

Reflection of Maqāṣid al-Sharī'ah in the classical *Fiqh al-Awqāf*

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Abstract

Purpose – This paper aims to analyse the Sharī'ah premises of classical *waqf* doctrines followed by critically analysing the framework of *waqf* jurisprudence (*fiqh al-awqāf*) from a *Maqāṣid* al-Sharī'ah (the higher objectives of Islamic law) perspective. The objective of examining the jurisprudential framework of *waqf* from a *maqāṣid* perspective is to contextualise the scope of dynamism and innovation in the modern *waqf* structure.

Design/methodology/approach – For examining the jurisprudential aspects of classical *fiqh al-awqāf* with a special reference to *Maqāṣid* al-Sharī'ah, the paper analyses the classical *waqf* books and treatises from the four *Sunni* schools of jurisprudence by employing a textual analysis method.

Findings – The paper finds that the key constituents of *maqāṣid* are interwoven in the classical discourse of *waqf* rulings. It finds that in deriving the principles of *waqf*, the jurists ensured that the essentialities of *Maqāṣid* al-Sharī'ah are subtly intermingled with the necessary components of *fiqh* principles. Deconstructing the applied analogical reasoning of the classical jurists in deriving the *waqf* rulings, this paper provides recommendations for *maqāṣid*-oriented application of *waqf* in the modern context.

Research limitations/implications – This study does not cover either the historical contribution of *waqf* among the Muslim societies nor does it touch on the empirical aspects of modern *waqf*. Rather, the focus of the study is limited to analysing the classical jurisprudential rulings of *waqf* and their distillation process from a *Maqāṣid* al-Sharī'ah perspective. The study has good implication for modern *awqāf*, which need to be created, managed and directed in the spirit of *Maqāṣid* al-Sharī'ah.

Practical implications – The key objective of adopting the *maqāṣid* framework for the analysis of *fiqh al-awqāf* in its classical permutations is to learn how to utilise the *maqāṣid* approach as a baseline for the deduction of new *waqf* rulings in a contextualised term.

Originality/value – The novelty of the paper lies in its examination of the classical *waqf* rulings distillation process, and the cogent intersection of *Maqāṣid* al-Sharī'ah with the principles of *fiqh*. By delving into the Sharī'ah premises of classical *waqf* jurisprudence through the lens of *maqāṣid*, the paper adds an original value and fills an existing gap in the available literature.

Keywords *Waqf*, *Fiqh al-awqāf*, *Maqāṣid* al-Sharī'ah, Endowment, Islamic jurisprudence

Paper type Research paper

1. Introduction

In its original construct, *waqf* is a perpetual philanthropic institution that combines the perpetuity of spiritual and material reward for the benefactor and the beneficiary respectively. The epistemological premises of *waqf* lie in the precept of ongoing charity. Broadly, the feature of conferring the underlying benefits or revenues (*al-manfa'ah*) of an endowed asset on the beneficiaries, rather than giving away the asset itself, distinguishes a *waqf* from other forms of charities (Ghanim, 2009). From an Islamic jurisprudential perspective, this salient feature of *waqf* is affected by alienating the ownership rights and interests of a *waqf* asset during the tenor of the endowment.

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Waqf entails a number of well-defined jurisprudential principles. Adherence to these principles (known as *fiqh al-awqāf*) is essential to achieve the objectives of the practice (Othman, 1983). It is *fiqh al-awqāf* that lays down the basic conditions and qualifying criteria for a *waqf* (endowment), *wāqif* (endower), *mawqūf alayh* (beneficiaries), *mawqūf bihi* (subject matter of *waqf*) and *nazir* (*waqf* manager). Thus, the *fiqh al-awqāf* refers to the set of Islamic jurisprudential rules and principles that govern the terms and conditions of a valid *waqf* and facilitate the accomplishment of its objectives (Ghanim, 2009). From a jurisprudential perspective, perhaps, it is impossible to draw a complete picture of *fiqh al-awqāf* without putting into perspective the rules of other relevant Islamic institutions of property conveyance which were in existence prior to the emergence of *waqf*.

Waqf is distinguished in the sense that it provides an interface between the rules of *mawārith* (inheritance) and *waṣīyah* (bequeath) on the one hand, and between the jurisprudence of *atīyah* (gift) and *ṣadaqah* (charity) on the other (Al-Shafi'i 1990; Al-Khassaf, 1904; Al-Hilal, 1355 AH). Also, the principles of *waqf* equally intersect with the rules of *ariyah* (loan of an asset to avail its usufruct), *manīhah* (loan of usufruct in animals etc.), *qarḍ* (loan) and *amānah* (trust). In short, *waqf* in its technical setting absorbs features and elements from all these institutions while maintaining its own legal and doctrinal distinction over them all (Sahnum bin Saeed, 1324 AH; Al-Shaybani, 1997).

The mechanism of *waqf* is distinctively flexible compared to the restrictive rules of *mawārith*. However, the rules of *waqf* are comparatively restrictor than the principles of *atīyah*. The structure of classical *waqf* displays a unique interaction between the pre-Islamic institutions of mutual benevolence and Islamic concept of volunteerism. For instance, the salient features of pre-Islamic institutions such as *umra* (life estate), *ruqba* (conditional gift of residence) and the defining characteristics of pure Islamic concepts such as *infāq fī sabīlillah* (spending in the pious cause of Allah) and *ṣadaqah jariyah* (perpetual charity) are ubiquitous in the clauses of classical *fiqh al-awqāf* (Oberauer, 2013; Coulson, 1964; Schacht, 1953).

The corpus of *waqf* jurisprudence contains indications that the early jurists did not always insist on governing the institution of *waqf* in line with the strict rules of *uṣūl al-fiqh* (principles of Islamic jurisprudence). Rather, the classical Islamic jurists accorded much focus on the *kulliyat* (the universal aspects) of Shari'ah. Thus, in the jurisprudential framework of *waqf*, the jurists seem more inclined to apply the purpose of the law than the tools of the law.

Through the application of *maṣlahah* (public interest), *istiḥsān* (juristic preference), *sadd al-dharay* (prevention of excuses) and *urf* (local custom), the corpus of classical *waqf* jurisprudence displays a coherent synthesis of *Maqāṣid* al-Shari'ah-oriented approach in the resultant rulings of *waqf*. In other words, in deriving essential principles of *waqf*, the jurists ensured that the essentialities of *Maqāṣid* al-Shari'ah are subtly intermingled with the necessary components of *fiqh* principles. Arguably, it is due to this simple reason that in various classical *waqf* treatises, the fusion of higher objectives of Shari'ah is vividly palpable in some *waqf* principles while it is minutely discernible in some other. Probably, *fiqh al-awqāf* includes among the primary examples where sources of *fiqh* interspersed with *Maqāṣid* al-Shari'ah on almost equal grounding. On the surface, the rationale for blending *maqāṣid* approach in *fiqh* structure is characterised by two main reasons. Firstly, there is a relative scarcity of sufficient *naṣṣ* (an explicit textual ruling) that can comprehensively govern the institution of *waqf* on its own. Secondly, in the rigid application of *uṣūl al-fiqh* for deriving *waqf* rulings, the jurists might have anticipated a great deal of conflict with the *maṣāliḥ mursala* (public interest). Thus, the insufficiency of *naṣṣ* coupled with the relatively rigid framework of *uṣūl al-fiqh* could have been compensated only by deploying the *maqāṣid* approach towards the governance of *waqf*. In the hindsight, an immaculate distillation of *naṣṣ*, *maṣāliḥ* and *istiḥsān*, combined with the composite of *qiyās* and *urf*, is reflected in the classical corpuses of *fiqh al-awqāf* (Al-Khassaf, 1904; Al-Hilal, 1355 AH).

This paper analyses the Sharī'ah premises of classical *waqf* doctrines followed by conducting a critical analysis of the framework of *waqf* jurisprudence (*fiqh al-awqāf*) from a *Maqāṣid* al-Sharī'ah perspective. By delving into the Sharī'ah premises of classical *waqf* jurisprudence through the lens of *maqāṣid*, this study fills an existing gap in the available literature. The objective of examining the jurisprudential framework of *waqf* from the *maqāṣid* perspective is to contextualise the scope of dynamism and innovation in the modern *waqf* structure.

2. Evolution of *waqf*: the background

The motivation for the first few *awqāf* of early Islamic history was mainly sourced from two factors. Fulfilling the urgently surfaced socio-religious needs of the community and responding to the general Quranic exhortation to voluntary spending for the pious causes are the two key factors spurring the early *waqf* endowments. Whereas, the establishment of mosque of Quba[1] as well as *Byr al-Rumah*[2] (the well) embodies the prototypes of the first outlined factor, the endowment of Bayruha (the orchard) by Abu Talha (R.A), and the land of Khayber by Omar (R.A) reflect the embodiment of the other (Samhudi, 2001; Saleh, 2000; Badr, 1993).

In the classical *waqf* treatises, out of the four given examples of the early *awqāf*, there exists absolutely no clue whatsoever in relation to the legal status of the first three, simply because the Prophet (pbuh) did not explicitly prescribe it then and there. The distinct nature, essential characteristics and necessary conditions of a valid *waqf* were inferred by implication from the case of the fourth instance which was related to Omar (R.A). However, even the episode of Omar which happened in the seventh year of *Hijrah* too lacked a categorical elaboration on the nature of the ultimate ownership of the endowed property. What other possible explanation could have been given to the legal status of these endowed properties until the seventh year of *hijrah* except the presumption that during this period it was understood by the endowers that the fate and functions of their endowed properties would be decided by the collective discretion of the community itself.

In deciding the Sharī'ah-permissibility of *waqf*, the deed of Omar (R.A), the second caliph of Islam, worked as the primary and most authentic source for the classical jurists (Al-Khassaf, 1904). After narrating the story of Omar, Ibn al-Hajar (2001, p. 565) observes 'the *hadith* of Omar lays the basis for the Sharī'ah-legitimacy of *waqf*'[3]. However, in view of the fact that the *waqf* of Omar (R.A) was made only after six years of *Hijrah*, this assertion of al-Asqalani entails two possible implications. Either *waqf* was not known in Medina prior to the *waqf* of Omar (R.A), or there were instances of *waqf* but their legal status and distinctive nature were unspecified. In some references, the story of Abu Talha (R.A) and his endowed orchard[4] finds mentioning in the list of early *awqāf* (Gil, 1998). However, the fact that, later on, one of the beneficiaries of his deed, Hassan bin Thabit (R.A), the companion of the Prophet (pbuh), proceeded to sell off his share with Ameer Muawiah (R.A) poses two further questions. Either the endowment made by Abu Talha (R.A) was not intended to be a *waqf*, or till that time the perpetual nature of *waqf* was not established in the jurisprudence. By narrating this story, Ibn al-Hajar (2001, p. 546) tends to infer that the endowment of Abu Talha (R.A) was a general charity and not a *waqf*; as 'if he had made the orchard a *waqf*, Hassan would not have dared to sell it off'. However, *imam* al-Bukhari in his *Sahih* has repeatedly resorted to the content of this story to derive certain *waqf*-related *fiqhī* rulings.

The rulings inferred from the story of Abu Talha (R.A) by al-Bukhari include permissibility of making a *waqf* in favour of one's relatives, legitimacy of *waqf* even prior to transferring the corpus to another party/entity and validity of a *waqf* prior to designating its beneficiaries. Additionally, the permissibility of making a *waqf* prior to demarcating or

properly determining its boundaries has been deduced in the light of the story of Abu Talha (R.A) (Ibn al-Hajar, 2001, p. 566).

Despite this, what is clear from the earlier discussion is the fact that in early Islamic society there was no lucid specification between the cases of general *ṣadaqah* and *waqf*. In the literature of *hadīth*, *waqf* has been represented by the terms ‘*habs*’ or ‘*ṣadaqah jariyah*’. In other words, the *hadīth* literature does not contain the term ‘*waqf*’; instead, two terms namely *habs* and *ṣadaqah jariyah* denote what later evolved as *waqf* in the discourse of Islamic jurisprudence (Oberauer, 2013).

3. Methodology

This paper aims at analysing the Shari‘ah-basis of *waqf* both as a concept and as a legal institution. For the purpose of analysing the representative opinions of *Hanafi*, *Maliki*, *Shafi’i* and *Hanbali* schools of *fiqh*, the paper refers to the *fiqh* literature of these schools. To this end, the books which are repeatedly referred to are (1) *Sharh Kitāb al-Siyar al-Kabir* by Muhammad bin Hasan al-Shaybani (Circa 189 AH), (2) *al-Mudawwanah al-Kubra* by Sahnun bin Saeed al-Tanukhi (d. 240 AH), (3) *Kitāb al-Umm* by al-Shafi’i Muhammad bin Idris (d. 204 AH) and (4) *al-Mughni* by Ibn Qudamah (d.620H/1223CE).

For examining the jurisprudential aspects of classical *fiqh al-awqāf* with a special reference to *Maqāsid al-Shari‘ah*, a greater focus is assigned to analyse the related areas of Islamic jurisprudence by employing textual analysis. This is followed by a critical appraisal of analogical reasoning applied by later jurists to elaborate the domain of the related rulings. To this end, a critical evaluation of the two of the earliest jurisprudential treatises on *waqf* doctrines both known as *Ahkam al-awqāf* by al-Hilal al-Rai (d. 245 AH) and *imam al-Khassaf* (d. 261 AH) has been of paramount significance.

The choice of *maqāsid* approach for the analysis of *waqf* discourse has been selectively made in view of the fact that direct application of *uṣūl al-fiqh* (theory of Islamic jurisprudence) for the purpose may not be sufficiently enough to respond to the flux of modern changes which need re-interpretation of several *waqf* principles (Auda, 2008). *Uṣūl al-fiqh* as a theory and methodology of Islamic jurisprudential rulings has a more systematic but restrictive framework and approach in comparison to *maqāsid*-based reasoning. While the underlying propositions of *uṣūl al-fiqh* have noted divergence of opinions among the jurists due to differences in their methodological frameworks, the *maqāsid* in a broader context provides a convergent path for all (Auda, 2008; Ibn Ashur, 2006).

4. Maqāsid paradigm in the classical fiqh al-awqāf

Maqāsid al-Shari‘ah represents the intent and the higher objectives of the Lawgiver in the textual injunctions (Hallaq, 1997), which are extracted from the texts through induction (Nyazee, 2002). The development of *maqāsid* into a theory was a later phenomenon which emerged after tenth century CE through the work of al-Ghazali (Nyazee, 2002). Prior to al-Ghazali, *imam al-Harmayn Abdul Malik al-Juwaini* (the teacher of al-Ghazali) is the first who started discussing *Maqāsid al-Shari‘ah* as a distinctive discipline under the *qiyās* discussion (Atiyah, 2011; Qasmi, 2010). Later on, the works of Abu Ishaq al-Shatibi (circa 790 AH) and Tahir ibn Ashur (196 – CE) elaborated, expanded and systematised the *maqāsid* theory as presented by al-Ghazali (Rahmani, 2010; Masud, 1995). Thus, it is evident that at the time when *waqf* evolved into an institution in the eighth century CE, *maqāsid* had not been developed into a theory. However, though unsystematically, the elements and the approach of *maqāsid* are deeply involved in the distillation process of *waqf fiqh*.

Broadly, the levels of *Maqāsid al-Shari‘ah* can be categorised into three: macro, micro and nano (Awa, 2006). The macro framework of *maqāsid* covers the primary objectives of Shari‘ah as a whole, while the micro and nano levels cover the objectives of specific institutions and their different rulings respectively. For example, one of the key objectives of Shari‘ah is to facilitate

creation of a society which is built on the values of altruism and cooperation rather than opportunism and exploitation. For this purpose, at macro level, Sharī'ah aims to proscribe and block all means and mechanism of usurpation, misappropriation and unfair enrichment (Kamali, 2008; Atiyah, 2007). To this end, at micro level, for instance, Sharī'ah prescribes a complete ban on *ribā* (interest, usury) from the economy (Saleem, 2010). To further compliment the implementation of this injunction, at nano level, Sharī'ah prohibits individuals from involving in *ribā*-based transactions in any capacity. Thus, charging *ribā* or paying it is equally forbidden. Similarly, documenting a *ribā*-based transaction or becoming a witness to it is prohibited with equal emphasis.

At macro level, the higher objectives of Sharī'ah are derived by examination of the primary sources of Sharī'ah. Subsequently, the realisation of a particular Sharī'ah objective is facilitated by either prescription or prohibition of an institution or mechanism at micro level (Ibn Ashur, 2006). Within the same context, several injunctions are prescribed at nano level in the form of different ancillary Sharī'ah rulings to support the accomplishment of the underlying objective at the grass-root level.

In this context, it is argued that at a macro level since Sharī'ah holds as one of its objectives to foster a society in which the economic agents are equally inspired by spiritual considerations along with their material and mundane attachments, it employs subtle methods to achieve this objective. For this, the followers of Sharī'ah are exhorted to develop and nurture an altruistic, benevolent, cooperative, socially responsible and benign approach towards their dealings and practices (Abdullah, 2015). As an instrument to accomplish this objective and to eliminate the elements of selfishness, worldly greed and materialism from its followers, Sharī'ah prescribes a list of various obligatory and non-obligatory charities and charitable practices. The relevance of *waqf* institution in this discussion automatically assumes a special status. *Waqf* has its own set of objectives, at micro level, which complement the fulfilment of the above-described macro objective of Sharī'ah. Similarly, each and every *fiqh* principle of *waqf* has its own purpose at nano level which is meant to support accomplishing the objectives of *waqf* institution at micro level.

The classical discourse on *fiqh al-awqāf* contains strong indications that in the formative period of *waqf*-jurisprudence, the essential features and governing criteria of the institution were principally derived in the light of the higher objectives of Sharī'ah. This contention is substantiated by referring back to the applied methodologies of the classical jurists as they frequently resorted to the application of *maqāsid*-oriented approach in suggesting, supporting and substantiating their respective opinions on *waqf*. Although *maqāsid* in itself constitutes a multi-dimensional discipline, however, in propounding the ancillary jurisprudential principles of *waqf*, it appears that the jurists assigned noted significance to *daf' al-darar* (removal of harm) and *jalb al-manfa'a* (procurement of benefit). For instance, as the rules of inheritance are potentially pitched in contradictory position with the mechanism of *waqf*, the jurists contemplated the principles of *waqf* in view of this lacuna. In the jurisprudential discourse on *waqf*, the jurists seemed critically concerned on how to contain any resulting harm on the legal heir through, potentially, a manipulative application of *waqf* mechanism by an endower. Classical jurists, for this purpose, exerted their wits to obstruct all possible scope for the circumvention of inheritance law through the usage of a *waqf* deed.

To this end, the reflection of *maqāsid* approach can be easily captured in the opinion of Ibrahim al-Nakh'i with relation to a *waqf* in which the legal heirs of the endower were nominated as beneficiaries. He asserts, 'all (permissible) *habs* require being in line with the prescribed inheritance-rules (of Sharī'ah) except the *habs* of horses and weapons' (Al-Shaybani, 1403 AH, p. 65). Similarly, in the same context, al-Shaybani quotes the story of Saib who narrated that 'we sought the opinion of Shurayh about a person who

made his house *habs* for (some of) his children'. On this, Shurayh declared that '*la habsa an faraidi Allah*' (there is no *habs* (against) the rules of inheritance) (1403 AH, p. 60). The context in which the opinions of Ibrahim al-Nakh'i and Shurayh were given reveals that in view of these jurists a *habs* cannot be used as a tool to circumvent the rules of inheritance.

Thus, according to classical Hanafi jurists, a *waqf* deed which causes harm to the interest of the legal heirs is impermissible (Al-Shaybani, 1997, p. 268). In the same vein, imam Malik does not permit a *waqf* in which equality between the male and female heirs of the *wāqif* is not maintained (Sahnun bin Saeed, 1324 A.H). In this context, what is important to note is the fact that there is no specific *naṣṣ* for this opinion of either imam Malik or Hanafi jurists. In other words, there is no *naṣṣ* which can explicitly restrict the provisions of inequality in allocation of *waqf*-benefits among the legal heirs of a *wāqif*. Nonetheless, with reference to this opinion, the jurists applied a *maqāṣid*-oriented approach which meticulously incorporate the *daf' al-darar* (removal of harm) dimension in it. Thus, it becomes clear that this ruling is inferred by application of the higher objectives approach which entails removal of injustice or harm to one's legal heirs.

The *maqāṣid*-orientation of *fiqh al-awqāf* is also palpable in the flexible approach which early jurists adopted in prescribing the jurisprudential principles of *waqf*. Evidently, the *maqāṣid* approach extends to cover both aspects of *waqf* jurisprudence, i.e. spiritual and material (Nyazee, 2002). The spiritual aspect of *maqāṣid* is aimed at securing the sanctity, acceptability and reward-worthiness of a *waqf* deed in Hereafter. In comparison, the material aspect of *maqāṣid* assigns, inter alia, special consideration to the protection and proper functioning of a given *waqf*. Additionally, protecting the interest of the potential beneficiaries of *waqf* also constitutes the essentials of *maqāṣid* approach in *waqf* jurisprudence. In this regard, the following statement of Zaid bin Thabit could be regarded as axiomatic. He holds: 'we do not find a parallel to *habs*; as it ensures a perpetual reward for the endower, and protects the property for the beneficiaries forever' (Al-Khassaf, 1904, p. 15).

The significance of safeguarding the spiritual aspect of *waqf* is apparent in various *waqf*-doctrines solicited by the early jurists. One such example pertains to the hypothetical case of a horse which is endowed for the purpose of *jihād*. When posed with the question of renting such a horse during the period of peace and truce in order to benefit from its rentals, Al-Shaybani (1997) did not see it permissible. The underlying reasoning of his opinion rested on the overall spiritual objective of *waqf*. Al-Shaybani argues that 'through the *waqf*, the endower intends spiritual sanctity and reward, and hence, employing the subject matter for mundane objectives (such as leasing it for rental) would defy the intended objective of the endower' (1997: 278–281). In contrast, if the *mawquf alayh* lends it out as *ariyah* (free of charge) to a needy, al-Shaybani deems it acceptable.

Compared to the spiritual aspect, the material aspect of *maqāṣid* covers multi-dimensional facets of *waqf* rulings. For this, the jurists strived to ensure maintenance of coherence between the form and substance of a *waqf* deed; or simply, between the visible and non-visible objectives of Shari'ah. It is in this context that the validity of many potentially sham *waqf* deeds were rejected by the jurists. Imam Malik, for instance, does not validate a *waqf* until the same is delivered to a nominated trustee (*nazir*). The *maqāṣid* orientation of this opinion of Malik is apparent in his underlying reasoning. For him, permitting a *waqf* which has not been delivered to the *nazir* may potentially open up the avenues for misuse of the institution, and eventually to harm the interest of the legal heirs. For example, a sham *wāqif* could continue benefitting from his property; and right before his death may claim that he had already endowed this as a *waqf*. Thus, in this way, the interest of his legal heirs would be severely hurt^[5] if such a *waqf* is

permitted (Sahnun bin Saeed, 1324 A.H, p. 419). In this respect, Malik argues, if X makes a *habs* for his children and then to their children and does not put the provision that the poor would be the final beneficiary; the *wāqif* might have intended that the property would return to the full ownership of his grandchildren in the end. In this way, he would have bypassed the other legal heirs such as *dhawi al arham'* (blood relatives) (Sahnun bin Saeed, 1324 A.H, p. 419). Perhaps it was due to similar concerns that *Malikis* disallow a *waqf* which is exclusively for the male heirs of *wāqif*, and excludes the female heirs from the list of the beneficiaries.

Furthermore, for the purpose of preserving the permanence of *waqf* (*hifz al-waqf*), the jurists have inclined to permit the application of measures which are otherwise prohibited in Sharī'ah. For instance, putting a seal of fire on horses of *waqf* or carving out the name of their designated beneficiaries was allowed by the jurists merely for the purpose of identification. This, in turn, may ensure the safety of *waqf*-horses against theft, sale or embezzlement (Al-Shaybani, 1997, p. 255). In this regard, al-Shaybani explicates: though, it would hurt the involved animal, which is forbidden in Sharī'ah, the permissibility in this effect is acquired with the reasoning that this would ensure overall benefit of the community (Al-Shaybani, 1997, p. 255). Additionally, with a similar view, it has been solicited by the jurists that the very first beneficiary of a *waqf* is the *waqf* itself, irrespective of whether or not it is stipulated in the *waqf* deed (Makdisi, 1981, p. 65). To this effect, ensuring the protection and timely maintenance of the corpus of the *waqf* becomes the primary duty of its *nazir*. Thus, though, the *qiyās*-based analogy disallows the employment of *waqf* in ways which are in contradiction to the stipulations of the *wāqif*, this analogy is shunned and replaced by *istihsān* if a rigid application of *qiyās* exposes the *waqf* to harm or decline. For instance, al-Shaybani contends that if a *wāqif* endows a horse for the purpose of *jihād*, from the *qiyās* perspective, it would be impermissible for the *mawquf alayh* to ride the horse for his own needs. However, since the strict application of *qiyās* in this case would hurt the interest^[6] of *waqf* itself, the jurists resorted to *istihsān* and permitted ride so far as the horse is not exposed to the danger of injury or exhaustion (Al-Shaybani, 1997, p. 280).

On a similar basis, the classical jurists opined that a *waqf* must be protected from loss or injury not only from the outsiders but from the internal stakeholders as well. The implication of this position is evident from the ruling which holds that if the *wāqif* himself happens to damage his own endowed property, he would be held liable to compensate for this (Al-Shafi'i, 1990). This opinion was reached by establishing that the subject matter of *waqf* alienates from the ownership of *wāqif* and falls under the ambit of *huquq Allah* (rights of Allah). For this ruling, apparently, application of the material aspect of *maqāsid* prepared the background.

Under the discussion of *maqāsid*, Malik's opinion with reference to the permissibility of endowing a shared property as *waqf* is also significant. Remarkably, Malik has disputed to allow the *waqf* of a shared property without the consensus of all shareholders. The basis for this opinion of Malik is the *maṣlahah* of other partners. According to him, if *waqf* of such a property is allowed without the consent of other shareholders, this may cause harm to the dissenting or unwilling party (Ibn al-Hajar, 2001, p. 560).

Similarly, it was through the application of *maqāsid* approach that the jurists opined that a property put on *ijārah* (leasing) or *rahn* (pawn) cannot be subject to *waqf* by the legal owner of the given property (Al-Khassaf, 1904, p. 304–305). The underlying reasoning of this opinion is that the rights of individuals cannot be breached in the name of *waqf*. In other words, if a deed of *waqf* results into violation of individual's rights, such a deed would turn into impermissible (Al-Khassaf, 1904, p. 304–305).

Figure 1 further illustrates the key elements of higher objectives which underpin the derivation of *waqf* rulings by the classical jurists:

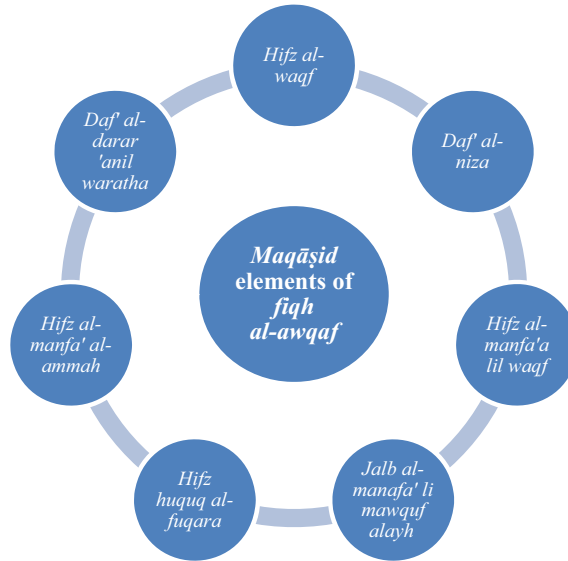


Figure 1.
Key objectives of fiqh
al-awqaf

As explained in Figure 1, the derivation process of classical *fiqh al-awqāf* appears to have been dictated by certain key objectives. For example, the objective of *hifz al-waqf* (preservation of *waqf* corpus) is captured by the jurisprudential dictum which holds that the first beneficiary of a *waqf* is ‘the *waqf*’ itself. In other words, as per the classical jurists’ opinion, the revenues of a *waqf* must be first directed to preserving the *waqf* corpus against the risk of damage or diminution in it (Abdullah, 2018). Similarly, a loss suffered by a *waqf* due to negligence or wishful misconduct of any stakeholder must be duly indemnified by the transgressor, even if the endower (*wāqif*) himself happens to be the one (al-Mawsuah, 2006). In the same vein, that the jurists considered the objective of *hifz al-manfa’a lil waqf* (protecting the benefits of *waqf*) while expressing their opinion on related cases is explained in the rulings that a *waqf* cannot be swapped for a significantly below the market rate (Mahdi, 2010).

Additionally, to maintain the objective of *jalb al-manafi’ lil mawquf alayh* (safeguarding the interest of the beneficiaries), the jurists did not allow leasing the *waqf* property against a considerably discounted rental amount. In addition, administering a *waqf* in a way that it restricts or causes to diminish the benefits for the beneficiaries is disapproved by the jurists (Al-Khassaf, 1904).

For the jurists, the basis for not allowing endowment of a shared property without consent of the shareholders, as well as the impermissibility of endowing a disputed property lies, in general, in *daf al-niza’* objective (Ibn al-Qudamah, 1997). Compared to this, the objective of *hifz huquq al-fuqara* (safeguarding the interest of the poor) dictates the jurisprudential ruling which holds that the benefits of each perpetual *waqf* must return to the poor at the end irrespective of whether it is a family *waqf* or a charitable *waqf* (Al-Hilal, 1355 AH). In a similar manner, for the purpose of *hifz al-manfa’ al-ammah* (safeguarding the interest of the community), the jurists did not allow a private or family *waqf* made by a ruler from the state property (al-Mawsuah, 2006). Similarly, a purpose of *waqf* which conflicts with the interest of the wider society does not find acceptability among the classical jurists (Al-Hilal, 1355 AH). Finally, the permissibility of a *waqf* has been declined by the jurists where the legal heirs are intentionally deprived of their rights. For this, the objective of *daf al-darar anil waratha* (removing the harm from legal heirs) dictates the related *waqf* rulings (al-Mawsuah, 2006).

5. Recommendations

The premises of *fiqh al-awqāf* (*waqf* jurisprudence) exhibit huge latitude of flexibility which can be skilfully exploited to condition the usage of specific *awqāf* in line with the requisites of *Maqāsid* al-Sharī'ah. For the purpose of harmonisation of juristic opinions in newly arisen intricate matters, *maqāsid* approach is placed in an ideal position to drive the modernisation process in the corpus *fiqh al-awqāf* (Auda, 2008).

Importantly, *waqf* is a device which can be used to promote or discourage a trend, practice, belief or exercise in a given society. To this end, leveraging its *maqāsid*-orientation, it shall be ensured that a *waqf* is employed properly in line with *maqāsid* and is not misused to harm any internal or external stakeholders.

Finally, the early *awqāf* were successful in playing the effective role they played only due to their proper and efficient application in line with *maqāsid* paradigm. The effectiveness of a *waqf*, be it for public or private purpose, depends on the appropriate employment of its concept, mechanism, objectives and vision. Thus, these aspects of *awqāf* need to be revisited by the stakeholders of *awqāf* in the current dynamic context.

6. Conclusion

Waqf emerged and evolved in the early Islamic society within a specific context of religious motivation for charitable behaviour and altruism. There is no dispute of opinion that the institution of *waqf* acquired its Sharī'ah legitimacy among the early jurists in gradual but in a well-grounded manner. For jurisprudential purpose, *waqf* has been equated with a variety of legal devices. In the hindsight, the evolution of jurisprudence of *waqf* largely depended on extraction of features from the pre-established legal institutions. The features of *sadaqat*, *mawarith*, *wasiyyah* and *hadiyyah* collectively provided the building blocks for *fiqh al-awqāf*. The legal basis for jurisprudence of *waqf* is essentially reliant on the secondary sources of Sharī'ah in general and on the rules of analogy in particular.

In the classical *fiqh* literature, the concept of *waqf*, with all its technical-flexibility, has been treated by Sharī'ah jurists with an extra pinch of delicacy and caution. For the jurists, one obvious reason to hold this cautious approach in treating *waqf* was informed by their fear of leaving a loophole which may be exploited to circumvent the established rules of *mawarith* and *sadaqah*. Since the jurisprudence of *waqf* evolved in the aftermath of the aforementioned institutions, avoiding a mutual contradiction with their rules apparently dictated the derivation of *waqf* rulings in the main.

The jurisprudential rulings of *waqf* are derivatives of the common theme flowing through all Sharī'ah-regulated voluntary dispositions. This common theme is to maximise the coverage of benevolence, equity, justice and removal of hardship for all involved parties. This theory is further consolidated by the contention that in deducing *waqf* principles, the rules of *maṣlahah* and *istiḥsān* find repeated application; as by applying *istiḥsān* the objective of realising equity and fairness could be better served compared to the application of *qiyās*-based strict textual principles.

The early discussion on *waqf* is interesting in the sense that it dissects the principles of various institutions to distil a synergetic body of *waqf*-related *fiqh* rulings. In this process, elements of *Maqāsid* al-Sharī'ah corroborated the *fiqh* methodologies of different jurists.

The *maqāsid* potentially covers a diverse variety of areas in defining and determining the proper framework of Sharī'ah-rulings. With relation to jurisprudence of *awqāf*, the incorporation of *maqāsid*-oriented approach is vividly reflected in the corpus of *fiqh al-awqāf*. In other words, in *waqf* principles, a sum of *maqāsid* is cogently weaved together with other Sharī'ah sources.

For this paper, the key objective of adopting the *maqāsid* framework for analysis of *fiqh al-awqāf* in its classical permutations is to learn how to utilise the *maqāsid* approach as a baseline for the deduction of new *waqf* rulings in a contextualised term. The application of *maqāsid*-based mechanism of analysis is vital in the modern context in order to develop a pragmatic pitch for the interpretation of the classical *waqf* jurisprudence in such a way that it effectively responds to the newly developed relevant areas and issues of *waqf* coverage.

Notes

1. Quba is located in the outskirts of Medina. On the eve of his emigration to Medina, the Prophet (pbuh) stayed there for few days and built there the very first mosque of Islamic history.
2. Rumah was a famous well owned by a Jew in Medina. He used to charge individuals for supplying water from the well. The Prophet (pbuh) asked his companions to buy and donate the well for the sake of Allah. Othman, the third caliph of Islam, responded to the call and after paying the price of well, endowed it for free public utility.
3. The original wordings of Ibn al-Hajar go as '*wa hadith Omar hadha aslan fi mashruiah tul waqfi*'.
4. It has been narrated in several references that when the Quranic verse no. 92/3 revealed with the injunction that 'you can never achieve piety until you spent (for the sake of Allah) what is most beloved to you', Abu Talha came to the prophet and pledged to endow his famous orchard known as Bayruha (Al-Qurtubi, 2003, p. 132/4).
5. In general, neither the classical nor the modern books on *fiqh* of *awqāf* have comprehensively delved upon the *maqāsid*-orientation of the *waqf* doctrines. If looked from the *maqāsid* paradigm, it would be clear that the jurisprudence of *awqāf*, as available in the early treatises of the great jurists, was structured in line with the essence of the higher objectives of *shariah*.
6. It is argued that there are two potential problems in not permitting the employment of such a horse other than employing it in *jihad*. These problems include (1) with such a restrictive ruling, the beneficiary may lose interest in keeping such horses (2) and in not riding the given horse for a long period of time, the health of the horse may get affected (Al-Shaybani, 1997).

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