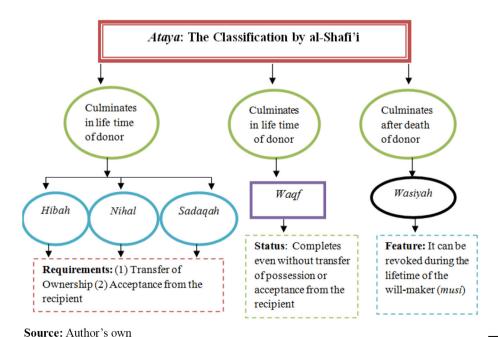

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Figure 1.
Categorisation of
ʿatāyā by al-Shāfiʿī

beneficiary (Saḥnūn, 1324 AH; Al-Shāfiʿī, 1990; Al-Shaybānī, 1997). This difference of opinion continued among the classical jurists over the completion of waqf. The primary reason for it was the existing differences in the analogical tools jurists applied to equate and analyse the framework of waqf.

Framework of waqf doctrines: the tools of analogy
To determine the legal status of waqf and infer its associated doctrines, early Islamic jurists apparently employed three layers of Sharīʿah premises. These include *naṣṣ* (an explicit textual ruling) and *qiyās* (analogical reasoning), coupled with a composite of *istiḥsān* (juristic preference), *ʿurf* (customary practices), *maṣlaḥah* (public interest) and *sadd al-dharīʿah* (prevention of harmful means). These sources provided the basis and premises for jurists to construct the jurisprudential structure of waqf.

The explicit texts referred to for jurisprudential aspects of waqf mainly comprise prophetic actions and statements, followed by the practices and statements of the companions. The primary prophetic statement used as reference in *fiqh al awqāf* is found in the story of ʿUmar (R.A.). It precisely encapsulates the most concise, compact and authentic guidelines. However, the *naṣṣ* of this story is not sufficient in itself to comprehensively govern the complete structure of waqf jurisprudence.

In addition to the story of ʿUmar (R.A), the *ṣadaqah* of the companion Abū Talḥah (R.A.) provided some key leads in this respect. For instance, the validity of a waqf of real estate prior to demarcation of its boundaries has been inferred through the story of Abū Talḥah (R.A.). Additionally, the premises for the ruling that the waqf of a shared property is valid are based on the precedent of the waqf for the Prophet's Mosque. It is reported that the land on which the mosque is built was under the collective ownership of the tribe of Bani al-Najjar and that they made it waqf collectively (Ibn Ḥajar, 2001). Similarly, the waqf of weapons and horse by Khālid ibn Walīd provided the precedent for the permissibility of endowing chattel as waqf. These examples constitute indicative samples of *naṣṣ* which laid the ground for the jurisprudence of waqf.

The repeated application of *qiyās* and *istiḥsān* is vividly reflected in the discourse of *fiqh al-awqāf*. In general, the *maqīs ʿalayhi* (the original source upon which the derived ruling is based) for derivation of *fiqh al-awqāf* constitutes a wide array of pre-Islamic legal devices. The existing jurisprudential structure of waqf is composed of an array of doctrinal principles borrowed from similar Sharīʿah-approved devices. According to the analogy drawn by Abū Ḥanīfah, waqf is comparable with *ʿāriyah* (gift of usufruct). In his view, similar to the nature and case of an *ʿāriyah*, ownership of waqf remains with the *wāqif*, and the corpus can be withdrawn at his disposal (Al-Marghīnānī, 2010; Ibn al-Humām, 2011). In this respect, Ibn al-Humām (2011) asserts that the opinion of Abū Ḥanīfah is plausible for three reasons. These include the following:

- the general *wilīyah* (authority/guardianship) of waqf remains with the *wāqif*;
- the nature of waqf requires recurring charity from the *wāqif*, and this could not be possible except if the ownership remains with the *waqif*; and
- it would contradict the standard Sharīʿah requirement if transfer of ownership were to happen without vesting in anyone else.

Nevertheless, Ibn al-Humām (2011) concedes that the cases of slave manumission and the *masjid* are exceptional, as in their case, the third reason is not applicable. Similarly, according to Abū Ḥanīfah, a waqf becomes *lāzim* (the ownership of which is necessarily suspended) and *dāʾim* (perpetual) only in three cases:

- if it emerges as a result of will;
- if the existence of waqf is confirmed by a judge (*qāḍī*) through adjudication in a disputed case; and
- if the waqf is for a *masjid* (Ibn al-Humām, 2011).

Abū Ḥanīfah permits a waqf to be established after the death of the *wāqif*. Here, his contention is based on the analogy of *waṣiyah* (Islamic will), which takes effect only after the death of the *muṣi* (testator) (Al-Shaybānī, 1997, p. 266).

The institutions of *waṣiyah* (Islamic will) and *warātha* (inheritance) have also served as tools of analogy for waqf. Specific principles of these two institutions along with other similar devices provided the structural basis for development of waqf doctrines. For instance, the doctrine that a deathbed waqf donation cannot exceed one-third of the endower's aggregate property is based on analogy with a Sharīʿah provision related to *waṣiyah* (Al-Sarakhsī, 1993).

In some references, even the rules related to *hadi* (the animal earmarked for sacrifice during *ḥajj* or *ʿumrāh*) provided a basis for a specific ruling of waqf. For example, that a *wāqif* can benefit from his own waqf is a ruling which is based on the comparison of waqf with *hadi* (Ibn Ḥajar, 2001). Though it might be difficult to supply an exhaustive list of the devices employed by the jurists as points of reference and analogy to derive waqf rulings, Figure 2 contains the names of the key ones.

Perpetuity versus temporality of waqf
The issue of perpetuity over temporality of waqf was also a critical point of juristic dispute in the classical discourse. The divergence of juristic opinions on this point was rooted in the variation in their scholastic approaches towards waqf. Arguably, for Imam Abū Ḥanīfah and Imam Mālik, there is no substantial Sharīʿah evidence to prove the intrinsically perpetual nature of waqf. Abū Ḥanīfah accepted the permissibility of waqf reluctantly and
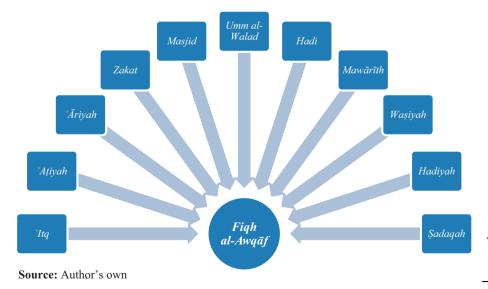

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Figure 2.
Tools of *qiyās* (*maqīs ʿalayhi*) to derive the *fiqh al-awqāf*

that too without viewing the necessity of its permanence (Al-Sarakhsī, 1993; Al-Marghīnānī, 2010; Ibn al-Humām, 2011). To some extent, Mālik too argued for a convergent theory so far as the permanence of waqf was concerned (Saḥnūn, 1324 AH). Presumably, for both Abū Ḥanīfah and Mālik, the literal and technical implications of waqf are more relevant to the beneficiaries than the *wāqif*. In other words, it is the beneficiaries of a waqf who are not permitted to dispose of waqf either by selling the corpus, gifting it, or making it subject to inheritance. However, according to Abū Ḥanīfah, subject to specific conditions, the *wāqif* can exercise his ownership rights on a waqf property. On the other hand, in the *Mudawwanah* of Saḥnūn, we are informed that Mālik was acquainted with the waqf-related Sharīʿah maxim 'It cannot be sold or inherited or gifted' with reference to the waqf deeds of some companions. However, he did not view this maxim as a sufficient proof for instituting the characteristic of perpetuity as a necessary element of each and every waqf (Saḥnūn 1324 AH; Al-Sarakhsī, 1993).

Arguably, the point which the jurists of Madīnah subscribed to was that the term '*ḥabs*' does not necessarily imply the perpetuity of a deed. Instead, according to them, it is the practical requirement of some waqf deeds which determines the perpetuity of a given waqf. For instance, in *Al-Mudawwanah al-Kubrā*, Saḥnūn (1324 AH) refers to the opinion of Mālikī jurists with respect to a *ṣadaqah* in which the endower endows for an indeterminate number of beneficiaries and their progeny. In regard to such a waqf, they unanimously opined that such a deed would automatically turn into *ḥabs*. The underlying reasoning for this opinion is presumably nothing other than the practical need of the deed itself. In contrast, the corpus of a deed which contains the phrase, '*Al-ṣadaqah al-mawqūfah*', the beneficiaries of which are specified in identity and number, such a *ṣadaqah* would not constitute a *ḥabs*. Rather, the corpus of such a *ṣadaqah* would return back to the ownership of the endower at the end. Thus, it is evident that the jurists of Madīnah did not stipulate the specific term '*ḥabs*' in determining the perpetuity of a deed. Rather, even if the term *ṣadaqah* is used in the deed but the number of its given beneficiaries is indeterminate, it would be regarded as *ḥabs* by implication (Saḥnūn, 1324 AH).

For Mālikīs, the terms *ṣadaqah* and *ḥabs* do not make any difference in either determining the legal status of a deed or in restricting its beneficial character. In comparison, for Ḥanafīs, *ṣadaqah* is specifically the rights of the poor while waqf is for both the rich and poor. Al-Shaybānī (1997) solicits a subtle but fundamental difference in how a waqf would benefit the rich and poor in divergent ways. According to him, a rich person could benefit from the usufruct of waqf; however, he could not enjoy entitlement in the revenues, as this is the sole right of the poor. According to Al-Shaybānī (1997), waqf constitutes only permissibility (*ibāḥah*) of enjoyment and not the transfer of ownership (*milkiyah*). The implication of this technical difference is that a waqf can benefit both the rich and poor but its revenues are exclusively reserved for the poor only. For example, if a slave has been made waqf for the services of *mujāhidīn* (those who struggle against oppressors), both rich and poor can enjoy his services equally. However, if a house is dedicated as waqf, the revenues generated through renting it cannot be spent on the rich (Al-Shaybānī, 1997).

For Mālikī scholars, the condition of temporality or permanence does not affect the legal standing of a waqf. In contrast, al-Shaybānī did not envisage a deed of waqf as permissible except with the condition of perpetuity. Hence, for Ḥanafīs, if a waqf is designated for a determinate number of beneficiaries without specifying where the benefits would be directed after their deaths, the deed would become void right from the beginning. Al-Shaybānī cites the opinion of Abū Ḥanīfah with respect to the waqf of a person who declares 'My house is *ḥabs* for X and, in his aftermath, for his children' that this waqf is void (Al-Shaybānī, 1997). In the *Mudawwanah*, on the other hand, a similar example of waqf was

considered permissible (Saḥnūn,1324AH). Al-Shaybānī critically analyses the position of Mālikīs on the temporality of a waqf in his book *Al-Hujjah ʿalā Ahl al-Madīnah*. He argues, "The scholars of Madīnah hold that this is permissible, and if the nominated beneficiaries are extinct, the proceeds of the *ḥabs* would be diverted to their nearest relatives without being eligible for sale or gift or inheritance" (1403 AH, p. 46). Al-Shaybānī contends that the Mālikī scholars' position on this is self-contradictory. He refutes their position with the contention that there are only two possibilities with respect to the ownership of the given corpus of *ḥabs*. It is either vested in the designated beneficiaries or not. Accepting the first hypothesis would necessitate the passage of the given property to the legal heirs of the beneficiaries, which is not the legal position of even the jurists of Madīnah. In case, the second hypothesis is accepted, then there would be no valid reason why the beneficiaries should prevent the corpus from being inherited by the legal heirs of the *wāqif* (Al-Shaybānī,1403AH, pp. 46-47). Thus, al-Shaybānī justifies the dominant Ḥanafī position on the perpetual character of a waqf, which, according to them, is an essential characteristic of a valid waqf. For them, a waqf which is not perpetual is void from the beginning (Al-Hilāl, 1355AH; Al-Khaṣṣāf, 1904). In this regard, al-Shaybānī's clarification that "in our view the permissible kinds of *ḥabs* are those which have the provision of returning to the poor, paupers and wayfarers and which never return back to inheritance," explains the Ḥanafī position on the perpetuity of waqf (1403 AH, p. 65).

Al-Shaybānī further explains, "There are numerous narrations regarding *ḥabs* which support the position of Abū Ḥanīfah; however, we are unaware of any narration which may support the Mālikī position on the possibility of temporary *ḥabs*" (1403 AH, p. 58). According to al-Shaybānī, the *ḥabs* made by ʿAlī, ʿUmar, Ibn ʿUmar, and Zayd ibn Thābit were perpetual, not temporary, as they all stipulated that eventually, the benefits should revert to the poor and pauper. Finally, al-Shaybānī contends that there is not even a single narration which establishes that any of the Prophet's companions made a *ḥabs* on a temporary basis (Al-Shaybānī,1403AH, pp. 57-58).

The edifice of the classical jurisprudential discourse on waqf is largely constructed on the premises of the waqf of ʿUmar. Though it may be argued that the grounds for the Sharīʿah permissibility of the institution were laid in the light of several other sources as well, including prophetic and non-prophetic precedents, the waqf of ʿUmar served as the most authentic source. However, despite its fame, itis surprising to note the historical contention on issues addressed in it. Perhaps Abū Ḥanīfah remained uninformed about it. Remarkably, in a narration attributed to Imam Abū Yūsuf, it has been argued that "If the story of ʿUmar had reached Abū Ḥanīfah, he would have changed his opinion on the revocability of waqf" (Ibn Ḥajar, 2001, p. 566).

On the surface, seemingly the deed of ʿUmar was not the primary source for the *fiqh al awqāf* developed by Imam Mālik as well. What substantiates this contention is the fact that neither the *Muwaṭṭaʾ* of Imam Mālik, nor *Al-Mudawwanah al-Kubrā* by Saḥnūn have referred to this story of ʿUmar in the context of waqf. In hindsight, it may be reasonable to assume that Mālik too was unaware of the clauses of ʿUmar's waqf deed. This contention gains further weight if the terms of ʿUmar's deed and Mālik's opinions on jurisprudential principles of waqf are juxtaposed side by side. Mālik's jurisprudential positions on various aspects of waqf are diametrically opposed to those of jurists, such as Abū Yūsuf, whose primary source of waqf doctrines was ʿUmar's deed. For instance, there is a stark difference of opinion between Mālik and Abū Yūsuf on whether or not a waqf is completed without transfer of possession. Similarly, Abū Yūsuf and Mālik held divergent views on whether a *wāqif* can enjoy the benefit of his own waqf or not. Additionally, the divergence of opinion between the two extends to the juristic dispute on whether a *wāqif* can play the role of

mutawallī or not (Ibn Ḥajar, 2001). Bukhari (1979), who frequently cites and dissects the story of ʿUmar to extract waqf-related rulings, also differs with Mālik on the aforementioned aspects of waqf. In comparison, he subscribes to views convergent with those of Abū Yūsuf on these waqf rulings.

Conclusion

Though the sanctity of the term *'ṣadaqah jāriyah'* is agreed upon in Sharīʿah, there has been a divergence of opinion among classical jurists as to whether the concept of waqf (which was initially known as *ḥabs*) embodies and represents the term *'ṣadaqah jāriyah'*. At a later stage, a consensus of opinion was achieved among the classical Islamic jurists on the Sharīʿah sanctity and validity of waqf. However, unanimity of opinion on the legal status of a waqf and its treatment could not be attained among the early classical jurists. The fiercely disputed aspects of waqf included, inter alia, determining the ownership status of a waqf, its completion criteria, and its perpetuity versus revocability.

This paper aimed to examine the classical process of establishing the Sharīʿah validity of waqf and its principles among the classical jurists. The paper critically analysed the nature of argumentation among the classical jurists, and it investigated the edifice of juristic analogies applied by different jurists in deriving the framework of waqf doctrines. The paper dissected the basis and building blocks of *ijtihād* (the exercise of independent juristic judgement) as applied by the jurists, and it critiqued some key rulings of classical waqf. The objective of the analysis was to conceptualise the methods, mechanism and nature of juristic analogies in deriving the waqf principles with an aim to understand the scope of jurisprudential analogy and the possibility of its application in the modern context.

The paper underlined that in its initial phase waqf was commonly referred to as *ḥabs*. Later on, the two terms, waqf and *ḥabs*, were frequently used interchangeably to denote the essence of *ṣadaqah jāriyah* (perpetual charity). It was found that the jurisprudential framework of waqf has not been comprehensively defined in the primary sources of Sharīʿah. The paper finds that it was this scarcity of available explicit primary texts that caused the classical jurists to apply *ijtihād* in deriving the waqf principles. Thus, a substantial amount of waqf jurisprudence is characterised by analogy-based (*ijtihādī*) derivation by classical jurists.

While examining the development of the framework of waqf jurisprudence by early jurists, it was found that waqf has been equated with a variety of Islamic legal concepts. In other words, the development process of the waqf jurisprudence framework largely depended on extracting the essential features of some already established institutions such as *ṣadaqah*, *mawārīth*, *waṣiyah*, *hadiyah*, *hadi* and *ʿitq* (manumission of a slave). Juristic analogy with all these institutions collectively contributed to preparing the precepts for *fiqh al-awqāf* (jurisprudence of waqf). Thus, it has been argued that the conceptual basis and premises of waqf are sanctioned through the primary sources of Sharīʿah, but the framework of waqf doctrines, or the jurisprudence of waqf, is essentially reliant on the secondary sources of Sharīʿah. Among the secondary sources, the involvement of rules of analogy is manifestly prevalent in the deduction of waqf jurisprudence. Interestingly, as noted earlier, due to being largely grounded within the precepts and premises of *ijtihād*, there is great scope for flexibility in the jurisprudence of waqf. Compared to the static nature of *naṣṣ*, the *ijtihād* paradigm is dynamic and accommodative, stretching to cover newly arising demands of specific times and places. The paper found that the key issues that absorbed the efforts of the classical jurists included discussion on the following:

- Sharīʿah validity of waqf in its irrevocable form;
- completion of a waqf prior to its transfer to a trustee or beneficiary;
- the indeterminate ownership status of the underlying waqf property; and
- the temporality versus perpetuity of a waqf.

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Further reading

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