

# The Classical Muslim Law of Waqf: A Study of Ḥanafī Legal Discourse

## <sup>1</sup>Aadil Hussain Wagay, <sup>2</sup>Dr Ghulam Nabi

<sup>1</sup>Senior Research Scholar, Department of Islamic Studies, IUST, Awantipora, J&K, India <sup>2</sup>Assistant Professor, Department of Islamic Studies, IUST, Awantipora, J&K, India

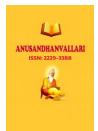
Abstract: Waqf (pious endowment) is a crucial component of the Islamic financial system as well as a key institution within the Islamic framework, where a Muslim donates revenue-generating property for the benefit of others. This article aims to provide a comprehensive introduction to the classical Ḥanafī legal discourse on Waqf. A significant finding is the inconsistency in legal theory, as Ḥanafī jurists differ on whether the founder's ownership terminates upon the creation of a Waqf. This study explores how Ḥanafī scholars have historically understood and discussed waqf laws, what are the necessary conditions for its validity and what is the status of Sharāiṭ al Wāqif. Despite extensive discussions on Waqf in major Fiqh works, there is still a need for a comprehensive study focused exclusively on the Ḥanafī legal discourse. The study addresses this need using a descriptive and analytical methodology.

Keywords: Waqf, Ḥanafī, Fiqh, Sharāit al Wāqif, Sharī'ah

### 1. Introduction

Waqf is one of the most significant institutions in the Islamic Sharī'ah (Islamic Law), with immense potential to reconstruct the social and economic fabric of society. This institution exemplifies human interdependence, generosity, tolerance, and solidarity across various dimensions—religious, social, economic, cultural¹ and humanitarian. Waqf has the capacity to address the fundamental needs of the impoverished, including clothing, food, and housing, while also providing a range of public goods and services, such as healthcare and education. Due to its substantial potential and embodiment of Islamic values of kindness and compassion, scholars regard Waqf as the most suitable Infāq (charitable spending) institution in Islām, capable of addressing a wide array of societal needs². Waqf prioritizes both the welfare of families and the protection of individuals from poverty. It represents a more advanced form of ṣadaqah, (charitable spending) specifically known as Ṣadaqah al-Jārīya. Waqf fosters a sense of community and provides orphans, widows, and the impoverished with a stable source of income, constituting a significant act of kindness. This institution not only supports the immediate needs of vulnerable populations but also contributes to the long-term social and economic stability of the community³.

Waqf literally means Imprisonment and interdiction. Its plural is Awqāf, which has been derived from the root word "Waqafa", which means "to stop", "to halt", and "to retain" In a technical sense, it means that the assets that have been donated will be prohibited from being transferred to another person. Waqf is the term used to describe the permanent dedication or consecration of movable or immovable property for any charitable, religious, educational, social, or welfare cause, either expressly or implicitly. Awqāf are institutionalised expressions of perpetual philanthropy and manifestations of mercy, brotherly love, and affection for creation in the service of their Lord. In other words, it means to prevent tamlik and tamalluk (Tamlik means to give the possession of an asset to another person and tamalluk conveys the meaning of ownership of an asset) of its possession forever and retain it for the specific advantage of certain philanthropy.



## 2. Waqf in Ḥanafī Fiqh

So for as the stand of the Ḥanafī  $fuq\bar{a}h\bar{a}$  (jurists) on the technical meaning of Waqf is concerned, we have two different types of definitions of Waqf as there is a difference of opinion among the Ḥanafī  $fuq\bar{a}h\bar{a}$  on the technical meaning of Waqf. The first definition pertains to the majority of scholars and  $fuq\bar{a}h\bar{a}$  supported by arguments from the  $Qur'\bar{a}n$  and Sunnah, which also is the stand of Imām Abū Yūsuf and Imām Muḥammad. The second definition of Waqf has been associated with Imām Abū Ḥanāfah. The first definition is shared by majority of scholars, including  $Sh\bar{a}f\bar{i}s$ ,  $Hanbal\bar{i}s$  and Imām Abū Yūsuf and Imām Muḥammad among the Ḥanafīs. Indeed Ḥanafīs give fatwa (legel decree) on this same view contradictory to the view of founder of the school- Imām Abū Hanāfah. This definition of Waqf has been given by author of  $Al Hid\bar{a}vah$  in these words:

"The appropriation of property to the ownership of Allah in such a way that its benefits reach the people"

As per this definition, the ownership of property of the *Wāqif* (endower) terminates and the property stands transferred in the ownership of *Allah* and the usufruct to the benefeciaries. As a result, a *Waqf* will be established that cannot be bought, sold, gifted, or inherited. Unlike Abū Ḥanīfah, who limits *Waqf* ownership to the *Wāqif*, the students give it to God. However there is a difference between the opinions of Imām Abū Yūsuf and Imām Muḥammad. The former is of the view that as soon as the *Waqf* comes into existence, the ownership of *Wāqif* extinguishes but according to later the ownership of *Wāqif* extinguishes only when *mauqūf* (endowed item) is handed down to *Mutawallī*. However, the preferred view is the saying of Imām Abū Yūsuf among the Ḥanafī Scholars.<sup>8</sup> Human ownership of the *Waqf*, and its most essential perquisite, the right of alienation, ceases to exist under this definition.<sup>9</sup> Haskafī<sup>10</sup> in *Durr Al Mukhtār* also gives the same definition. If the *Waqf* is undivided and has the share of other also, then the sharer will have the right to have his share. He says:

"Imām Abū Yūsuf and Imām Muḥammad are of the view that the donated property belongs to the ownership of Allah Almighty. Its usufruct will be spend on those whom Wāqif wills even if they are wealthy. It is not permissible for it to be abrogated, nor can it be inherited and it is the Fatwa also". 11

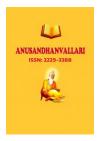
The second definition is the classical definition of Waqf given by Imām Abū Ḥanīfah with following words:

"The appropriation of property in such a way that the founder's right in it shall still continue, and the usufruct of it go to some charitable purpose" 12

This definition emphasises that, Waqf is valid and permissible but not binding and the  $mauq\bar{u}f$  still remains in the ownership of the  $W\bar{a}qif$ . He has the right to sell it as well as gift it. He will have the power of all legitimate disposal and inheritance will also continue in it after his death. He has the right to terminate the Waqf also. Al  $Hid\bar{a}yah$  has further explained that according to Imām Abū Ḥanīfah, Waqf is permissible but not obligatory as it is like a loan, hence not absolute in nature. So the  $W\bar{a}qif$  has the freedom to resume it and its sale or gift is valid. In case of the death of the  $W\bar{a}qif$ , the Waqf will be inherited by his heirs. The  $W\bar{a}qif$  will have the authority to change the terms and conditions of endowment. Haskafi in  $Durr-Ul-Mukht\bar{a}r$  also mentions this definition of Imām Abū Ḥanīfah. He writes:

"Endowment is permissible but not binding, just as borrowing is valid where ownership and possession remains in the owner".

However, the two famous disciples of Imām Abū Ḥanīfah, Imām Abū Yūsuf and Muḥammad Al Shaybani, as well as legal scholars from the Shāfī and Ḥanbali schools, contradict this definition. However in the light of the aḥadīth, the records of the Ṣahaba (companions of Prophet PBUH), it is known that the valid and most popular opinion is that of the students and not of the teacher. Many of the Companions established Waqf according to their means, and there is no evidence of anyone returning the Waqf or selling it and making use of its value.



Waqf according to Imām Abū Ḥanīfah also becomes obligatory and the ownership of  $W\bar{a}qif$  will end and it will neither be sold nor will it be gifted or inherited when any of the following three situations were found. <sup>15</sup>

- 1. If the *Wāqif* desires to extinguish the *Waqf* and it becomes disputable between *Mutawallī* and *Wāqif*, then *Qāḍi*(Judge) giving verdict in favour of making *Waqf* obligatory and it will become so.
- 2. The other way is to make the Waqf subject to death at the time of making the Waqf, for example, the Wāqif says:
  - "When I die, this house of mine is Waqf for such and such work"

In this way, the endowment will become obligatory and the endowment will be established on one-third of his property as soon as death occurs, just as the will continues in one-third of the property left by the deceased after death. It is known as the Testamentary *Waqf*.

3. The third scenario is that when a person donates his land for the construction of *Masjid* and let the people offer *ṣalah* (prayer) in it. As soon as any individual offers *ṣalah* in it,the ownership of the *Wāqif* ends and the property stands transferred in the ownership of *Allah* Almighty.

After mentioning the views of Ḥanafī jurists regarding Waqf, the question here arises which view has been generally followed by Ummah (Muslim community) ?So the entire Ummah is adhering the opinion of the majority of scholars and Imām Abū Yūsuf and Imām Muḥammad, and Ḥanafīs also give the fatwa in accordance to this definition.

## 3. Conditions of a valid Waqf<sup>16</sup>

For a waqf to be valid, it must adhere to several conditions. These conditions ensure that the waqf fulfills its intended purpose in accordance with Islamic law. These are the legal and procedural requirements for establishing a valid waqf. The primary conditions are:

- 1. The  $W\bar{a}qif$  should be free and not a slave. Waqf by a slave will be invalid as he is not the owner of anything. Whatever is possessed by a slave belongs to his master.
- 2. The  $W\bar{a}qif$  should be an adult. Waqf by a minor will not be considered valid. His waqf will be valid only if permitted by  $Q\bar{a}di$ .<sup>17</sup>
- 3. The Wāqif should be of sound mind. Waqf from a madman or a lunatic will not be considered valid. 18
- 4. When making waqf, the property should be in the ownership of the Wāqif.<sup>19</sup>
- 5. The *mauqūf* must be an identified article, that is, it is necessary to determine the thing that is dedicated.
- 6. The *Wāqif* should not have been prohibited from disposal by the *Qāḍi*.
- 7. There is also a condition that the  $W\bar{a}qif$  should state the final aspect (Jahat) of the Waqf in such a way that it will never end.
- 8. The *Waqf* should be permanent and not temporary.<sup>20</sup>
- 9. Wāqif did not make a condition to sell while making a Waqf.<sup>21</sup>
- 10. It is that the *Waqf* should be in immovable objects, such as land and house, etc. Movable things subject to Immovable are also included in immovable objects and their *Waqf* is also permissible.

## 4. Sharāiţ al Wāqif (Conditions of Endower)



A Wāqif enjoys a huge amount of authority so for as the Sharāiṭ al Wāqif are concerned. A clear understanding of the conditions of Wāqif is crucial while establishing a Waqf, as the rulings are highly dependent on it. The Wāqif has the authority to place on his Waqf any conditions he sees fit, provided they do not contravene Sharā'ah, and those conditions must be just as enforceable as those stipulated by Sharā'ah.<sup>22</sup> The selection of trustees, the designation of beneficiaries, and the allocation of benefits are all decisions that are most heavily influenced by the founder. He had the option of appointing someone else to serve as trustee or giving himself sole authority over trustee responsibilities under the condition that his heirs would hold the position until the end of his line upon his death. The beneficiaries or the way of distribution of the assets may be changed, and he may declare his right to reduce or increase the shares of the beneficiaries, revoke the share of a beneficiary, or add or remove beneficiaries.<sup>23</sup> If the donor does not make such provisions, all those to whom the endowment is provided will be treated equally; there will be no discrimination made between the wealthy and the poor, or between the men and the women among them.<sup>24</sup>

All legal scholars agree that the status of the declaration and the requirements set forth by the *Wāqif* when establishing a *Waqf* are equivalent to the text of the *Sharī'ah*, This saying of the jurists is very much famous in the books of jurisprudence. The statement goes like this:

شرط الواقف كنص الشارع

"The provisions of the Wāqif are as binding as those enacted by the lawgiver-Allah Almighty".

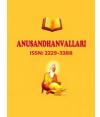
There is disagreement on the meaning of this sentence. Some believe it should be followed entirely, while others believe it ought to be executed in a way that is obedient to  $Shar\bar{\iota}'ah$ . Ḥanafī scholars interpreted the above text as in meaning, implication, and execution, the conditions of the  $W\bar{a}qif$  are the same as the text of  $Shar\bar{\iota}'ah$ , however, they shouldn't in any manner contravene  $Shar\bar{\iota}'ah$ . In view of some scholars, the main creed of the Hanafī scholars is that:

"The conditions imposed by the Wāqif will not stand opposite to the meaning what Waqf stands for"

But the later Hanafis are of the opinion that the opposite meaning will not be considered in the texts of Sharī'ah but will be done in non-texts, that is, if such conditions are custom of the day and the Waqf will also be considered valid and if it is not so customary, the Waqf will also be considered invalid. The Waqf will be deemed void if the conditions alter its basic structure. The  $Ahn\bar{a}f$  have created a general rule that everything that is against the conditions of  $W\bar{a}qif$  is against the  $Shar\bar{a}'ah$ , hence  $Shar\bar{a}it$  al  $W\bar{a}qif$  must be adhered to. If the conditions change the basic structure of the Waqf then the Waqf will be considered invalid. The Hanafi have established a general rule that everything that is contrary to the condition of the  $W\bar{a}qif$  is contrary to the  $Shar\bar{a}'ah$  so the conditions of  $W\bar{a}qif$  are to be followed.

Generally  $Shar\bar{a}it$  al  $W\bar{a}qif$  should be adhered to since they are equivalent to the text of the Shari'ah if subservient to  $shar\bar{i}$  'ah. However, in exceptional circumstances, which can happen,  $Shar\bar{a}it$  al  $W\bar{a}qif$  might not be obeyed since, as ignoring  $Shar\bar{a}it$  al  $W\bar{a}qif$  is more beneficial to Waqf than following it. Both  $Mutawall\bar{i}$  and  $Q\bar{a}di$  have the power to achieve this, but  $Q\bar{a}di$  is the one who actually does most of the work. 'Allāma shāmi has mentioned following seven such situations where it is permissible to avoid  $Shar\bar{a}it$  al  $W\bar{a}qif$  in Radd al  $Mukht\bar{a}r$ :<sup>27</sup>

- 1. Mal-i Mauqūf is not to be exchanged.
- 2. The *Qāḍi* can't depose the *Mutawallī*.
- 3. Waqf should not be rented for more than one year, and the situation is that people are not willing to take it for less than one year, and people with low incomes benefit more if it is rented for more than one year.



- 4. Recitation should be made on the grave of *Wāqif*.
- 5. Surplus income of the *Waqf* should be given as charity to the person who asks in the mosque, then the *Mutawallī* has the right to give charity to whom he deems expedient, be it the person who asks in the mosque or to those who ask outside the mosque or the needy people who do not seek for help.
- 6. Bread or meat should be given daily to the beneficiaries; then the *Mutawallī* will have the right to provide the cash instead of bread or meat.
- 7. If the  $W\bar{a}qif$  has fixed the Imām's salary, which is insufficient, and he is a pious scholar, then the  $Q\bar{a}di$  will have the right to increase the  $Im\bar{a}m$ 's salary.

### 5. Nature of Waqf (Permanent or Temporary):

Most of the jurists favour a permanent waqf, and they reject a waqf that is temporary or for a fixed time because the purpose of Waqf is to obtain a permanent reward, which is achieved only through a permanent Waqf. However, Imām Mālik allows temporary waqf also. That is why Aḥnāf scholars have considered Waqf to be permanent and perpetual as a necessary condition for Waqf to be valid so that its benefit can be utilised for eternal times to come. They consider immovable property as real Waqf and Waqf of movable property invalid and permissible under exceptional cases. Imām Shāfī and Imām Aḥmad bin Ḥanbal require absolute continuity for the validity of the endowment; Imām Muḥammad is also convinced of the same, Imām Abū Yūsuf is also convinced of continuity, but they do not consider the clarity of continuity necessary.

In contrast to these scholars, Imām Abū Ḥanīfah and Imām Mālik do not consider continuity as a condition for the validity of *Waqf*. Instead, they justify the temporary nature of *Waqf*, and similarly, they also validate the condition of selling *Waqf* if necessary.<sup>29</sup> So perpetuity is the rule, and temporality is the exception.

## Conclusion

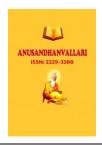
The above study shows that Imām Abū Ḥanīfah, Imām Abū Yousuf and Imām Muḥammad are considered as the legal authorities in the Ḥanīfī School of Islamic Jurisprudence and the significant figures in the development of Ḥanafī law. Moreover, it seems reasonable to assume that Ḥanafī jurists used diverse argumentative approaches and styles while dealing with waqf. Apart from this, the bulk of waqf law is derived by using legal techniques such as qiyās and istihsān (juristic preference). In the later period, 'urf (custom) also became an essential source for determining specific legal problems. Apart from discovering the various prerequisites of the socio-economic Institution of waqf contained in the Fiqh texts, this article has also identified inconsistency in the legal theory of waqf between different schools of Islamic Jurisprudence and even with the Ḥanīfī. Throughout their works, Muslim jurists seem to have been struggling with the issue of property ownership and its relationship with the stakeholders of the waqf. The majority of jurists hold that the waqf property is transferred to God, yet the waqf dissolves with the apostasy of the male founder.

<sup>[1] 1</sup> Dallah, Minlib. 2023. Accumulate but Destribute: Islamic Emphasis on the Establishment of Waqf (Pious Endowment), *Religion and Development*, 2, pp. 21-40. doi:10.30965/27507955-20230014

<sup>[2] 2</sup> Topbas, Osman Nuri. 2009. Endowment, Charity, and Service in Islām. Istanbul: Erkam Publications, p. 18.

<sup>[3] 3</sup> Khan ,Dr Fazl Ilahi.n.d. Aagaz-i Islām mai Waqf-i Islām ka Asr wa nafuz.p.123.

<sup>[4] 4</sup> Manzoor, Ibn.1968. Lisān ul 'Arab. Beirut: Dār ul Beirut, Vol.9, p.359.



- [5] 5 Hussain, Munawar.2021. Muslim Endowments, Waqf Law and Judicial Response in India . New York: Routledge, p. 1.
- [6] 6 Topbas, Osman Nuri. Op. Cit. p. 17.
- [7] 7 Al Marginani, Burhan al Din. 1957. Al Hidāyah, Lahore: Premier Book House, p.231. Tr. by Charles Hamilton.
- [8] 8 Abbasi, Muhammad Zubair. 2012. The classical Islamic law of waqf: A concise introduction. *Arab Law Quarterly*, 26(2), 121-153.,See also,Qāsmi, Mujāhid al Islām.2012. *Auqāf:Aḥkam-o-Masāil*,New Delhi:IFA Publications,p.346.
- [9] 9 Moumtaz, Nada. 2021. *God's Property: Islām, Charity, and the Modern State*, California: University Of California Press, 2021, p.35.
- [10] 10 Haskāfi, Muḥammad Ala-ud-Din. 2008. Durr Ul Mukhtār, New Delhi: Kitab Bhavan, p. 332.
- [11] 11 Idem.
- [12] 12 Al Marginani, Burhan al Din. Op. Cit., p.231. See also, Abdullah, M. 2020. Op. Cit., pp. 281-296.
- [13] 13 *Idem*.
- [14] 14 Haskāfi, Muḥammad Ala-ud-Din. Op.Cit.,p.332.
- [15] 15 Nadwi, Muḥammad Zaffar alam. *Islām kā Nizām-i Waqf*. Lucknow: Majlis Saḥāfat wa Nashrīyāt, 2013), pp.29-31.
- [16] 16 Abbasi, Muhammad Zubair, Op. Cit., 121-153. See also, Qāsmi, Mujāhid al Islām. Op. Cit., pp. 595-598.
- [17] 17 Al Shami, Ibn Abidin. Fatāwā Shāmī. Lahore: Zia ul Qur'ān publications, 2017, p.59.
- [18] 18 *Idem*.
- [19] 19 Ibid.p.63.
- [20] 20 Al Marghinani, Burhanuddin. Op. Cit., pp. 234-235.
- [21] 21 Al Shami, Ibn Abidin. *Op. Cit.*, p.65.
- [22] 22 Accounting And Auditing Organization For Islāmic Financial Institutions. *Sharī 'ah Standards*. Kingdom of Bahrain: Dar Al Maiman,p.819.
- [23] 23 Makdisi, George. *The Rise of Colleges: Institutions of Learning in Islām and the West*, Edinburgh: Edinburgh University Press, 1981, p.36.
- [24] 24 Al Fawzan, Dr Salih. 2005. A Summary of Islāmic Jurisprudence, vol. 2, Riyadh: Al-Maiman Publishing House, pp. 208.
- [25] 25 Al Shami, Ibn Abidin. Op. Cit., p. 68.
- [26] 26 Al Zuhayli, Dr Wahbah. 2012. Al Fiqh Al Islāmī wa Adillatuh. Karachi: Dar al 'Ishā 'at ,pp. 651-652.
- [27] 27 Al Shami, Ibn Abidin. Op. Cit., p. 163.
- [28] 28 Al Zuhayli, Dr Wahbah. Op. Cit., pp. 641-642. (See also Al Hidāyah, p. 234.)
- [29] 29 Al Marghinani, Burhanuddin. Op. Cit., p. 234.