

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

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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, Sharāiṭ 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"⁴. 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.⁵ *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 philanthropy⁶.

2. *Waqf in Ḥanafī Fiqh*

So far as the stand of the Ḥanafī *fuqāhā* (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 *fuqāhā* on the technical meaning of *Waqf*. The first definition pertains to the majority of scholars and *fuqāhā* supported by arguments from the *Qur'ān* 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 Ḥanīfah. The first definition is shared by majority of scholars, including *Shāfiʿī*, *Ḥanbalī*s and Imām Abū Yūsuf and Imām Muḥammad among the Ḥanafīs. Indeed Ḥanafīs give *fatwa* (legal decree) on this same view contradictory to the view of founder of the school- Imām Abū Ḥanīfah. This definition of *Waqf* has been given by author of *Al Hidāyah* in these words:

*“The appropriation of property to the ownership of Allah in such a way that its benefits reach the people”*⁷

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 beneficiaries. 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.⁸ Human ownership of the *Waqf*, and its most essential perquisite, the right of alienation, ceases to exist under this definition.⁹ Haskafī¹⁰ 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 *mauqūf* still remains in the ownership of the *Wāqif*. 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 Hidāyah* 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 *Wāqif* has the freedom to resume it and its sale or gift is valid.¹³ In case of the death of the *Wāqif*, the *Waqf* will be inherited by his heirs. The *Wāqif* will have the authority to change the terms and conditions of endowment. Haskafī¹⁴ in *Durr-ul-Mukhtār* 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 *Shāfiʿī* and *Ḥanbali* schools, contradict this definition. However in the light of the *aḥādīth*, the records of the *Ṣahāba* (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 *Wāqif* will end and it will neither be sold nor will it be gifted or inherited when any of the following three situations were found.¹⁵

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*¹⁶

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 *Wāqif* 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 *Wāqif* should be an adult. *Waqf* by a minor will not be considered valid. His *waqf* will be valid only if permitted by *Qāḍi*.¹⁷
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*.¹⁹
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 *Wāqif* 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.²⁰
9. *Wāqif* did not make a condition to sell while making a *Waqf*.²¹
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. *Sharāiṭ al Wāqif* (Conditions of Endower)

A *Wāqif* enjoys a huge amount of authority so far 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 *Sharī'ah*, and those conditions must be just as enforceable as those stipulated by *Sharī'ah*.²² 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.²³ 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.²⁴

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 *Sharī'ah*. Ḥanafī scholars interpreted the above text as in meaning, implication, and execution, the conditions of the *Wāqif* are the same as the text of *Sharī'ah*, however, they shouldn't in any manner contravene *Sharī'ah*.²⁵ In view of some scholars, the main creed of the Ḥanafī scholars is that:

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

But the later *Ḥanafīs* 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 *Aḥnāf* have created a general rule that everything that is against the conditions of *Wāqif* is against the *Sharī'ah*, hence *Sharāiṭ al Wāqif* must be adhered to. If the conditions change the basic structure of the *Waqf* then the *Waqf* will be considered invalid. The Ḥanafī have established a general rule that everything that is contrary to the condition of the *Wāqif* is contrary to the *Sharī'ah* so the conditions of *Wāqif* are to be followed.²⁶

Generally *Sharāiṭ al Wāqif* should be adhered to since they are equivalent to the text of the *Sharī'ah* if subservient to *sharī'ah*. However, in exceptional circumstances, which can happen, *Sharāiṭ al Wāqif* might not be obeyed since, as ignoring *Sharāiṭ al Wāqif* is more beneficial to *Waqf* than following it. Both *Mutawallī* and *Qāḍī* have the power to achieve this, but *Qāḍī* is the one who actually does most of the work. ‘Allāma shāmi has mentioned following seven such situations where it is permissible to avoid *Sharāiṭ al Wāqif* in *Radd al Mukhtār*:²⁷

1. *Mal-i Mauqūf* is not to be exchanged.
2. The *Qāḍī* 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 *Wāqif* has fixed the Imām's salary, which is insufficient, and he is a pious scholar, then the *Qādi* will have the right to increase the Imām'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.²⁸ Imām Shāfi 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.²⁹ So perpetuity is the rule, and temporality is the exception.

Conclusion

The above study shows that Imām Abū Ḥanīfah, Imām Abū Yūsuf 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.

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

[4] 4 Manzoor, Ibn. 1968. *Lisān ul 'Arab*. Beirut: Dār ul Beirut, Vol.9, p.359.

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- [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:Alḥkam-o-Masāil*,New Delhi:IFA Publications,p.346.
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- [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 Nashriyāt,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.
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- [19] 19 *Ibid*.p.63.
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- [28] 28 Al Zuhayli,Dr Wahbah. *Op.Cit.*,pp.641-642. (See also *Al Hidāyah*,p.234.)
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