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

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Abstract

**Purpose** – This paper aims to analyse the Shari’ah 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 Shari’ah 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 Shari’ah permissibility remained critically disputed among them for a while. Though, the opinion of those jurists who approved the Shari’ah-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, Shari’ah, Endowment, Fiqh, Sadaqah, Islamic jurisprudence

**Paper type** Research paper

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The author is highly grateful to the anonymous reviewers of the paper for their critical and very constructive feedback and comments on the draft manuscript which greatly helped to enhance the quality of the paper.
Introduction

In the classical jurisprudential discourse, the Sharī‘ah basis of waqf has been delineated by jurists as rigorously as its ancillary principles. The nature of argumentation on the Sharī‘ah 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-Shāfi‘ī, 1990; Al-Shaybānī, 1997). Though the opinion of those jurists who approved of the Sharī‘ah 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 Bayrūţah orchard by Abū Talhah (R.A.), as well as the waqf of the well of Rūmah by ‘Uthmān 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 waqfs (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 sadaqah (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 sadaqah of the famous orchard by the companion Abū Talhah (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 sadaqah 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-Mawṣū‘ah 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 hadith (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 Sharī‘ah legitimacy of waqf for the early generations of jurists. To this effect, scholars such as Mālik, al-Shāfi‘ī, 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 Sharī‘ah permissibility of waqf would be tantamount to rejection of ijma‘ (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-awqaf (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-awqaf). 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-awqaf. 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 Hanafi, Mālikī, Shāfīʿī and Ḥanbālī 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-Tanṭūkhī (d. 240 AH);
- *Kitāb al-Umm* by Muḥammad ibn Idrīs al-Shāfīʿī (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 arguments 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 ʿṢahīḥah (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 Hanaﬁ jurists, Oberauer (2013)’s work is primarily based upon the opinions of Mālikī and Ibaḍī jurists. Though these two works provide an insight into the development of waqf jurisprudence, they do not comprehensively encompass the relationship between the Sharī’ah 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-Hīlāl (1355 AH) and Al-Khaṣṣāf (1904), he provides a scholarly analysis of waqf-related hadiths (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 Sharī’ah

The classical discourse on waqf is mainly composed of discussions on two dimensions. Firstly, discussion on the Sharī’ah 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 Sharī’ah evidence to establish the permissibility of waqf in Sharī’ah (Al-Hīlāl, 1355 AH; Al-Khaṣṣāf, 1904; Al-Shāfī‘ī, 1990). Apparently, the primary concern of jurists was that the concept of waqf should not contradict the rules of Sharī’ah related to mawāriz (inheritance), ṣadaqah (charity) and hibah (gift), among others. For those jurists who validated the concept of waqf early on, the premises of its Sharī’ah 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 ‘Umar (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-Hīlāl, 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 Yūṣuf and Qurtubī, a consensus was achieved at a later
stage regarding the Sharīʿah permissibility of waqf (Al-Khaṣṣāf, 1904; Ibn Hajar, 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 Qaḍī Shurayḥ disputed the legitimacy of waqf in view of the
Prophetic tradition that “the Prophet came to release ḥabs” (Al-Ṣāfī ʿī, 1990: 4/52) and “there
is no scope for ḥabs after the revelation of the inheritance rules prescribed by Allah” (Al-
Ṣāfī ʿī, 1990: 4/58). Based upon this prophetic tradition, it is argued that Qaḍī 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 Yūṣuf, the most probable cause of their
reservation on waqf was that they had not received any pertinent authentic report on its
Sharīʿah acceptability (Ibn Hajar, 2001; Al-Mawsīlī, 2005). According to Al-Ṣāfī ʿī (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 ʿārīyah (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 ʿārīyah. 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-Mawsīlī
(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 ʿārīyah
(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 šadaqah jāriyyah, the ownership of such a šadaqah 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 Sharī`ah 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-Sarakhsi, 1993; Al-Marghinānī, 2010; Ibn al-Humam, 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, Ahmad 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 šadaqāt, 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 Sharī`ah evidence was needed to support this proposition.

To this effect, the following statement of Abū Yūṣuf, Abū Ḥanīfah’s disciple, explicates the nature of the jurisprudential dilemma and how it was surmounted by the classical jurists. Abū Yūṣuf 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 Sharī`ah has suspended our ownership from mosques for the purpose of qurba (nearness to Allah) […] we have permitted waqf of other properties as well (Al-Shaybānī, 1997, p. 267).

Interestingly, the contention of Abū Yūṣuf that “Sharī`ah has suspended our ownership from mosques” itself lacks a solid Sharī`ah evidence. Rather, this opinion is deduced from indicative evidence rather than being declared in any explicit text (Saleh, 2000). To this end, the Qur’anic 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-Qurtūbī, 2003). However, an objective examination of Ḥanafi 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 Ḥanafi 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 ‘Abidīn, 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 ārīyah on the one hand and a temporary transfer of usufructuary rights through ārīyah and manīḥah (temporary usufructuary gift) on the other (Schacht, 1953). Thus, the technical status of waqf effectively fills 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-Shāfī ʿī 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-Shāfī ʿī, the parallel between them is in the sense that they both entail usufruct, but without being owned. Furthermore, in the view of al-Shāfī ʿī, there are similarities between a manumitted slave and waqf in terms of their not being subject to sale, gift or inheritance (Al-Shāfī ʿī, 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-Shāfī ʿī, 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-Shāfī ʿī argues that the requirement of transferring the complete ownership is substituted in a waqf through transferring the ownership of usufruct (manfaʿ ah) to the beneficiaries (Al-Shāfī ʿī, 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 (mnaqīs ʿalayhi) for validating suspension of other variants of waqf as well (Ibn Hajar, 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 (itnām). 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 (qiyyās) and not an explicit textual ruling (maṣṣ), 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 sadaqah or hibah (Amin, 1994). However, al-Shāfī ʿī 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-Shāfi‘ī 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-Shāfi‘ī (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-Shāfi‘ī considers waqf under the broad definition of ‘atāyā (singualar ‘ātiyāh: charitable giving). ‘Atāyāh, 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-Shāfi‘ī divides the first category into ḥabs and other forms of giving; i.e. sadaqah, hibah and niḥal (gift). Ḥabs, according to him, culminates with mere pronouncement by the waqīf and does not require transfer of title/possession for its completion. In comparison, the other three branches of the first category, sadaqah, 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 ‘ātiyāh (which culminates only in the aftermath of the death of the donor) constitutes a wasiyyah (Islamic will), which is revocable during the lifetime of the donor (Al-Shāfi‘ī, 1990). Figure 1 explains this categorisation of ‘atāyā by al-Shāfi‘ī.

The point which al-Shāfi‘ī 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 ‘atāyā, at least, in terms of its jurisprudential requirements for completion; i.e. transfer of possession and acceptance from the

Framework of waqf doctrines

Figure 1. Categorisation of ‘atāyā by al-Shāfi‘ī

Source: Author’s own
beneficiary (Saḥnūn, 1324 AH; Al-Ṣāḥīfī, 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 analyze 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 (analagical reasoning), coupled with a composite of istiḥsān (juristic preference), ʿurf (customary practices), maslahah (public interest) and sadd al-dhārīʿah (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-auqāf 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 sadaqah 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 Hajar, 2001). Similarly, the waqf of weapons and horse by Khalid ibn Walid 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-auqāf. In general, the maqṣīs ʿalayhi (the original source upon which the derived ruling is based) for derivation of fiqh al-auqāf 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 waqīf, and the corpus can be withdrawn at his disposal (Al-Marqāḥīnī, 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 ʿuṣūr (authority/guardianship) of waqf remains with the waqīf;
- the nature of waqf requires recurring charity from the waqīf, and this could not be possible except if the ownership remains with the waqīf; 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 lāzīm (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 waqīf. Here, his contention is based on the analogy of wasiyah (Islamic will), which takes effect only after the death of the muṣī (testator) (Al-Shaybānī, 1997, p. 266).

The institutions of wasiyah (Islamic will) and warāṭha (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 wasiyah (Al-Sarakhsī, 1993).

In some references, even the rules related to hādi (the animal earmarked for sacrifice during ḥajj or ʿumrāḥ) provided a basis for a specific ruling of waqf. For example, that a waqīf can benefit from his own waqf is a ruling which is based on the comparison of waqf with hādi (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 alayhi) to derive the *fiqh al-awqāf*

Source: Author’s own
that too without viewing the necessity of its permanence (Al-Sarakhsī, 1993; Al-Marghīnānī, 2010; Ibn al-Humām, 2011). To some extent, Mālikī too argued for a convergent theory so far as the permanence of waqf was concerned (Ṣaḥnūn, 1324 AH). Presumably, for both Abū Ḥanīfah and Mālikī, the literal and technical implications of waqf are more relevant to the beneficiaries than the waqīf. 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 waqīf can exercise his ownership rights on a waqf property. On the other hand, in the Mudawwānah of Ṣaḥnūn, we are informed that Mālikī was acquainted with the waqf-related Shariʿah 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 (Ṣaḥnūn 1324 AH; Al-Sarakhsī, 1993).

Arguably, the point which the jurists of Madīnah subscribed to was that the term ‘ḥābs’ 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-Mudawwānah al-Kubrā, Ṣaḥnūn (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 ḥābs. 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 ḥābs. 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 ‘ḥābs’ 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 ḥābs by implication (Ṣaḥnūn, 1324 AH).

For Mālikīs, the terms ṣadaqah and ḥābs 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 (ibākah) 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 ḥābs for X and, in his aftermath, for his children’ that this waqf is void (Al-Shaybānī, 1997). In the Mudawwānah, on the other hand, a similar example of waqf was
considered permissible (Saḥnūn, 1324 AH). Al-Shaybānī critically analyses the position of Mālikīs on the temporality of a waqf in his book Al-Hujjah ʿalā Abī 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 waqf (Al-Shaybānī, 1403 AH, 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, 1355 AH; Al-Khāṣṣāf, 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 ‘Āli, ‘Umar, Ibn ‘Umar, 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 ḥab on a temporary basis (Al-Shaybānī, 1403 AH, pp. 57-58).

The edifice of the classical jurisprudential discourse on waqf is largely constructed on the premises of the waqf of ‘Umar. Though it may be argued that the grounds for the Sharī‘ah permissibility of the institution were laid in the light of several other sources as well, including prophetic and non-prophetic precedents, the waqf of ‘Umar served as the most authentic source. However, despite its fame, it is 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 ‘Umar had reached Abū Ḥanīfah, he would have changed his opinion on the revocability of waqf” (Ibn Hajar, 2001, p. 566).

On the surface, seemingly the deed of ‘Umar 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 Muwatta’ of Imam Mālik, nor Al-Mudawwanah al-Kubrā by Saḥnūn have referred to this story of ‘Umar in the context of waqf. In hindsight, it may be reasonable to assume that Mālik too was unaware of the clauses of ‘Umar’s waqf deed. This contention gains further weight if the terms of ‘Umar’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 ‘Umar’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 waqf 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 waqf can play the role of
Conclusion

Though the sanctity of the term ‘ṣadaqah jāriyah’ is agreed upon in Sharī`ah, 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 Sharī`ah 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 Sharī`ah 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 Sharī`ah. 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, mawārīn, waṣiyah, hādiyyah, ḥādi and ‘ītq (manumission of a slave). Juristic analogy with all these institutions collectively contributed to preparing the precepts for fiqh al-awqaf (jurisprudence of waqf). Thus, it has been argued that the conceptual basis and premises of waqf are sanctioned through the primary sources of Sharī`ah, but the framework of waqf doctrines, or the jurisprudence of waqf, is essentially reliant on the secondary sources of Sharī`ah. 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 nass, 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:

1. Ownership status of waqf
2. Completion criteria of waqf
3. Perpetuity versus revocability of waqf
• Sharī‘ah 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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