Early Doctrines on Waqf Revisited: The Evolution of Islamic Endowment Law in the 2nd Century AH*

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Abstract
This study examines the early development of waqf doctrine. Based on sources from the 2nd century AH, I argue that the institution of waqf emerged from a fusion of two earlier institutions: (1) the habs fi sabil Allah, a permanent endowment for pious purposes that probably originated in voluntary contributions to jihād; and (2) the habs in favor of persons, originally a life estate, which probably had its roots in an earlier institution called 'umrā. Over the course of the 2nd century AH, the legitimacy of life estates was increasingly challenged, and the doctrine on habs in favor of persons was gradually modified until the institution eventually lost its temporary character. By the end of the 2nd century, the habs in favor of persons had become a variation of the habs fi sabil Allah: It was accepted as valid only if the settlor stipulated that after the beneficiaries' death the donation should become a permanent endowment for a pious purpose.

Keywords
waqf, 'umrā, ru qbā, habs fi sabil Allah, life estate

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Introduction

Scholarship has long recognized the central role of *waqf* in the tapestry of Muslim societies. The institution caught the eye of western scholarship as early as the second half of the 19th century. Subsequently, a sizeable body of literature on *waqf* has emerged from a variety of perspectives, both legal and sociological. There have been hardly any attempts, however, to reconstruct the early doctrinal development of *waqf*. Studies on endowment law tend to focus on the ‘classical’ period. One study that does indeed explore early developments is P.C. Hennigan’s *The Birth of a Legal Institution*, published in 2004. This book does not fully live up to its title, for Hennigan’s primary sources are the Hanafi scholars Hilâl al-Râ’i (d. 859 CE) and Khassâf (d. 874 CE), and thus the study focusses on a period more adequately described as the ‘adolescence’ of *waqf* rather than its ‘birth’.

The one study on endowment law that does go back to the earliest documented layers of doctrinal development is Joseph Schacht’s “Early Doctrines on Waqf” published in 1953. In this article, Schacht arrives at a noteworthy finding. Classical jurists understood *waqf* as an endowment in perpetuity that never becomes alienable property again. Once all of the designated beneficiaries have died, the property is used for a pious purpose such as support for the poor or the maintenance of religious and charitable institutions. According to Schacht, this classical understanding of *waqf* is a secondary development: Well into the time of Mâlik (d. 795 CE), the most common form of *habsh* was a life estate: once all of the beneficiaries had died, the endowed property returned to the settlor or his heirs. This reinstatement of property rights was called into question in the doctrine of Mâlik, who insisted that endow-

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2) See for instance the accounts by D. Santillana, *Istituzioni di diritto musulmano malechita* (Rome 1938), vol. 2, 412-51, and *EI²*, s.v. Waqf (R. Peters), with further bibliographic references.


ments may not revert to the settlor after the beneficiaries' death, but must be awarded to the settlor's next of kin, who are not entitled to full property rights, but only to a right of usufruct. According to Schacht, this position of Mālik's is a first step towards the above-mentioned classical understanding of waqf.\(^5\)

In the present study, I systematically analyze the doctrinal development observed by Schacht. The life estates referred to by Schacht were denoted as 'habs' or 'ṣadaqa mawqūfa'. I argue that habs and ṣadaqa mawqūfa probably originated in an earlier institution, viz. the 'umrā, which also was a life estate: The 'umrā is an endowment that reverts to the original owner after the beneficiary's death. If the original owner predeceases the beneficiary, his heirs receive the property after the beneficiary's demise.

Most early jurists disapproved of the 'umrā, probably because it can interfere with inheritance law: In the event that the beneficiary of an 'umrā survives the original owner, the inheritance of the endowed asset is deferred, with the possible consequence that the original heirs may not live to receive their share. I argue that the temporary habs or ṣadaqa mawqūfa described by Schacht probably emerged as a substitute institution for the 'umrā and as a reaction to the widespread rejection of the latter by the jurists. I suggest that, initially, habs and ṣadaqa mawqūfa were alternative names for the 'umrā: Settlers began to characterize their life estates as ṣadaqas, a religious denotation that conferred legitimacy and merit on such endowments. The name 'habs' was chosen for the same reason: it was borrowed from an institution called habs fi sabil Allāh—a perpetual endowment to a pious cause, which probably originated in the voluntary contribution of weaponry and horses for jihād.

Ultimately, the strategy of characterizing a life estate as a habs or ṣadaqa did not succeed in conferring legitimacy on such endowments. The habs, it is true, eventually gained wide acceptance among jurists, but at the same time, it was gradually modified until it lost its original character as a life estate. Mālik's insistence that the settlor or his heirs may not reacquire property rights over a habs was one important step in this process. Another was the habs-doctrine advanced by Shaybānī (d. 805 CE): He insisted that a habs in favor of persons is valid only if

\(^5\) Ibid., especially 446 ff.
the settlor stipulates that the asset be applied to a pious purpose—a ‘sabil Allah’—upon the beneficiaries' death. In other words, Shaybānī merged the life estate with the habs fi sabil Allah from which, initially, it had only borrowed a name. As a result, the life estate became a variation of the habs fi sabil Allah, distinct from other variants only in that the use of the asset for the stipulated pious cause is delayed until all of the beneficiaries have died. Shaybānī's position, which is fully developed in the writings of the Hanafī scholars Hilāl al-Ra'y (d. 859 CE) and Khaṣṣāf (d. 874 CE), would prevail in later legal discourse. It is the cornerstone of the classical jurists' understanding of waqf as an endowment in perpetuity that ultimately reverts to a pious cause.

To analyze the early evolution of endowment law, one must place it within its larger doctrinal context. The discussion of endowments was part of a systematic discussion of donations. In part one I shall focus on early legal doctrine regarding different types of donation. In part two I shall analyze how the institution of waqf emerged out of that context.

I) Donations in Early Islamic law

1. Full-fledged Donations: Şadaqa, Hiba and Hadiyya

1.1. Definition and Mutual Differentiation

At the center of the early Islamic discussion of donations one finds the şadaqa, the hiba and the hadiyya. These three types of donation may be characterized as 'full-fledged' donations, in the sense that they involve a complete transfer of title. In this respect, these types of donation differ, for instance, from life estates: As we shall see below, property designated as a life estate reverts to the settlor after the beneficiary's death, for which reason the beneficiary is enjoined from selling it.6

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6 It should be noted that Muslim jurists do not distinguish between full-fledged donations and other donations. In fact there is no exact terminological equivalent of the English expression 'donation'. Instead, the various forms of donation—both full-fledged and others—are sometimes subsumed under the term 'atiyya, derived from a'ā, 'to give' (see for instance Muḥammad b. Idris al-Shāfī'i, Kitāb al-Umm, [9 parts in 5 volumes, together with the Mukhtasar by Muzānī (= Vol. 5)], ed. Muḥammad Zuhri al-Najjār (Beirut: Dār al-Ma'rina, 1973), 4:55.3f.).
The mutual delineation of the three full-fledged types of donation is blurred in early legal literature, and the definitions offered by the scholars are far from unanimous. The scholars' understanding of 'sadaqa' was significantly shaped by its usage in the Qur'an, where the term refers to zakât as well as to voluntary alms, and is inter alia prescribed as atonement for a specific sin, viz. the premature shaving of one's head for pilgrimage (Q 2:196). In other words, the Qur'an uses the term sadaqa with reference to charitable donations or—more generally—to donations that seek otherworldly recompense. The early scholars used the term in more or less the same sense: Donations to the poor (masâkin) or for a pious cause (fi sabil Allâh) are usually referred to as "sadaqas". Some jurists, however, did not treat the poverty of the recipient or the pious cause as an exclusive defining feature of a sadaqa. Shâfi'î (d. 820 CE), for example, held that the recipient of sadaqa may be a rich person (with the result that the criterion of a pious cause is mooted). Moreover, at least in classical law, a sadaqa may be given to relatives and neighbors (regardless of their financial status). Classical law in fact regards donations to relatives and neighbors as the most commendable form of sadaqa.

The jurists applied the terms hiba and hadiyya to all donations that were not a sadaqa. With regard to the distinction between hiba and hadiyya, there were different opinions. Early Ibâdis apparently assumed that a hadiyya is sent rather than conveyed personally. This may be an

7) On the usage of sadaqa in the Qur'an, see EP s.v. Šadaqa (T.H. Weir/A. Zysow), 709.
9) Shâfi‘î, Umm, 4:56.26ff.
10) EP s.v. Šadaqa (T.H. Weir/A. Zysow), 710b.
11) That the Ibâdis understood the hadiyya to be a donation made for the sake of obeisance may be inferred from a legal problem discussed in Abû Ghânîm’s Mudawwana: What happens to a hadiyya if the beneficiary dies before the gift "has arrived (wasala)?" The Ibâdis held that the gift becomes invalid (see Abû Ghânîm al-Khurâsâni, Al-Mudawwana al-kubrã, 2 vols. [Maskat 1984], 2:161.10ff.). The special interest of the case lies in the fact that the gift has left the hands of the donor, but has not been acquired (gâbd) by the donee. The fact that the author uses the term "hadiyya" here may indicate that a hadiyya typically was sent.
indication that they understood a hadiyya to be a donation made for the sake of obeisance. Shafi'i differentiates between hadiyya and hiba according to the intention of the donor. For Shafi'i, a hadiyya is characterized by an expectation of reciprocity: The donor gives with the intention to receive a quid pro quo—a “reward” (thawab), as the jurists put it. According to Malik and the early Ibadi on the other hand, the expectation of reciprocity is not specific to the hadiyya—it may also be present in a hiba. In short: While most jurists referred to the donor’s intention in order to differentiate between different types of donation, they did so in quite different ways and did not always treat intention as the single determining factor. The only point on which the early jurists apparently agreed is that a donation that involves an expectation of reciprocity does not qualify as sadaqa.

1.2. Completeness and revocability of donations
What were the legal effects and consequences of the three types of donation under discussion? As mentioned above, the principle effect was the same for all three: complete transfer of title to the beneficiary. However, the jurists differed over when a donation becomes complete (tamam) and under what circumstances it may be revoked (rujü'). With regard to these questions, too, one encounters a variety of positions in early law.

There was at least one point on which almost all jurists agreed: A donation that contains an expectation of reciprocity is revocable until the expected quid pro quo is performed. This position was held by practically all scholars, regardless of their views on the three types of donation. In holding this view, the scholars basically treated a dona-

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12 Later jurists, too, characterized the hadiyya as a donation made for the sake of obeisance, see EP, s.v. Sadaka (T.H. Weilt/A. Zysow), 712a, as well as Al-Mawsu’a al-fiqhiyya (Kuwait: Wizarat al-Awqaf wa’l-Shu’un al-Islamiyaa, 1983 ff.), s.v. Sadaqa, 324 b.
13 Shafi'i, Umm, 4:56.30ff. By calling this consideration a ‘reward’ (thawab), the jurists distinguish it from the mandatory consideration in a sale transaction (bay'), which is called ‘iwad. The sources are silent on how explicit the expectation of reciprocity must be in order to vitiate the quality of a donation as sadaqa.
tion with an expectation of reciprocity as a synallagmatic contract (i.e. a transaction that involves a consideration). This is most obvious in a statement attributed to Mālik, in which he expressly compares such donations to sale contracts (buyū').

The jurists disagreed, however, when it came to donations without an expectation of reciprocity. There were two basic positions. One of these, held by Mālik and by a number of early Ibāḍī scholars, was probably the older opinion. The other position was held by Shāfi’ī and a number of early Ḥanafi scholars.

a) The Position Held by Mālik and Some Early Ibāḍī Scholars

According to this position, donations become complete (tamām) when the beneficiary takes possession of the donated item (an act referred to as qabḍ in Islamic law; literally “to seize”). The completeness of a donation becomes relevant after the donor’s death: If the beneficiary failed to take possession of the item prior to the donor’s death, the donation is void and the item becomes the property of the donor’s heirs. This is true of all donations—sadaqa, hiba or hadiyya (always on the condition that there was no expectation of reciprocity).

position in question to Abu ‘Ubayda, Abū l-Mu’arrij and Ibn ‘Abd al-‘Azīz. According to Mālik, if the donee has already disposed of the gifted object to a third party, the donor has no claim against that third party. He only has a claim against the donee, who must compensate him with the object’s counter value (qīma) (see Sahnūn, Mudawwana, 4:388.15ff., 389.23ff.). Similarly, the donor may not reclaim the gifted asset if it has increased in value while in the possession of the donee. In this case, too, the donor may only claim the counter value of the object, i.e., its value at the time he delivered it to the donee (see ibid. 390.17f. and Abū Ghānim, Mudawwana, 2:157.14ff., but note also the dissenting opinions of Abū ‘Ubayda [ibid.] and Shāfi’ī [Umm, 4:61.14ff.]).

Sahnūn, Mudawwana, 4:387.22ff., 404.27ff. and 412.8ff. It should be noted, however, that there is an important difference between a donation with an expectation of reciprocity and a sale transaction: a sale contract is binding as soon as the offer is accepted, and is therefore binding prior to the performance of the consideration (see J.C. Wichard, Zwischen Markt und Moschee. Wirtschaftliche Bedürfnisse und religiöse Anforderungen im frühen islamischen Vertragsrecht, [Paderborn et al. 1995], 115). For the difference between a sales contract and the ‘hiba il-thawāb’, see further Sahnūn, Mudawwana, 4:404.27ff.

For Mālik’s position see Mālik b. Anas, Al-Muwatta’ (Riwayat Yahyā b. Yahyā al-Laythi), (Beirut: Dār al-Nafā’is, 2001), 534.5 ff.; Sahnūn, Mudawwana, 4:399.2f. and 5ff., 401.14ff.; regarding the Ibāḍīs see Abū Ghānim, Mudawwana, 2:161.8ff., 166.5f., and 19ff. Abū Ghānim attributes the position in question to ‘Abdallāh b. ‘Abd al-‘Azīz and Abū l-Mu’arrij. By contrast, Rabī’ b. Ḥabīb seems to have held that a hiba is complete even
Completeness is of no relevance, however, to the issue of revocability—at least not according to the position under discussion, according to which a donation made without expectation of reciprocity cannot be revoked under any circumstances. This seems to have been Mālik’s opinion: He held that a donor has no right to refuse relinquishment of a donated item to the beneficiary—a refusal that by all intents and purposes must be interpreted as an implied revocation of the gift. If the donation in question is a sadaqa, Mālik held that—depending on the circumstances—the authorities may be under an obligation to intervene and force the reluctant donor to surrender the property. Abū Ghānim al-Khurāsānī attributes a similar position to the Ibāḍī jurists Abū l-Mu’arrij ‘Amr as-Sadūsī and ‘Abdallāh Ibn ‘Abd al-’Azīz. They, too, considered a donation complete only if the beneficiary took possession of the item. At the same time, they held that a donation cannot be revoked—regardless of whether or not the beneficiary took posses-
sion of it, and irrespective also of the donation's status as *sadaqa*, *hiba* or *hadiyya.*

The positions attributed to Malik and the early Ibâdis indicate that among some early jurists, the revocation of gifts met with fundamental disapproval. This disapproval is expressed dramatically in a prophetic hadîth that circulated in different versions, and which these jurists invoked to substantiate their legal position. The hadîth compares a donor who “returns” to his donation (*'ada*, or—in another variation—*raja'a*) to a dog that returns to its vomit. In one variant the donation in question is referred to as a *hiba*, in another as a *sadaqa*.

With regard to *sadaqa*, some jurists interpreted this tradition as a general prohibition for a donor to reacquire ownership of the gifted item: Malik, for instance, maintained that a donor may not buy back the item he gave away as *sadaqa*, either from the donee or from anyone else who becomes its owner. Some early Ibâdis discussed the possibility that a donor's *sadaqa* might return to him by way of inheritance. They advised that in such a case one should immediately donate the item again, preferably to a similar purpose as the first donation. In short, these scholars interpreted the 'return' mentioned in the hadîth in a global sense: The reacquisition of the property rights to an asset one has given away as *sadaqa* was a general taboo—regardless of the manner in which those rights were reacquired.

The categorical irrevocability of donations implies that a donation becomes effective upon its declaration. Why then did these scholars create the additional legal qualification of 'completeness', which—linked as it is to the precondition that the donee takes possession

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21) Abû Ghânîm *Mudawwana*, 2:156.27ff. (regarding *hiba*), 158.12ff. (regarding *sadaqa*), 161.8ff. (regarding *hadiyya*).


25) The notion that one must not reacquire one's own *sadaqa* is also found in classical law. Some classical jurists considered it problematic if a donor inherits his *sadaqa*, see EI² s.v. Ṣâdaqa (T.H. Weir/A. Zysow), 714 a.
(qabda)—was both temporally and conceptually severed from ‘irrevocability’? From a systematic point of view, this dual approach does not seem very stringent. It would have been much more straightforward to hold that a donation is both irrevocable and complete upon the donor’s declaration. The implication would have been that a donation remains effective even if the donor dies before the beneficiary has taken possession of the gift.

It is this particular implication that the jurists apparently wished to avoid. The reason for this anxiety presumably lies in certain provisions of Islamic inheritance law: Islamic law allows a testator to dispose of his estate by will and thus bequeath assets to persons of his own choosing. However, this freedom of testation is restricted in two respects. For one thing, the bequeathed assets must not exceed one-third of the total estate—the remaining two-thirds are distributed among the legal heirs according to certain shares (in what follows I refer to this regulation as the ‘one-third restriction’). Moreover, no heir may benefit from a bequest. A donation, on the other hand, provides a testator with a means to give his entire estate to persons of his choice—including the persons who will be his legal heirs after his death. This is only permissible, however, if the donation is carried out during the testator’s lifetime. Deathbed donations are subject to the same restrictions as bequests.

Against this background it becomes clear why the jurists made it a condition for the completeness of a donation that the donee takes possession of the item. Otherwise, a donation could easily be used to circumvent the restrictions on freedom of testation. One need only donate one’s entire estate as a gift inter vivos, but without conveyance. Upon one’s death, the entire estate would go to the donee, because the donation would be complete and effective even though the donee had never taken possession of it during the donor’s lifetime. The result would be an evasion of the one-third restriction on bequests. By the same token one could evade the prohibition of a bequest to a legal heir: One need only donate an asset as a gift inter vivos to a person who will be one’s legal heir after one’s death, but without conveying the asset to the donee.

The sources leave no doubt that the early jurists were aware of such loopholes to evade the law of inheritance and that they adjusted the law accordingly. This awareness is keenly reflected in a hadîth attributed
to the Caliph 'Umar b. al-Khattāb (d. 644 CE). In this report, 'Umar insists that it is unacceptable for a father to present his son with a gift without conveying the property during his lifetime—and then, if the father dies first, the son claims that his father had donated the asset to him, whereas if the son dies first, the father denies that he had ever made the donation. The position that a donation is complete only if the donee takes possession of it effectively precluded such maneuvers. This was the primary purpose of the requirement of *qabd*: It forced donors to actually hand over their donations, and to do this while still alive; otherwise, the donation would be invalid.

b) The Position Held by Shafi'i and the Early Hanafi Jurists
A second basic position regarding the completeness and revocability of donations was held by Shafi'i, by Shaybâni and—according to the latter's account—by the majority of Ḥanafi scholars, including Abū Ḥanifa (d. 767 CE) himself.

These scholars also held that a donation does not become complete until the beneficiary has taken possession of the asset. Unlike Mālik and the early Ibâdis, however, they held that a donation is also revocable until such time as the beneficiary has taken possession. In other words, these scholars linked completeness and revocability to one and the same criterion, viz. *qabd*. As a consequence, any donation that has not become complete is revocable and vice-versa. This is true of all types of donation—ṣadaqa, hiba or haddiyaa.

This position was probably motivated by practical considerations: From the perspective of the law of evidence, it is comparatively easy to establish that someone has taken possession of an asset, whereas the mere declaration of a gift—according to circumstances—may be difficult to prove. Thus, the coupling of completeness and irrevocability to one and the same precondition promoted legal certainty. A tradition attributed to ‘Abdallâh b. Mas'ûd (d. 652/3 CE) indicates that the early jurists did in fact give some attention to the problem of legal certainty in matters relating to donations: According to this tradition, a ṣadaqa
and the freedom given to a slave should be collected from the donor on the very day on which the donation is declared.\textsuperscript{28} By allowing a donor to revoke his donation, the jurists created a strong motive for the beneficiary to take possession of the asset in a timely manner.

It was this pragmatic position held by Shafii and the early Hanafis, which deliberately ignored the aversion felt by Malik and others to the revocation of gifts, that would prevail in later legal discourse: The large majority of classical jurists held that, in principle, a donation is revocable until such time as the beneficiary takes possession. As for sadqa, the classical jurists held a different position: Almost all classical jurists maintained that a sadqa—unlike other types of donation—cannot be revoked under any circumstances.\textsuperscript{29} Even the ‘taboo of return’, viz. the notion that a benefactor must not reacquire his sadqa in any way—e.g., repurchase, inheritance or gift—is still present in classical law.\textsuperscript{30} Thus the majority opinion in classical law was a compromise: It qualified Malik’s total negation of revocability without completely abandoning it.

2. Life Estates: ‘Umra, Sukna and Ruqbä

2.1. The Different Types of Life Estate

Besides full-fledged donations, early Islamic law also knew life estates. As with full-fledged donations, there were different types of life estate, and the early jurists did not always distinguish one from the other consistently, let alone unanimously.

Sahhnûn (d. 854 CE) relates of Ibn Shihāb al-Zuhri (d. 741/2 CE) that he knew a form of donation called “minha”, a transaction by which a person transfers his slave to a third party with the stipulation that following the beneficiary’s death the slave once again becomes the property of the donor.\textsuperscript{31}

\textsuperscript{28} Sahhnûn, Mudawwana, 4:429.18f.
\textsuperscript{29} EP s.v. Sadaka (T.H. Weir/A. Zysow), 713b.
\textsuperscript{30} Ibid., 714a. See also Mawsû’u Fiqhiyya (Kuwait), s.v. Sadaqa, 324b and 343a.
\textsuperscript{31} Sahhnûn, Mudawwana, 4:404.3ff. The Mawsû’u Fiqhiyya (Kuwait) provides a description of the minha (alternatively: maniha) that differs from the one provided by al-Zuhri: The owner of a sheep, camel or cow transfers the right to milk the animal in question to a third party until the milk runs dry (see the articles ruqbä and ‘umra).
Malik was familiar with this form of donation, which he called "'umra". According to early Malikî jurists, the 'umra could be used to transfer not only slaves but also livestock. It appears, however, that in principle such a transfer was not restricted to slaves and livestock—indeed not even to movables: According to Malik, a house could be donated as a life estate. The early Malikî jurists referred to the life estate in a house as "suknä" (literally "residence", i.e., the right of abode acquired by the life tenant). The early Ibâdis apparently used the terms 'umra and sukna in a similar way: In Abû Ghânim's Mudawwana, 'umra is used as a general term for life estates, whereas sukna is used specifically with regard to houses.

It is arguable whether 'umra and sukna should be regarded as 'donations' in the strict sense of the word. In his Mudawwana, Sahnûn treats both terms in the chapter on full-fledged donations (kitâb al-hibät) as well as in the chapter on loans (kitâb al-'âriya). Indeed, 'umra and sukna were a kind of combination of donation and loan: Since the asset had to be returned to the settlor after the life tenant's death, the latter was not allowed to sell it, and thus did not enjoy full property rights. In that respect, 'umra and sukna resembled a loan for a previously stipulated but undetermined period of time. Indeed, the Ibâdi scholar 'Abdallah b. 'Abd al-'Azîz expressly characterized the 'umra as a kind of loan ('âriya).

Early Islamic law also knew variations of the life estate that ultimately turned into a full-fledged donation. Al-Zuhri relates that the above-mentioned minha could be made with the specific stipulation that the slave who is gifted as a life estate may become the alienable property of...
a third party after the life tenant's death.\textsuperscript{39} Al-Zuhri called this transaction a 'donation to the last' (hiba li'il-ākkir)—that is, a full-fledged donation to the last of a series of successive beneficiaries.\textsuperscript{40} According to al-Zuhri, such a donation might also be made in favor of the slave himself, in which case the slave was to be manumitted after the life tenant's death.\textsuperscript{41} The same position is attributed to 'Atā' b. Abī Rabāh (d. 734), who referred to the transaction in question as "umrā".\textsuperscript{42} However, a life estate that ultimately turned into a full-fledged donation was not restricted to slaves. Muhammad b. 'Abd al-Rahmān al-Qurarī,\textsuperscript{43} for instance, accepted them with regard to any kind of wealth (māl).\textsuperscript{44}

Moreover, the person who created an 'umrā or suknā could stipulate that the life estate be in favor of a person and that person's offspring (i'aqb).\textsuperscript{45} According to the Ibādī scholar Ibn 'Abd al-'Azīz, he could also stipulate that the asset be used for a pious cause (fi sabīl Allāh) after the life tenant's death.\textsuperscript{46}

\section*{2.2. Critique of Life Estates}

There were many forms of life estate in early legal discourse. This multiformality suggests that in the initial stage of legal development, life estates were still minimally regulated. At the same time, the early sources

\textsuperscript{39} Sahnūn, \textit{Mudawwana}, 4:404.5f. Mālik also accepted this form of donation, see ibid., 392.18ff.

\textsuperscript{40} Ibid., 4:404.5f. Al-Zuhri, in his description of the hiba li'il-ākkir, does not mention more than two successive beneficiaries. I assume, however, that in principal there was no restriction on the number of successive beneficiaries.

\textsuperscript{41} Ibid., 4:404.6f.


\textsuperscript{43} I have been unable to identify this scholar. His opinion was reported to Sahnūn through a certain Ibn Lahl'a, probably 'Abdallah b. Lahl'a (715-790 CE). On him see Raif G. Khoury: 'Abd Allāh Ibn Lahl'a (97-174/715-790); juge et grand maître de l'Ecole Égyptienne; avec édition critique de l'unique rouleau de papyrus arabe conservé à Heidelberg (Wiesbaden 1986).

\textsuperscript{44} Sahnūn, \textit{Mudawwana}, 4:404.7ff.

\textsuperscript{45} Ibid., 4:392.23f. (where this position is attributed to Mālik); Shāfī', \textit{Umm}, 4:63.16ff., and Shaybānī in \textit{Muwaṭṭa' Mālik} (recension of Shaybānī), 288.6, hadith no. 812.

\textsuperscript{46} Abū Ghānim, \textit{Mudawwana}, 2:190.7ff.
already contain a systematic critique of life estates: Some variants of it were controversial, and others were outright rejected.

One variant of the ‘umrā that met with widespread rejection was a transaction called ruqbā. The ruqbā basically was an ‘umrā with a supplementary stipulation for the event that the life tenant outlives the original owner. In an ordinary ‘umrā, if that happens, the asset passes to the original owner’s heirs following the life tenant’s death. In a ruqbā, however, the asset becomes the property of the beneficiary if he survives the original owner.

Those early jurists whose opinions have come down to us rejected the ruqbā. Abū Ḥanīfa and Shaybānī reportedly treated the ruqbā as though it had no legal effect whatsoever: In their view, an asset gifted as ruqbā must be treated like a loan, viz. the donor may claim it back at will and following the beneficiary’s death it becomes the property of the donor’s heirs. The same position is attributed to Mālik by Qurtubi (d. 1273 CE). Abū Yūsuf, in turn, treated the ruqbā as a simple hiba: In his view, an asset gifted as ruqbā becomes the alienable property of the beneficiary ab initio, notwithstanding the donor’s express stipulation to the contrary.

Why were the jurists so averse to the ruqbā? Once again, the answer is related to Islamic inheritance law. The ruqbā could be used as a means to evade the abovementioned restrictions on freedom of testation. All that is needed is for two persons to engage in a mutual exchange of assets in the form of ruqbā. When one of them dies, the other acquires title to both sets of assets. As a consequence, the heirs of the deceased are deprived of both the asset the latter has given away and the one he has received. In principle, a person may dispose of his entire wealth in this manner, thereby removing it from his estate without incurring any loss of wealth, since, due to the mutuality of the arrangement, he is compensated for what he gives away. To be sure, the ruqbā is not necessarily a mutual arrangement. However, some early sources describe the

48 Ibid., 28:65 (= Qurtubi, al-Kāfī).
49 Ibid., 28:210.9ff. (= Kāsānī, Badā‘i' al-ṣanā‘i’) and 204.12ff. (= Qudūrī, Mukhtasar).
ruqba exclusively in this mutual form. This suggests that the mutual form may have been the most common one, and that the ruqba was indeed typically used as a means to circumvent inheritance law.

Many early jurists rejected not only the ruqba, but also the 'umra, without, however, denying the legitimacy of the 'umra outright. Instead, they treated the 'umra like an ordinary full-fledged donation (just as Abū Yūsuf did with the ruqba): According to these jurists, an asset donated as 'umra becomes the inheritable property of the beneficiary. This position was held by Shāfi‘i, by the Ibāḍī imam and scholar Abū 'Ubaydā (d. between 754 and 775 CE) and his pupil Abū l-Mu‘arrij, by the Basran traditionist Qatāda (d. 735), the Meccan jurist 'Aţā b. Abi Rabāh (d. 734) and the Medinese traditionist Jābir b. 'Abdallāh (d. between 692 and 698), as well as by Shaybānī and—according to the latter's account—by the majority of Ḥanafi scholars, including Abū Ḥanifa. Those who accepted the 'umra (i.e. who treated it as a life

50 Sahnün describes the ruqba exclusively as a mutual arrangement. Mālik reportedly commented on the arrangement with the lapidary remark that "there is no good to it (lä khayra fihā)" (Sahnün, Mudawwana, 4:451.27ff.). Khalil, in his Mukhtasar, also describes the ruqba as a mutual arrangement. Like Mālik, Khalil rejected the ruqba (Mausū‘at silsilat al-maṣādir al-fiqhiyya, 28:319.3ff. [= Khalil b. Ishāq, Mukhtasar]). Kāṣāni, in turn, describes the unilateral variation (ibid., 210.9ff. [= Kāṣāni, Badā‘i‘ al-sañā‘i‘]). The Ibāḍī scholar Abū Bakr al-Kindi (d. 1162 CE) describes both the mutual and the unilateral variation (Abū Bakr al-Kindi, Al-Muṣannaf, 42 vols. [Oman: Wizarat at-Turath al-Qawmī wa’l-Thaqāfa, 1983], 271/1:223.2ff.).

51 An alternative (or supplementary) explanation for the jurists' aversion to ruqba would be that such arrangements bear an element of uncertainty that renders them aleatory: In a way, one 'bet' on the death of another. With regard to synallagmatic contracts, Islamic law takes a very restrictive stance towards transactions that involve an element of uncertainty (gharar). For instance, sale contracts may not be made conditional upon events extraneous to the agreement, as for example if A sells B a house on the condition that A's father dies (see Ibn Naqīb al-Misrī, 'Umdat al-sālik wa‘-uddat al-nāsil fi Reliance of the Traveller, ed. and transl. Nuh Ha Mim Keller [Delhi, 1991], 378ff., regarding the example with the sale of the house. Regarding uncertainty in general, see Frank E. Vogel and Samuel L. Hayes, Islamic Law and Finance: Religion, Risk and Return [Leiden et al. 2006], 87ff.).

52 For Qatāda, 'Aţā b. Abi Rabāh and Jābir b. 'Abdallāh see Şan‘āni, Muṣannaf, 9:188, hadith no. 16883; 191, hadith no. 16893; and 192, hadith no. 16897.

53 Shāfi‘i, Umm, 4:65.15ff. Regarding the Ibāḍī scholars, see Abū Ghānim, Mudawwana, 2:164.5 and 190.7ff. and 15ff. Regarding the Ḥanafi scholars, see Muhāmmad b. al-Ḥasan al-Shaybānī, Kitāb al-ʻAthār, ed. Khalīl al-‘Awwād, 2 vols. (Kuwait, Damascus and Beirut: Dār al-Nawādir, 2008), 2:594, hadith no. 699; Muwaṭṭa’ Mālik (recension of Shaybānī), 277ff., hadith no. 712. Interestingly, Shaybānī held a different position regarding sukna: he
estate) included Mālik, al-Zuhri, the Ibādi scholar ‘Abdallāh b. ‘Abd al-‘Azīz and—according to the latter’s account—the Iraqi jurist Ibrāhīm al-Nakahā’ī (d. ca. 717 CE).

Abū Ghānim relates an argument between Ibn ‘Abd al-‘Azīz and an anonymous interlocutor in which Ibn ‘Abd al-‘Azīz fiercely attacks the position that the ‘umrā must be treated like an ordinary gift. He denounces that position as arbitrary, pointing out that it disregards the donor’s express stipulation. What is the legal basis—Ibn ‘Abd al-‘Azīz asked—for awarding the beneficiary full property rights even though the donor has obviously not intended a transfer of title? Indeed one may argue that such a course of action amounts to an infringement of the donor’s property rights.

Alas, as convincing as Ibn ‘Abd al-‘Azīz’s objection may seem, it misses the very point that his adversaries were trying to make. At bottom, Ibn ‘Abd al-‘Azīz’s position amounts to the insistence that a donor is free to stipulate the conditions of his donation as he pleases. This was exactly what his adversaries denied. At this point it becomes clear that the controversy over the ‘umrā was a product of different attitudes towards the question of how thoroughly the law should regulate donations. On the one hand, there was a tendency to restrict donations to a limited set of contract types. This tendency manifests itself in the approach that treats the ‘umrā or ruqbat as an ordinary gift. According to Ibn ‘Abd al-‘Azīz, however, a degree of contractual freedom should be allowed in the field of donations.

Mālik apparently held the same view. Sahnūn, who relates Mālik’s acceptance of the ‘umrā in his Mudawwana, adds by way of explanation that according to Mālik “the people follow their own stipulations”

considered it a loan (‘aḍriya) that reverts to the owner after the beneficiaries’ death. This, according to Shaybānī, was the position of Abū Ḥanīfa and the majority of Hanafi scholars (see ibid., 288, hadith no. 812). The same position is attributed to Ibrāhīm al-Nakahā’ī by Sān’ānī (see Musannaf, 9:193, hadith no. 16904). We may infer that according to these scholars, a sukna—like any loan—may be revoked by the owner at will.

Sān’ānī, Musannaf, 9:188, hadith no. 16883, and 190, hadith no. 16887.

Abū Ghānim, Mudawwana, 2:164.3 (regarding both Ibn ‘Abd al-‘Azīz and al-Nakahā’ī). Shaybānī, however, reports that al-Nakahā’ī treated the ‘umrā as an ordinary donation (see Athār, 2:593, hadith no. 698).

Abū Ghānim, Mudawwana, 2:164.3.
(wa-qāla Mālik al-nās 'alā shurātihim). It is probable that by the end of the eighth century CE, this phrase had already become a kind of ‘maxim’ used by proponents of contractual freedom to articulate their position concisely. In the Muwatta’, the phrase is embedded in a tradition attributed to Qasim b. Muḥammad (d. 724 or 726 CE): Asked about the ‘umrā, Qāsim is reported to have responded that in matters relating to property and donations, he never saw the people do anything other than follow their own stipulations (mā adraktu al-nās illa wa-hum 'alā shurātihim fi amwālīhim wa-fi-mā a’taw). Critics of the ‘umrā could cite traditions in support of their position. In the abovementioned argument, Ibn ‘Abd al-‘Azīz was confronted with a tradition attributed to the Prophet, according to which the ‘umrā belongs to the beneficiary “during his life and after his death (hay‘atahu wa-ba‘da mamātihi)”. Ibn ‘Abd al-‘Azīz was also confronted with the contention that “the way of the ‘umrā is the way of inheritance (sabīl al-‘umrā sabīl al-mirāth)”.

His anonymous interlocutor characterized this contention as “qiyās” (presumably, the point he wished to make was that an asset gifted in the form of an ‘umrā must be treated as part of the beneficiary’s inheritable estate, even though the phrase “sabīl al-‘umrā sabīl al-mirāth” may be interpreted in a different way). Shāfi‘i, on the other hand, presents the same contention as a tradition attributed to the Prophet—which he quotes along with numerous other traditions cited by critics of the ‘umrā.62

57) Saḥnūn, Mudawwana, 4:451.23f.
58) Muwatta’ Mālik (recension of Yahyā b. Yahyā), 536, hadith no. 1438. Shāfi‘i also relates the tradition (see Umm, 4:63.22f).
59) Abū Ghānim, Mudawwana, 2:164.12f.
60) Ibid., 2:164.9.
61) In truth, of course, the contention that “the way of the ‘umrā is the way of inheritance” is not an analogy (qiyās), but simply an apodictic assertion. Ibn ‘Abd al-‘Azīz was well aware of this, and recommended that his interlocutor not put forth his ‘analogy’ in the presence of the ahl al-qiyās, lest he make a laughing stock of himself.
62) Shāfi‘i, Umm, 4:64.19f. The tradition cited by Shāfi‘i, which is formulated differently than the statement attributed to Ibn ‘Abd al-‘Azīz’s anonymous interlocutor, is expanded in order to include the ruqbā: “la tu‘mirū wa-lā turqībū wa-man u‘miru shay‘‘ ab urqībatu fa-huwa sabīl al-mirāth”. Another compiler who relates numerous traditions that support a critical position toward the ‘umrā is San‘ānī (see Muṣannaf, 9:186, hadith no. 16875f; 187, ḥadīth no. 16770; 189, ḥadīth no. 16886 and 16888).
Why did many jurists reject not only the *ruqbā* but also the *‘umrā*? The answer probably lies, once again, with the law of inheritance. The *‘umrā* was also a means to evade inheritance laws, even though it was not quite as efficient in this regard as the *ruqbā*. Consider for example two parties (say a husband and his wife) who donate their entire estates to each other as *‘umrā*. As a consequence of this arrangement, upon the death of one party, the latter’s heirs do not receive any share of his or her estate until the other party also dies. If the surviving party outlives one or more of the deceased party’s legal heirs, the result is that inheritance is not only deferred but also altered as to who actually inherits the estate. To be sure, both consequences—the deferment of inheritance and the shift of entitlement—are potentially involved in every *‘umrā*, regardless of whether it is made as a mutual or a unilateral arrangement. The mutual arrangement, however, has an additional effect: Each party gives and receives at the same time, thus receiving compensation for the temporary surrender of its property (viz. the same effect as described above regarding the mutual *ruqbā*).

### 3. Interim Conclusion

The analysis of early legal sources reveals that 8\textsuperscript{th} century CE Muslim jurists were familiar with a wide range of donations. Different types of donation were not always distinguished from each other precisely, let alone consistently: Different scholars used different names for one and the same arrangement and—conversely—one and the same term was sometimes applied to different types of donation. This broad and blurred spectrum of types was probably a result of the rapid expansion of Islam in its first centuries. In the course of the early conquests, Muslims no doubt came into contact with different legal traditions and encountered a range of local practices relating to donations, and they appropriated these traditions and practices into their own legal practice.\(^{63}\)

The early sources also point to an effort to systemize the law of donation. As a result of this effort, some types of donation were contested or rejected. Practices that might interfere with the law of inheritance—

\(^{63}\) For a full discussion of pre- and non-Islamic institutions that may have inspired the Islamic *waqf*, see Hennigan, *The Birth of a Legal Institution*, 50ff., with further references.
such as ruqba and 'umra—met with particularly strong skepticism. At the same time, the sources indicate that in some legal quarters there was a strong conviction that it is fundamentally objectionable to revoke a donation. This conviction was particularly pronounced with regard to sadaqa, a technical term used by the jurists to signify a donation that serves a religious or charitable purpose. Some jurists held that a beneficiary who donates a sadaqa may not reacquire the asset in question in any way—not even through repurchase, donation or inheritance. Both issues mentioned here—the 'taboo of return' with regard to sadaqa and the potential conflict with the law of inheritance—played an important role in the early evolution of waqf doctrine, to which I now turn.

II) The Institution of Ḥabīs

In addition to the different types of donation treated in the previous section, Muslim jurists also knew the endowment established as a trust in favor of one or more persons or for a specific purpose. In early Islamic law, such endowments were usually referred to as ḥabīs (literally 'withholding' or 'retention'). The term 'waqf', which is more common in classical law, was hardly used prior to the 9th century CE.

The sources do not indicate when the term ḥabīs was first used to signify an endowment. The term does not appear in the Qurʾān. Shāfiʿī refers to some legal practices mentioned (and prohibited) in Q 5:103, which he characterizes as 'pre-Islamic ḥabīs' (ḥabīs al-jāhiliyya), viz. the bahira, the wasila, the hāmi and the sä'iba. A hāmi, Shāfiʿī explains, was established if the owner of a camel stallion declared that the animal would no longer be ridden after it had impregnated a mare. The bahira and wasila were pledges similar to that of the hāmi, and the sä'iba was the manumission of a slave on the condition that the owner be freed of all duties normally incurred as the freedman's patron (mawla). However, Shāfiʿī's explanation cannot be regarded as reliable information on pre-Islamic terminology. Rather, it must be placed within an exegetical context, viz. the discussion of certain ḥabīs-critical hadiths.
material. That material—to be treated in greater detail below—included traditions stating that *habs* had been “before Islam” and that it had been abrogated by revelation. In defense of *habs*, Shāfi‘ī argued that these traditions referred only to the ‘pre-Islamic *habs*’.^^

Early references to *habs* have come down to us in the form of legal opinions transmitted in early *fiqh* literature, notably in writings attributed to Shaybānī, Shāfi‘ī, Saḥnūn and Abū Ghānim al-Khurāsānī. Some of these opinions are attributed to scholars who lived as early as the first half of the 8th century CE (attributions that must be treated with caution). Together with the *hadith* material mentioned above, these legal opinions are the oldest extant information on *habs*.

1. The Ḥabs fi Sabīl Allāh

The type of endowment given most prominence in early legal literature is the *ḥabs fi sabīl Allāh*. The name of this institution is clearly inspired by the Qur‘ān, which uses the phrase *fi sabīl Allāh*—literally “in the path of God”—several times. Some of these passages instruct the believers to fight (*qātilū*) on God’s path [Q 2:190, 2:244], while others refer to financial commitment “*fi sabīl Allāh*” [Q 2:195, 2:261].

The one type of *ḥabs fi sabīl Allāh* used by the jurists as a model for discussing doctrinal questions is the endowment of weapons and horses for jihad. From this, one may infer that the *ḥabs fi sabīl Allāh* indeed originated in voluntary contributions of equipment for war. Some early jurists even held that weapons and horses are the only items that may be endowed as a *ḥabs* (which suggests that these jurists considered jihad the only legitimate purpose of a *ḥabs*).^^ That position, however, remained marginal. Mālik, for one, held that houses are appropriate items for *ḥabs fi sabīl Allāh*, and, according to Ibn al-Qāsim, the same

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^^ According to Shaybānī, this was the position of Ibrāhīm al-Nakha‘ī, ‘Amir al-Sha‘bī (d. between 721 and 728 CE) and ‘Abdallāh b. Mas‘ūd, see *Ḥujja*, 3:63.2, 64.1, and 65.1f. and *Siyar*, 5: 254.2ff. This restrictive position probably indicates that these scholars in principle disapproved of *ḥabs*—an attitude not uncommon in early legal discourse, as we shall see below. The endowment of weapons and horses for jihad, however, was a practice attributed to the Companions. This probably explains why those scholars were prepared to accept it.
applies to clothes, saddles, and slaves. Shaybānī considered many different articles as legitimate items for a ḥabs fi sabīl Allāh: houses, land, slaves, copies of the Qur’ān, as well as articles of small value such as axes or cooking pots. According to ‘Abdallāh Ibn ‘Abd al-‘Azīz, even gold and silver may be donated as ḥabs fi sabīl Allāh.

According to Shaybānī and Ibn ‘Abd al-‘Azīz, a ḥabs fi sabīl Allāh may be used for purposes other than jihad. Shaybānī, it is true, usually applies the expression “fi sabīl Allāh” to jihad, albeit not exclusively. Ibn ‘Abd al-‘Azīz apparently held a similar position: He discussed the question of what to do with an item that a dying person has endowed fi sabīl Allāh without specifying any specific purpose of dedication. Ibn ‘Abd al-‘Azīz solved the problem by referring to the nature of the item: If it is a weapon, it must be used for jihad. As for other articles, they must be applied to those purposes for which they are most suited, including the funding of a person’s pilgrimage, the manumission of a slave, or the provision of a gift (ṣild) for the donor’s next of kin. Mālik, in turn, held that even though the expression fi sabīl Allāh may refer to a wide range of pious purposes, it must be construed as referring specifically to jihad whenever used in connection with a ḥabs. This does not mean, however, that Mālik rejected ḥabs dedicated to other purposes: In his view, if it is known that a house is ḥabs, but its purpose is unknown, it is for the ruler to decide which purpose is most suitable.

68 Sahnūn, Mudawwana, 4:418.4ff. (slaves), 8ff. (clothes and saddles), 417.18 (houses). Rabi‘a, too, apparently considered real estate a legitimate item for endowment: He takes it for granted that endowments may produce income (see ibid., 417.15).
69 Shaybānī, Siyār, 5:266.5ff.
70 Abū Ghānim, Mudawwana, 2:163.17. Gold and silver should probably be interpreted, in this context, as money in general.
71 Shaybānī, Siyār, 5:253.3ff., 257.10ff., 266.9, 278.2ff. An interpretation of the expression “fi sabīl Allāh” that gives no prominence to jihad is put forth by the early Qur’ānic exegete Muqātil b. Sulaymān (d. 767 CE). According to him, the expression has the general meaning of “in obedience to God” (fi tā’at Allāh). See Muqātil b. Sulaymān, Kitāb al-Ashbāh wa’l-na‘ātir, ed. Dr. ‘Abdallāh Maḥmūd Ṣaḥāta (Cairo 1975), entry no. 69, al-sabil, 185.11ff.
72 Abū Ghānim, Mudawwana, 2:163.11ff. It will be recalled that Ibn ‘Abd al-‘Azīz considered gold and silver a legitimate item for endowment (see section II 1), hence the two purposes that involve funding, viz. pilgrimage and the purchase of a gift.
73 Sahnūn, Mudawwana, 4:417.4ff.
That purpose may be—depending on local political and military circumstances—jihād. However, some other positions ascribed to Mālik suggest that in his view the most obvious application of ḥabs is support for the poor.\textsuperscript{74}

The positions attributed to 8\textsuperscript{th} century CE jurists suggest that even though the ḥabs fi sabil Allah probably originated in the donation of military equipment for jihād, the institution was later expanded to comprise other items and purposes. This assessment correlates with political and military developments in Islamic history: For the early Muslim community, one of the most pressing tasks was to mobilize resources for military self-assertion and—later—expansion. With the evolution of the conquest society, other tasks came to the fore, most notably the provision of basic welfare within increasingly complex social structures—a task that called for a much more sophisticated allocation of public and charitable funds.

However, the early jurists understood the ḥabs fi sabil Allah as an endowment in favor of a purpose, not in favor of persons. According to Shaybāni, the settlor of a ḥabs fi sabil Allah has a right to appoint a specific person to carry out the stipulated purpose. A settlor may, for instance, endow a horse for jihād and bestow it upon a specific person. If, however, that person loses the ability or volition to carry out the stipulated purpose, he must convey the item to someone else.\textsuperscript{75} In this sense, property designated as a ḥabs fi sabil Allah does not belong to anyone. It should be noted, however, that this effect results from the dedication of the property to a purpose: The dedication to the purpose always supersedes any personal entitlement to the property. There is no indication that the early jurists understood endowments as classical jurists did, viz. as an asset that is intrinsically inalienable. To the contrary, some early jurists held that an endowment must be sold if its purpose cannot otherwise be attained: Mālik for instance held that a horse endowed for jihād that becomes too weak for battle or is sick with rabies should be sold and the proceeds used to buy a new horse. Ibn al-Qāsim held the same regarding worn clothes. If the proceeds are

\textsuperscript{74} Ibid., 4:417.18ff.

\textsuperscript{75} Shaybāni, Siyar, 5:274.5ff.
insufficient to buy new clothes, the money should be given to the destitute.76

2. Endowments in Favor of Persons: The Early Medinese Doctrine

In addition to the *habs fi sabil Allah*, early Islamic law also knew the endowment in favor of persons. Such an endowment was mostly identified as 'habs', but sometimes also as a specific form of 'sadaqa', as we shall see below.

The oldest information available on this type of endowment is a number of statements transmitted by Saḥnūn, who attributes them to certain 8th century CE jurists of Medina. These statements are brief and allow only a fragmentary insight into the Medinese habs doctrine of that time. Moreover, Saḥnūn's account is a piecemeal collage of opinions collected from numerous jurists that does not represent a single, cohesive doctrine. Nonetheless, these statements reveal a common basic understanding of the endowment in favor of persons, which I shall reconstruct in the following analysis.

The early Medinese jurists conceived of habs as a kind of sadaqa. This is clear in a statement attributed to Yahyā b. Saʿīd (d. 760 CE):

1. If someone donates a house as sadaqa or as habs—we treat these two as equal (bi-manzila wāḥīda)—and he does not stipulate anything [specific], then it shall not be sold or given away as a gift. The next of kin should reside in it, that is: his next of kin.77

76 For the positions attributed to Mālik and Ibn al-Qāsim see Saḥnūn, *Mudawwana*, 4:418.10ff. The above-mentioned position held by Ibn 'Abd al-'Azīz, according to which gold and silver are suitable items for a habs fi sabil Allah, indicates that he did not consider endowments inalienable: As a rule, gold and silver cannot serve a pious purpose unless they are alienated.

77 Saḥnūn, *Mudawwana*, 4:419.25ff. In this quote and in the following quotes from the *Mudawwana* my translation may deviate from the original for the sake of conciseness. The original text is as follows: "[...] qāla: man habbasa dār" aw taṣaddaqa bīhā qāla al-habs waʾl-sadaqa 'indanā bi-manzila wāḥīda qāla fā-in kāna jāhib dhālika l-ladbi habbasa tilka al-dār lam yusammi shay" fa-ınnahā lā tubāʾu wa-lā tūḥabu wa-l-yaksunhā al-aqrāb faʾl-aqrāb minhu."
What exactly does Yahyā b. Sa‘id mean when he states that *sadaqa* and *habs* are to be treated as equal? It is important to note, first of all, that this statement must not be misconstrued as a universal proposition. After all, a *sadaqa* becomes the property of the beneficiary, who may dispose of it at will (see section I. 1.1). A *habs fi sabil Allah*, by contrast, does not become the property of the beneficiary, and the same applies to all other types of *habs* (see below). Obviously, *habs* and *sadaqa* are not always treated as equal. When Ibn Sa‘id states that they are, he actually refers to a very specific case of *sadaqa*, viz. the *sadaqa* in favor of an indeterminate group of persons.

In the present context, the term ‘indeterminate group (of persons)’ refers to a group that includes future persons whose existence and number cannot be predicted. Examples of such groups are ‘the poor’ or ‘the relatives of X’ (provided that the future poor or future relatives of X are not explicitly excluded). When Ibn Sa‘id states that “the settlor’s next of kin” shall reside in the house in question, he is awarding the house to an indeterminate group, since he means the next of kin at any given time. At different points in time there may be different persons who qualify as next of kin.

Since the beneficiaries are indeterminate, the *sadaqa* cannot become their alienable property, because one cannot award property rights to one or more beneficiaries without disadvantaging persons who might become entitled in the future. It is this legal effect—the preclusion of property rights—to which Ibn Sa‘id refers when stating that *sadaqa* and *habs* are treated as equal.

Why did Ibn Sa‘id award the house to the next of kin? Probably because he regarded the settlor’s next of kin as the most obvious, ‘natural’ beneficiaries of an endowment. In the absence of a specific stipulation from the settlor, he inferred that the settlor had in fact intended that his next of kin be beneficiaries. The inalienability of the asset, on the other hand, was a legal effect that also would have ensued if the settlor had expressly designated his next of kin (or—alternatively—any other indeterminate group of persons) as beneficiaries. This is evident

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25. It will be recalled that—at least in classical law—a *sadaqa* for relatives is regarded as the best form of *sadaqa*, see above section I 1.1.
from two further statements related by Saḥnūn from early Medinese jurists:

2. Some men among the people of knowledge, including Rabī‘a (d. between 749 and 760 CE), held: If a man donates a sādaqa in favor of a group of people whom he does not specify with respect to number or name, then this is to be treated like a habs.29

3. Some of Mālik’s authorities held: Any habs or sādaqa that is endowed in favor of indeterminate future persons—this is the habs mawqūf, e.g., if someone says “for my children” without specifically identifying them. For this is indeterminate (majhūl). Do you not hold that a child who is born after this statement is included among the beneficiaries? The same applies if he says “for my children and those who are born to me after them”. This, too, is [an endowment] in favor of indeterminate future persons. If, however, he specifically identifies [them] then they are a determinable group.”80

These two statements explicitly address the indeterminacy of the beneficiaries. Once again, the legal consequence of that indeterminacy is that the sādaqa is treated like a habs.

In statement no. 3, an endowment in favor of an indeterminate group (be it habs or sādaqa) is characterized as ‘habs mawqūf’. What exactly does the term ‘mawqūf’ express? The exact meaning of this term becomes clear when we turn to the legal consequences of an endowment (sādaqa or habs, respectively) created in favor of determinate persons.

As for the sādaqa, those legal consequences have already been mentioned above: A sādaqa created in favor of determinate persons becomes the full-fledged property of the beneficiaries, who may alienate it at will. However, according to 8th century CE Medinese doctrine, a donor


may also stipulate that his sadaqa will revert to him after the beneficiaries' death. A sadaqa with such a stipulation was called 'sadaqa mawqūfa'.Saḥnūn relates from Rabî'a (d. between 749 and 760 CE):

4. The sadaqa mawqūfa that may be sold if the donor so wishes [comes into existence] if a man donates a sadaqa in favor of two or three or a larger number [of persons] and names them. [Saḥnūn adds by way of explanation:] This means [if the donor stipulates] "as long as they live" without mentioning any offspring. And this is the [sadaqa] 'mawqūfa' that the donor may sell at will when it returns to him.81

The expression 'mawqūfa' is used in this statement to signify the legal effect that constitutes the basic character of an endowment, viz. the suspension of property rights. It is this effect that distinguishes a sadaqa mawqūfa from an ordinary sadaqa: The beneficiaries must not alienate the asset. In this respect, Rabî'a uses the term in the same sense as the classical jurists: They too understood the expression 'mawqūf' as signifying the suspension of property rights (the term 'waqf' commonly used for endowments in classical law in fact originates from this understanding of 'mawqūf'). In one important respect, however, Rabî'a's understanding of the term differs from that of the classical jurists: the latter took it as a matter of course that the property rights to an endowment are suspended in perpetuity. For Rabî'a, the suspension of property rights is only temporary. With the death of the beneficiaries, the settlor's property rights to the asset are revived.

The expression 'habs mawqūf' to signify a habs (or sadaqa) in favor of an indeterminate group (see statement no. 3 above) should be interpreted in the same way. In other words: We must conclude that an endowment in favor of an indeterminate group also reverts to the settlor after all beneficiaries have died. We may further conclude that in statement no. 3 the expression 'habs mawqūf' is used with the specific intention to distinguish the endowment under discussion (whether habs or sadaqa) from a habs fi sabil Allāh: In contrast to the habs mawqūf, the

81 Ibid., 4:420.9ff.: "qāla Rabī’a: wa’l-sadaqa mawqūfa l-lati tubā’u in shā’u sāḥibuhā idhā tašaddaqa al-rajul ala rajula’n au thalātha wa’l akhṭar mn dhlīka idhā samnāhum bi-asmā’ihim qāla Saḥnūn wa ma’nāhu mà ’āshih wa’l-ʾam yaddhkur ‘aqīb faḥādhīhi l-mawqūfa l-lati yabi’uḥu sāḥibuhā in shā’u idhā rajā’at ilayhi.”
\textit{habs fi sabil Allāh} results in the extinction of property rights in perpetuity, due to the fact that the 'beneficiary' of such a \textit{habs} is always a purpose and thus cannot 'die'. In fact, the understanding of \textit{‘mawqūf’} as the temporary suspension of property rights is even more evident in statement no. 3 than it is in no. 4 (Rabi‘a), since in no. 3 it is precisely the temporary nature of the suspension that is expressed by qualifying the \textit{habs} as \textit{‘mawqūf’}.

My conclusion that, according to 8th century CE Medinese doctrine, a \textit{habs} in favor of an indeterminate group of people reverts to the settlor after the beneficiaries' extinction is corroborated by two further statements related in Sahnūn's \textit{Mudawwana}:

5. Ibn Wahb (d. 813 CE) relates from Yūnus b. Yazīd that he asked Abū l-Zinād (d. 751 CE) [about his opinion] regarding a man who endows a \textit{habs} in favor of a person X and his children so long as they live and stipulates that the asset must neither be sold nor inherited nor given away as a gift (hiba). Abū l-Zinād answered: As long as there are beneficiaries, the asset is [to be used] as he has stipulated. And when they become extinct it devolves on the closest relatives (\textit{wulāt}) of the person who gave [it as] a \textit{habs} and \textit{sadaqa}.

6. Rabi‘a held: If someone endows his house in favor of his children and the children of another person and declares it \textit{habs}, it is a [valid] \textit{habs} in favor of them [all]. They may reside in it according to their respective needs for housing space [?]. When they [all] have died, the next of kin [to the settlor] take the house—not the next of kin to those who were entitled together with his children, if there had existed any [such entitled people], regardless of whether those next of kin are [the latter's] children, grandchildren or otherwise.

\begin{itemize}
\item[6.] \textit{Ibid.}, 4:420.27ff.: "[...] man habbasa dārāhu `alā waladīhi wa-walad ghayrihi fa-ja`alabā habs'' fa-hiya habs`alāyhim yas̱ʿūnāhā `alā qadar maraṣīqihim wa-in inqaradū akhadhahā wulātuhu ḍūnā wulāt man kānā minhum ma`a waladīhi idhā kānū walad" wa-walada walad" aw ghayruhum."\end{itemize}
These two statements indicate that, according to early Medinese doctrine, the property rights to a *haba* in favor of an indeterminate group are not suspended in perpetuity, but are revived after the beneficiaries' extinction. In these two cases, the asset becomes the property of the settlor's next of kin (probably because it is assumed that at the time of the beneficiaries' deaths the settlor has already died as well).

Another statement related by Sahnun sheds light on the one case yet unaccounted for in our systematic analysis, viz. an endowment in favor of determinate persons characterized by the settlor as *haba* but not as *sadaqa*:

7. According to Ibn Wahb, Makhrama b. Bakir related the following from his father: It is held that if a man creates a *haba* in favor of someone and then does not add "for you and your offspring after you", [the asset] returns to [the settlor]. If he dies before the beneficiaries, then after the latters' death the asset is divided among the settlor's heirs according to the rules of inheritance [lit.: according to the Book of God].

This statement indicates that the early Medinese jurists treated *haba* in favor of a determinate group of persons in the same way as they treated a *sadaqa* in favor of such a group: In both cases the asset reverts to the settlor as his property after the beneficiaries have died (or to the settlor's next of kin, should he himself have died as well).

Collectively, the statements analyzed above point to a legal doctrine that may be summarized as follows: 8\textsuperscript{th} century CE Medinese jurists acknowledged the characteristic legal effect of an endowment, viz. the suspension of property rights. In their opinion, this legal effect is conditional on two variables: First, the terminology used by a settlor in

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84 According to my interpretation, in the statements quoted above the term "next of kin" (\textit{wulât}) refers to those persons who would inherit from the settlor if he were to die at the point in time at which the beneficiaries become extinct. This must not be confused with the benefactor's heirs (\textit{waratha}) who—depending on the circumstances—may be a completely different set of persons.

making the endowment (ṣadaga/habs/ṣadaqa mawqūfa) and, second, the nature of the group of beneficiaries (determinate/indeterminate). In principle, the terms ṣadaqa or habs may be used to effectuate the suspension of property rights. The term ṣadaqa, however, causes this effect only if one of two requirements is satisfied: (a) the beneficiaries must be an indeterminate group, or (b) the settlor must expressly specify his ṣadaqa as “mawqūfa”. Otherwise, the beneficiaries acquire full property rights to the asset given as ṣadaqa. If, on the other hand, the settlor uses the expression “habs”, the property rights are always suspended—regardless of whether the group of beneficiaries is determinate or not.

In tabular form, the doctrine may be represented as follows:

<table>
<thead>
<tr>
<th>Terminology</th>
<th>Nature of group of beneficiaries</th>
<th>Suspension of property rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>habs</td>
<td>indeterminate</td>
<td>yes</td>
</tr>
<tr>
<td>habs</td>
<td>determinate</td>
<td>yes</td>
</tr>
<tr>
<td>ṣadaqa</td>
<td>indeterminate</td>
<td>yes</td>
</tr>
<tr>
<td>ṣadaqa</td>
<td>determinate</td>
<td>no</td>
</tr>
<tr>
<td>ṣadaqa mawqūfa</td>
<td>determinate</td>
<td>yes</td>
</tr>
</tbody>
</table>

Note, however, that with respect to endowments in favor of persons, the early Medinese jurists understood suspension of title as a temporary legal effect. Unlike the habs fi sabīl Allāh, an endowment in favor of persons ultimately reverts to the settlor or his next of kin, who acquire full property rights. The classical conception of an endowment as the extinction of property rights in perpetuity was still alien to early Medinese legal thought. The same applies to the notion that the ultimate purpose of an endowment must be some pious cause, as the classical jurists would later insist. Sahnūn relates only one statement that even hints at the possibility that a settlor of a habs in favor of persons may stipulate that the asset be used for a good cause after the death of the beneficiaries.86

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86 Ibid., 4:420.4ff.: The statement is related by Ibn Wahb, who attributes it to “some earlier people of knowledge (ba’d man madā min ahl al-‘ilm)”. It concerned a ṣadaqa endowed in favor of a person X and his offspring. Ibn Wahb relates that according those earlier scholars,
Clearly the early Medinese jurists treated a *habs* in favor of persons as a life estate. The legal effects of such a *habs* are identical to those of the *`umrā* (see section II 2.1).

The coexistence of two identical legal institutions with different names is certainly remarkable. How can this phenomenon be explained? A key to the explanation may lie with the different connotations attached to the respective names: Unlike the expression “`umrā”, the terms “ṣadaqa” and “*habs*” have a strong religious connotation. It will be recalled that “ṣadaqa” is a Qur’ānic term and that it is commonly used to denote charitable, pious giving. The term “*habs*”, in turn, was closely associated with the *habs fi sabîl Allah*, probably the oldest form of *habs*. It is conceivable that the *habs* in favor of persons emerged from the `umrā, and that this development was driven by the efforts of early settlers to confer merit on their actions. There is some evidence in the sources that supports this assumption, at least with regard to ordinary donations: According to several Shi‘ī traditions, Ja‘far al-Ṣâdiq criticized people who erroneously used the expression “ṣadaqa” to signify an ordinary gift. In the same fashion, early Muslims may have detached the term “*habs*” from its original context—the *habs fi sabîl Allah*—and extended it to life estates. If this hypothesis is accepted, then the *habs* in favor of persons took only its name from the *habs fi sabîl Allah*, whereas, on a conceptual level, it was inspired by an entirely different institution, viz. the `umrā.

Most of the extant early sources pay significantly more attention to *habs* than to `umrā. Shāfī‘ī and Saḥnûn mention the `umrā only in passing. The *Muwatta’* contains only a little more information. Early Ḥanafī positions regarding the `umrā have come down to us only because Shaybâni briefly mentions them in his recension of the *Muwatta’*. Only Abū Ghânim—who mainly relates the positions of earlier Ibâdī scholars such as Abû ‘Ubayda, Ibn ‘Abd al-‘Azîz and Abû l-Mu‘arrij—treats the `umrā in some detail. As for *habs*, one arrives at the opposite result:

such a ṣadaqa is a *habs* that may not be sold or given away as a gift. Once all of the beneficiaries have died, the asset must be used for the purpose to which the settlor had “dedicated it on the path of God” (ṣan`a allāh wa-sabbalah ‘alayhi).

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Abū Ghānim treats *habs* only in passing, whereas Saḥnūn and Shāfī‘i treat it at considerable length. Shaybānī, in his *Kitāb al-Ḥujja*, discusses *habs* (albeit briefly), whereas he does not mention the ‘*umrā* anywhere in this work.88 In short: Juristic interest in the *habs* in favor of persons apparently increased over time, whereas interest in the ‘*umrā* diminished. This suggests that the ‘*umrā* probably was the older of the two institutions and that it was increasingly superseded by the *habs* and the šadaga mawqūfa. This trend may have been fostered by the critical stance adopted by many jurists towards the ‘*umrā*.

But the *habs* did not escape criticism. There are many traces in the early legal sources of a critical stance toward this institution. In part, this hostility was probably due to the fact that the *habs*—at least in its above-described form—was plainly an ‘*umrā*-in-disguise. Be that as it may, this type of *habs* represented only a passing stage in the institution’s development. Mālik already understood *habs* in a slightly different way—a step that most probably was a reaction to widespread criticism of the practice. At the same time, this step laid the ground for a development that ultimately led to the understanding of endowments found in classical law. In the following sections, I shall first describe early criticism of *habs* and then give an account of Mālik’s doctrine on *habs*.

3. Critique of Habs

One prominent scholar who was critical of *habs* was Abū Ḥanīfa. Some legal positions attributed to him by Shaybānī suggest that he refused to accept *habs* as a contract in its own right. Instead, he apparently treated *habs* as though it were a simple loan (‘*āriya): According to Abū Ḥanīfa, a *habs* is simply a “permission of use” (*ibāhat al-manfa‘a*) that may be revoked by the settlor at will. Title to the asset remains with the settlor, who is free to sell it to a third party if and when he wishes.89 In

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88 Shaybānī does not discuss the *habs* in favor of persons in any work other than his *Kitāb al-Ḥujja* and his recension of Mālik’s *Muwaṭṭa‘*. However, he treats the *habs fi sabil Allāh* thoroughly in his *Kitāb al-Siyar*.
89 Shaybānī, *Siyar*, 5:254.12ff.; *idem*, *Ḥujja*, 3:46.5ff., 56.5ff. and 19ff. However, according Abū Ḥanīfa, it is permissible to dispose of the usufruct of the asset by bequest, on the condition that the asset’s value does not exceed one-third of the estate (see *ibid.*). In other
short, Abu Hanifa treated *habs* in the same way as he treated the *ruqba* (cf. section I 2.2).

A critical position towards *habs* is attributed to the majority of early *Ibâdî* scholars, as well as to Ibrâhîm al-Nakha‘î. These scholars invoked a series of traditions on *habs* that circulated in different variants and were sometimes fused with each other. The common leitmotiv of these traditions is the notion of a conflict between *habs* and the “shares of God” (*farâ'id Allah*), i.e., the rules of inheritance as prescribed in the Qur'ân.

In part, these traditions state that *habs* was ‘abrogated’ by the ‘shares of God’.90 Abu Ghânim, for one, relates the following:

I asked Abu l-Mu’arrij and Ibn ‘Abd al-‘Azîz [for their opinions] regarding a man who endows his house, his land, or any other asset (*mâl*) as *habs* fi *sabil Allâh*. Abu l-Mu’arrij replied: I sat with Abu ‘Ubayda when he was asked about this, and [Abu ‘Ubayda] replied that Ibn ‘Abbâs said: “The *habs* was before *Sûrat al-Nisâ’* [i.e. *Sûra* 4, N.O.] was revealed, and when that *Sûra* was revealed, the ‘shares’ abrogated the *habs* (*nasakhat al-farâ'id al-habs*)”. Ibn ‘Abd al-‘Azîz said that regarding this [position] there is no dissent among our jurists and among our companions whose opinions we share and upon whom we rely, because [of the principle that there must be] no *habs* in defiance of the shares of God (*li-annihu là habs an farâ'id Allâh*).91

words: Abu Hanifa accepted a testamentary *habs*. The passage in question does not tell us anything about the legal consequences of such a *habs*.

90 The contention that *habs* was ‘abrogated by the shares of God’ is strikingly reminiscent of the position held by many jurists of the 2nd century AH with regard to the ‘bequest verses’, i.e., Q 2:180 and 2:240, which prescribe that a person contemplating death must leave a bequest for his wives, parents and close relatives. Many 2nd century jurists held that the ‘bequest verses’ had been abrogated by the ‘inheritance verses’, i.e., Q 4:11-12, which award wives, parents and certain other relatives specific shares in the estate (see David S. Powers, *Studies in Qur'an and Hadith. The Formation of the Islamic Law of Inheritance* [Berkeley et al. 1986], 149ff.). The position is attributed *inter alia* to Ibn ‘Abbâs (ibid.), who is also the one who reportedly held that *habs* was abrogated by the shares of God (see below).

91 Abu Ghânim, *Mudawwana*, 2:162.21ff. Some scholars translate the phrase “*li-annihu là habs an farâ'id Allâh*” as “no *habs* in circumvention of the shares of God” (see e.g. Hiroyuki Yanagihashi, “The Doctrinal Development of *Marâd al-Mawt* in the Formative Period of Islam,” *Islamic Law and Society* 5:3 (1998), 326-58 [at 344]; Hennigan, *The Birth of a Legal Institution*, 93). However, the translation of the preposition “*an*” as “in circumvention of” implies an interpretation of the respective tradition as a ban on only such *habs* that actually
The phrase at the end of this quote—lā ḥabs ‘an farrā‘īḍ Allāh—was a common slogan of ḥabs-critical discourse. It recurs in other traditions, sometimes without an explicit reference to abrogation. In most cases, the phrase is embedded in a conversation with the legendary Iraqi Qâdî Shurayh b. al-Ḥarîth (d. between 697 and 717 CE). Shaybânî, for instance, relates the following version:

Suflîn b. ‘Uyaynî related from ‘Aṭâ‘ b. al-Sâ‘îb: I said to Shurayh: Oh Abû Umayyâ, give me a fatwâ! Shurayh answered: Oh my brother’s son! I am a qâdî, not a mufti! I replied: Egad, I do not intend litigation! [But] a man from the ward made his house a ḥabs. Then, just after [Shurayh] had entered [viz. the court room?], I heard him talk to a man who was [about to be?] approached by his legal adversaries and he informed the man, saying: no! No ḥabs in defiance of the shares of God!92

Jurists of the 2nd century AH differed in their interpretation of this ḥabs-critical ḥadîth material. According to Shâfi‘î, the statement “lā ḥabs ‘an farrā‘īḍ Allāh” does not imply an outright ban on ḥabs. Nor was ḥabs per se abrogated. Both the tradition and the abrogation were concerned only with a ḥabs that would actually collide with the inheritance rules. That was the case only if the value of the endowment exceeded one-third of the settlor’s estate or if it was in favor of a legal heir. Be that as it may, a collision with the rules of inheritance could occur only if the ḥabs were created by means of a testamentary disposition. Failing this—Shâfi‘î argued—the ḥabs must be treated by analogy to an ordi-

92 Shaybânî, Ḥujja, 3:64.3ff. According to my interpretation of the text, the conversation between ‘Aṭâ‘ and Shurayh took place outdoors and was followed by Shurayh’s entry—presumably into the court room—where he talked to the third, anonymous person. However, the text is not clear in this respect: “[...] akhbaranâ Sufyân b. ‘Uyaynî ‘an ‘Aṭâ‘ b. al-Sâ‘îb qâla: qultu li-Shurayh: yâ abâ umayyâ aﬁnî, qâla: yâ bna akhi innamâ ana qâd“ wa-lastu bi-muṣṭî”, fa-qultu: inni wa-Allâhî lâ wridu khusûma inna rajul“ min al-hayyi ja‘ala dârâbu ḥabs“, qâla: fa-sami’tuwa-qad dakhala wa-huwa yaqûtul-ni rajul kâna yâqrubu al-khusûma lâ yâkhbâra l-rajul al-lâ lâ ḥabsa ‘an farrâ‘īḍ Allâh.” For a variation of this Shurayh-ḥadîth”, see ibid., 60.1ff.

‘circumvent’ the rules of inheritance, e.g. a testamentary ḥabs in favor of an heir. As I shall show below, some jurists of the 2nd century AH understood the tradition as a general ban on ḥabs—an interpretation that probably rested on the notion that the Qur’ānic rules of inheritance abrogated the institution of ḥabs altogether. In order to avoid a specific interpretation, I prefer to translate the phrase as “no ḥabs in defiance of the shares of God”.

92 Shaybânî, Ḥujja, 3:64.3ff. According to my interpretation of the text, the conversation between ‘Aṭâ‘ and Shurayh took place outdoors and was followed by Shurayh’s entry—presumably into the court room—where he talked to the third, anonymous person. However, the text is not clear in this respect: “[...] akhbaranâ Sufyân b. ‘Uyaynî ‘an ‘Aṭâ‘ b. al-Sâ‘îb qâla: qultu li-Shurayh: yâ abâ umayyâ aﬁnî, qâla: yâ bna akhi innamâ ana qâd“ wa-lastu bi-muṣṭî”, fa-qultu: inni wa-Allâhî lâ wridu khusûma inna rajul“ min al-hayyi ja‘ala dârâbu ḥabs“, qâla: fa-sami’tuwa-qad dakhala wa-huwa yaqûtul-ni rajul kâna yâqrubu al-khusûma lâ yâkhbâra l-rajul al-lâ lâ ḥabsa ‘an farrâ‘īḍ Allâh.” For a variation of this Shurayh-ḥadîth”, see ibid., 60.1ff.
nary gift (*hiba*), which no one considered a violation of the rules of inheritance, so long as it was made *inter vivos*, and which—as a consequence—was unaffected by the restrictions on the *waṣiyya*.\(^{33}\)

Shāfī‘i interpreted the ḥadīth material under discussion in a manner that preserved the fundamental legitimacy of *hiba*. However, most early jurists whose interpretations of the material have come down to us took a different position: The early Ibāḍis, for instance, interpreted the material as an outright ban on *hiba*—with the exception only of Ibn ‘Abd al-‘Azīz, who accepted *hiba* if it was created *fi sabūl Allāh*.\(^{34}\) Shaybānī relates a similar position from Ibrāhīm al-Nakha‘ī, according to whom every *hiba* is a *hiba* in defiance of the shares of God, except for weapons and horses endowed *fi sabūl Allāh*.\(^{35}\) Moreover, Shaybānī relates a ḥadīth that is unequivocal in its blanket rejection of *hiba*, and which may well have been circulated in order to counter permissive interpretations, such as that of Shāfī‘i. The ḥadīth flatly states that “there is no *hiba* in Islam (*lā *hiba* *fi l-islām)*.”\(^{36}\)

Clearly at least some early jurists took a very critical stance toward *hiba*. It is difficult, however, to identify the specific reasons for their attitude. The ḥadīth material vaguely points in the direction of the rules of inheritance. However, it is not at all clear what collision the jurists had in mind when suggesting that *hiba* was “in defiance of the shares of God (*‘an farā’īd Allāh*)”. Moreover, some jurists were categorical in their rejection of *hiba*, despite the fact that it is difficult to see how some types of *hiba* could possibly collide with the rules of inheritance. A *hiba* *fi sabūl Allāh*, for instance, does not affect inheritance more than any other alienation of property.\(^{37}\)

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\(^{33}\) Shāfī‘i, *Umm*, 4:57.15ff.


\(^{36}\) Ibid., 3:60.6ff. The tradition is attributed to the Prophet, who reportedly made the statement as a comment on the revelation of Sūra 4.

\(^{37}\) Those jurists who cite the ḥadīth material to substantiate a categorical rejection of *hiba* may have understood “*lā *hiba* *an farā’īd Allāh*” in a technical sense, which would bring us back to the abrogation-motif: There can be no legitimate *hiba* once Sūra 4 (which contains the *farā’īd Allāh*) had abrogated that institution. According to this understanding, the preposition *an* (in *lā *hiba* *an farā’īd Allāh*) signifies a general collision, rather than a specific
On the other hand, criticism of *habs* was not confined to outright rejection. Some *habs*-critical jurists distinguished between various types of *habs*: The endowment of weaponry and horses seems to have been more widely accepted than other forms of *habs fi sabil Allâh* (cf. Ibrâhîm al-Nakha'î's position above), and *habs fi sabil Allâh* generally was more widely accepted than *habs* in favor of persons (cf. the position of Ibn 'Abd al-'Azîz). In other words, the *habs* in favor of persons was apparently regarded as particularly problematic. This may indicate that the institution envisaged by early jurists when rejecting the *habs* in favor of persons was actually the *habs* in favor of persons, as understood by the early Medinese, viz. a life estate analogous to the *'umrâ*. For that institution may indeed result in a modification of inheritance: If the beneficiaries outlive the settlor, inheritance of the asset by the settlor's heirs is deferred. If the beneficiaries also outlive one or more of the settlor's heirs, the latter are deprived of inheritance (viz. the same effects as described above in section II 2.2 with regard to the *'umrâ*).

Mâlik's doctrine on *habs*, to be analyzed in the following section, was probably a reaction to the criticism of *habs*. At the same time, his understanding of *habs* was the cornerstone of a doctrinal development that gradually changed *habs* into an institution markedly different from its original 'prototype' modeled on the *'umrâ*.

4. Mâlik's Doctrine on Habs in Favor of Persons

Mâlik's doctrine on *habs* in favor of persons is documented in the *Mudawwana*, where Sahnûn presents his legal opinions in the same casuistic fashion as those of the earlier Medinese jurists: Sahnûn's account is a series of statements, each of which refers to a specific combination of (1) the terminology used by the settlor (*habs/Sâdâqâ/Sâdâqa mawqûfa*) and (2) the nature of the group of beneficiaries (determinate/indeterminate). Each combination is assessed with respect to its legal effects and consequences. For the sake of clarity I present these combinations and their legal effects in tabular form. With regard to one infringement of certain rules of inheritance. This understanding, however, is not explicit in the sources.

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For Mâlik's legal position on *habs* in favor of persons, see Sahnûn, *Mudawwana*, 4:392.23 to 393.18; 419.20-25; 420.12-24.
combination (viz. no. 4), Mālik is said to have held two different positions regarding its legal effects. In the table, I identify those two positions as (a) and (b) respectively.

<table>
<thead>
<tr>
<th>Terminology</th>
<th>Nature of the group of beneficiaries</th>
<th>Legal effects</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 sadqa</td>
<td>indeterminate</td>
<td>property rights are suspended ... and the settlor's next of kin enjoy the right of usufruct after the death of all beneficiaries</td>
</tr>
<tr>
<td>2 ḥabs</td>
<td>indeterminate</td>
<td>as above</td>
</tr>
<tr>
<td>3 sadqa mawqūfa or ḥabs ṣadqa</td>
<td>determinate</td>
<td>as above</td>
</tr>
<tr>
<td>4 ḥabs</td>
<td>determinate</td>
<td>... and the settlor or his heirs enjoy full property rights after the death of all beneficiaries</td>
</tr>
</tbody>
</table>

Mālik understood ḥabs in a manner similar to the understanding of earlier Medinese jurists. In identifying the combinations of terminology and nature of beneficiaries that trigger the suspension of property rights, he follows the scheme encountered in earlier Medinese doctrine: If the beneficiaries are an indeterminate group, property rights are always suspended—irrespective of whether the settlor uses the term sadqa or ḥabs. If, on the other hand, the beneficiaries are a determinate group, the terminology used becomes relevant: If the settlor uses the term ḥabs, property rights are suspended. If he uses the term sadqa, property rights are suspended only if he characterizes his donation as sadqa mawqūfa (or, alternatively, as ḥabs ṣadqa, a term that is not considered in the statements attributed to earlier jurists). If the settlor does not distinguish his sadqa in this way, title is transferred to the beneficiaries.

To this point, Mālik’s position is practically identical to that of earlier Medinese doctrine. It departs from that doctrine, however, when it comes to the question of what happens with the asset after the benefi-
ciaries' death: According to earlier Medinese doctrine, the asset reverts in full ownership to the settlor or his next of kin. According to Mālik, the asset reverts to the settlor's next of kin, but only as a usufructory entitlement. Thus, the property rights remain suspended in perpetuity. As for the settlor himself, he is forever barred from even the usufruct of the asset he endowed.

With regard to one of the above-mentioned combinations—viz. no. 4 ("habs" + determinate beneficiaries)—Saḥnūn informs us of a second, alternative position attributed to Mālik: According to that position, a habs in favor of a determinate group of beneficiaries does revert to the settlor (or his next of kin) as alienable property—just as Mālik's predecessors had held (cf. no. 4b).

How should we interpret these legal positions attributed to Mālik? On the face of it, it seems that Malik's doctrine already reflects the above-described 'classical' conception of waqf, viz. the notion that an endowment always entails a perpetual suspension of property rights. If we interpret Malik's position in this way, then the alternate position regarding constellation no. 4 may be interpreted as a residue of an earlier phase of Malik's thinking in which he still adhered to traditional Medinese doctrine.

One reaches a different interpretation if one considers yet another legal opinion related by Saḥnūn from Mālik: That legal opinion concerns a type of endowment that Saḥnūn refers to as 'habs', but that in fact was a combination of the 'donation to the last' (hiba li'l-ākhīr) described in section II 2.1 and the ruqbā: It is an endowment in favor of two persons, with the stipulation that the survivor shall enjoy full property rights.99 Mālik accepted this type of endowment. Apparently, it did not disturb him—in this case—that the habs becomes alienable property again. In other words: Even Mālik did not yet take it as a

99 Saḥnūn, Mudawwana, 4:392.18ff. I assume that according to Mālik, such a habs could also be made in favor of more than two persons, but the Mudawwana does not explicitly state so. The habs under discussion differs from the hiba li'l-ākhīr in that the latter involves a full-fledged donation to the last of a series of successive beneficiaries, whereas with the former, the full-fledged donation is in favor of the last survivor within a circle of beneficiaries who are entitled to usufruct as a group. The ruqbā, in turn, differs from the habs under discussion in that it involves a full-fledged gift to the surviving party (viz. donor or beneficiary), and not to the last survivor within a group of beneficiaries.
matter of course that habs entails suspension of property rights in perpetuity.

Note, however, that this ‘donation to the longest-lived’—as one might call it—differs from the four combinations described above in that the asset becomes the property of a beneficiary, and not that of the donor or his heirs. Mālik’s position on this donation suggests that we should interpret his habs-doctrine as a whole as follows: Mālik was not troubled by the prospect that habs becomes alienable property again, but rather by the prospect that it reverts to the settlor or his heirs. For the same reason, Mālik prohibited the settlor from reacquiring any usufruct rights.

Why was Mālik troubled by the prospect that a habs may revert to the settlor? This question brings us back to the issue of the revocability of donations (cf. section I 1.2). It will be recalled that Mālik regarded donations as strictly irrevocable. Regarding sadaqa, he held that it must not return to the donor in any way—through sale, as inheritance, or by gift. This general prohibition for a donor to reacquire his sadaqa was the reason why Mālik held that habs must never again become the property of the settlor and that the settlor cannot reacquire even a usufructory right to his own habs. For Mālik, habs was conceptually related to sadaqa. Indeed, it was merely a type of sadaqa. As a consequence, the same rules must apply to both institutions.

The same logic applies to Mālik’s position that even the settlor’s heirs are barred from ownership of the habs: Traditional Medinese doctrine granted the heirs that ownership for a specific reason: they inherited it from the settlor. Since Mālik refused the settlor such title, it was only consistent to do the same with the settlor’s heirs.

Why, then, did Mālik grant the settlor’s next of kin a right of usufruct, even though a person’s next of kin typically include his legal heirs? Presumably, Mālik regarded the settlor’s next of kin as obvious, ‘natural’ beneficiaries of a habs or sadaqa (as he did with the poor, cf. section II.1). Thus, in the absence of any specific stipulation regarding beneficiaries, a usufructory entitlement passes to the next of kin. In other words: when Mālik grants the settlor’s heirs a usufructory entitlement to the habs, he grants them that entitlement because they are next of kin, not because they are the settlor’s heirs. This explains why the settlor’s heirs may enjoy such a right, whereas the settlor himself may not.
This interpretation of Mālik’s position is corroborated by another statement attributed to him: Here Mālik explains that if a settlor’s next of kin (awlá al-nās bihi) become entitled to the usufruct of a habs after the death of the beneficiaries, they do so regardless of whether or not they are legal heirs. At the same time, Mālik explains that with respect to this widely defined circle of relatives, entitlement is limited to those who are needy (dhawū l-hāja). In other words, entitlement is enjoyed by the ‘intersecting set’ of the two groups regarded as the ‘natural’ beneficiaries of a habs: viz. the needy and relatives.

Compared to earlier Medinese doctrine, Mālik went a step further in the conceptual integration of habs and sadaqa: He reasoned that if habs is a form of sadaqa, it must be subject to the same restrictions regarding the revival of property rights. The alternating positions attributed to Mālik regarding combination no. 4 (“habs” + determinate beneficiaries) may also be interpreted in this light: In that combination, the benefactor does not explicitly designate his endowment as a sadaqa—and this may have initially deterred Mālik from subjecting this type of endowment to the ‘taboo of return’. The alternative position—which is probably the later one—already reflects Mālik’s novel point of view that habs is always a sadaqa, irrespective of the terminology used by the settlor.

In view of the fact that Mālik accepted the ‘umrā, his position regarding habs appears inconsistent. After all, the ‘umrā is a donation that ultimately returns to the donor or his heirs. Why did Mālik reject this legal effect when it comes to habs or sadaqa? His position appears to be formalistic and detached from reality. After all, this position did not deter settlors from endowing property in such a way that the asset eventually would return to them: All that was required was to designate the endowment as an ‘umrā.

100 Literally, the text states that the next of kin are entitled regardless of whether they are “his children or his agnates, male or female” ([...] tarjī’u ilā awlá al-nās bihi [i.e. bi’l-muhabbis, N.O.] min waladīhi aw ‘asabatīhi dhukūrhum wa-ināthhum yadkhulūna fī dhālikā), see Sahnūn, Mudawwana, 4:392.23ff. In another statement attributed to Mālik, the grandchildren, too, are included among the beneficiaries (“[…] ‘asabatuhu kānū aw waladu waladihi”, ibid., 393.12ff.).

101 Ibid.
One must keep in mind, however, that Islamic law is not only about legal effects, but also about ethics. It focuses not only on the consequences of an act in this world but also on its consequences in the world to come. From this point of view, Malik's distinction between habis and 'umrā is more than mere formalism. Admittedly, Malik did not forbid a benefactor from creating a life estate, but at the same time, he made it clear that life estates are neither habis nor sadaqa, and thus are not pious acts entailing reward in the hereafter.

Malik's doctrine on habis is best understood as a compromise and concession to jurists who rejected both 'umrā and habis. Presumably, Malik's novel conception of habis was much more acceptable within these circles than the older conception of habis as identical to 'umrā. It no longer permitted what the 'umrā allowed, viz. to donate assets without renouncing title in perpetuity. As a consequence, habis could no longer interfere with the rules of inheritance. Instead, the donation of an asset as habis entailed that the asset was completely and irretrievably withdrawn from the settlor's inheritable estate. In the long run, however, usufructory entitlement was reserved for the settlor's offspring, and thus 'stayed in the family'.

This compromise understanding of habis turned out to be more generally acceptable than the older model that equated it with 'umrā. We know of at least one jurist who accepted this new understanding of habis notwithstanding his rejection of 'umrā—viz. Shafi'i. Regarding habis in favor of persons, Shafi'i held virtually the same position as Malik: After the beneficiaries' death, the asset passes to the settlor's next of kin, who acquire the right of usufruct but not title. As regards 'umrā, it will be recalled, Shafi'i treated it as an ordinary gift (hiba) (cf. section I 2.2). Shafi'i, too, seems to have associated this position regarding habis with the notion that habis is subject to a 'taboo of return': The habis, he states, is not merely irrevocable, nay it must not return to the settlor in any way—by way of either repurchase or inheritance.

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102 Shafi'i, Umm, 4:57.21ff.
103 Ibid., 4:54.16f., 56.12f.
5. **Further Developments: Shaybānî, Hilāl al-Ra'y and Khaṣṣaf**

The understanding of *habs* that we find in the doctrines of Mālik and Shāfi‘ī was only a passing stage in the evolution of endowment doctrine. By the time of Shaybānî a new understanding of *habs* had emerged. This understanding was already fully developed in the doctrine of the Ḥanafi scholars Hilāl al-Ra'y (d. 859 CE) and Khaṣṣaf (d. 874 CE). Ultimately, it would prevail in classical law.

Shaybānî criticizes Mālik's position, which he identifies as “the position of the Medinese”. Specifically, he censures the compromise character of that position, which he castigates as inconsistent: *Habs*, Shaybānî argues, may be understood either as a transfer of title, in which case it must be treated like an ordinary gift, or as the exclusive transfer of the right of usufruct—in which case it follows that the settlor or his heirs acquire full property rights upon the beneficiaries' death. The 'Medinese' solution, on the other hand—viz. the position that the settlor's heirs enjoy only usufructory rights—has no legal basis. After all, the settlor did not stipulate that his heirs would enjoy such rights—and what else, if not such a stipulation, might possibly be the legal basis for awarding them such rights?  

Shaybānî held a different position. In his view, a *habs* in favor of persons is invalid from the start, unless the settlor stipulates that, once the beneficiaries have died, the endowment be used to aid the poor or for some other purpose ‘fi sabil Allāh’. In the absence of such a stipulation, the endowment does not become legally binding: The settlor can revoke it at will, as can his heirs upon his death.

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104 Shaybānî, *Hujja*, 3:46.4ff. In the passage under discussion, Shaybānî mentions the settlor’s “heirs” (*wartha*). It will be recalled that Mālik held that the next of kin (*awlā al-nās bi'l-mubahbi/laqrab al-nās bihi*) is entitled to the usufruct, including relatives who are not legal heirs (cf. section II 4).


107 Khaṣṣaf, *Akhām*, 19.3ff. By holding this position, Khaṣṣaf basically treats an invalid *habs* like a loan (*a'riya*), which is revocable at will and ceases to exist upon the lender's death. However, according to Khaṣṣaf, one person may grant another a lifelong right of usufruct by means of a bequest (*waṣiyya*). Both Khaṣṣaf and Hilāl al-Ra'y held that such a
Shaybâni's position did not result from the conviction that ḥabs—as a form of sadaqa—must serve some 'real charity' lest the requirements of a sadaqa not be met. It will be recalled that sadaqa is not exclusively defined as a donation to the poor, and that a donation in favor of relatives, for instance, qualifies as sadaqa even without an ultimate gift to charity (see section 1 1.1). The special attribute of the purposes commonly summarized under the term "fi sabil Allāh" is not that they are acceptable as a purpose for sadaqa. Rather, it is their perpetuity: A person will die sooner or later, and even his progeny eventually will become extinct. The poor, on the other hand, are a class of beneficiaries about which the jurists implicitly assumed that it would last forever. According to one hadith, jihād also will last until the end of time.¹⁰⁸

Why did Shaybâni and his later school companions insist that the settlor of a ḥabs stipulate some perpetual purpose? Like Mālik and Ṣāḥīḥ, these scholars started from the premise that ḥabs must never again become the property of the settlor's family. This premise, however, gave rise to a problem: If a ḥabs may not revert to the settlor's family, then what shall be done with it after all beneficiaries have died?

Mālik and Ṣāḥīḥ handled this problem by granting the settlor's next of kin a right of usufruct. This, however, did not really solve the problem, but merely deferred it: Once the settlor's kin died, the problem rose again. Moreover, it is difficult to dismiss Shaybâni's criticism of Mālik's and Ṣāḥīḥ's position as inconsistent. From a systematic point of view, it really is not coherent to grant the settlor's next of kin a right of usufruct upon the beneficiaries' death. After all, the settlor did not stipulate that his kin shall be beneficiaries—and what, if not a stipulation by the settlor, could be invoked to substantiate this position? Indeed the position appears arbitrary, and it seems that it was primarily born of an effort to save at least some entitlement for the settlor's offspring, because the 'maximum demand'—viz. to grant the settlor's disposition is legally binding. As a testamentary disposition, it is subject to the 'one-third restriction'. After the beneficiary's death, the asset becomes the property of the testator's heirs (see Khassāf, Ahkām, 19.15ff.; Hilāl al-Ra'y, Ahkām, 138.11ff.). According to Hilāl, a testamentary waqf that does not contain a stipulation regarding the ultimate purpose of dedication has the same legal effect: Such a disposition does not constitute a valid waqf, but it is legally valid as a testamentary disposition (see ibid., 139.4ff.).

¹⁰⁸ See Abū Dāwūd, Sunan, 5 vols. (Beirut: Dār b. Ḥazm, 1997), 3:30, hadith no. 2532.
heirs full title—had failed to gain acceptance in legal discourse. Shaybânî’s solution is more consistent: The prerequisite that the settlor of a habs stipulate a perpetual purpose ensured that some group or purpose would always be entitled to the asset—an entitlement that rested on the settlor’s express stipulation.

In Hilâl al-Ra’y’s treatise on waqf, it is clear that the essential element of an endowment’s validity is the perpetuity of its purpose, and not its charitable character: Hilâl explains that there are different ways for a settlor to stipulate the ultimate gift to the poor. One way was to specify that the endowment shall be “for the destitute” (li’l-masâkin). Another was for the settlor to designate the endowment as “sadaqa”, which, in the absence of any specification, must always be awarded to the poor.109 It did not suffice, however, to designate the endowment as “habs” or “waqf”, because those terms were equivocal: they implied donations to both poor and rich. What troubled Hilâl was not the prospect that a rich person might benefit from the endowment. Instead, he was concerned that the purpose of the endowment was not sufficiently determined: the endowment, he argued, is a waqf without a specified purpose—and such a waqf is void. 110

Any endowment that lacks a perpetual purpose will eventually become a ‘waqf without a specified purpose’. Hilâl illustrates this with another example of an invalid endowment, viz. a waqf created in favor of the orphans of a specific family. According to Hilâl, this endowment is void ab initio. Once again, he does not find fault with the circumstance that the orphans might be well-to-do. The problem is rather that the purpose of the endowment—albeit sufficiently specified—is not perpetual. It is quite possible, Hilâl argued, that one day the family in question would no longer include any orphans. At that point, one would not know what to do with the asset. Apparently, Hilâl did not

109 Hilâl al-Ra’y, Abkâm, 4.3ff.
110 Ibid., 4.11ff.: “[...] li-anna hâdha waqf”“ wa-lam yusammi subulahu wa-wujûhabu fi’l-waqf’alä hädha bâti’. Abu Yusuf and ‘Uthmân al-Batti, in contrast, held that the term ‘mawqûf’—like ‘sadaqa’—always implies a donation to the poor (ibid.). Khâṣṣâf, on the other hand, held that the term “sadaqa” is insufficient to effect a valid waqf: it is necessary to add “for the destitute “(li’l-masâkin) or at least “for all eternity” (li’l-abad) (Khâṣṣâf, Abkâm, 20.11. In another passage of that work, however, Khâṣṣâf apparently adopts the same position as Hilâl, see ibid., 31.13ff.).
consider it a legitimate option to award the endowment to the poor. Presumably, he objected to this solution because it did not rest on an express stipulation by the settlor. As a consequence, Hilâl held that the endowment is void from the outset. In his opinion, an endowment is valid only if the settlor has dedicated it to some pious purpose that never ends (wâjh min wujûh al-birr là yânqâtî'llâ yuhâtu).\textsuperscript{111}

The position held by Shaybânî and his later school companions presents a consistent solution to the problem of what to do with an endowment after the beneficiaries' death. At the same time, this solution undermined the carefully balanced compromise found in Mālik's doctrine. Shaybânî's doctrine meant that habs might no longer return to the settlor's offspring—indeed they were not even entitled to usufruct, as under Mālik's doctrine. In this respect, this new doctrine was a more radical implementation of the 'taboo of return'.

It is not clear, however, whether Shaybânî actually invoked this taboo in order to substantiate his position. He clearly was familiar with the hadîth material on which this taboo rested: Shaybânî himself relates the above-mentioned tradition that compares a donor who returns to his sadaqa to a dog that returns to its vomit.\textsuperscript{112} However, the specific notion that habs must not 'return' to the settlor or his heirs because that would amount to a return to one's own sadaqa, is unattested for Shaybânî. This may be due to the scarcity of information that has come down to us regarding Shaybânî's doctrine on habs. On the other hand, Hilâl al-Ra'îy and Khaṣṣāf, whose doctrines on waqf are well documented, make no reference to the 'taboo of return'. In their thinking, the notion that habs involves a perpetual suspension of property rights has already assumed the quality of an axiomatic proposition. It has also assumed an all-encompassing character: Hilâl and Khaṣṣāf no longer apply that notion specifically to the property rights of the settlor or his heirs, but to property rights in general. To substantiate this understanding of habs, Hilâl and Khaṣṣāf invoke the example of the Companions of the Prophet who reportedly understood habs in the exact same way.\textsuperscript{113}

\textsuperscript{111} Hilâl al-Ra'îy, \textit{Ahkâm}, 11.2ff. and 11ff.
\textsuperscript{112} Shaybânî, \textit{Siyar}, 4:251.5ff.
\textsuperscript{113} Khaṣṣâf, \textit{Akhâm}, 19.3ff. Much of that exegetical reasoning is already put forth by Shaybânî (\textit{Hujja}, 3:58.1ff. and 65.4ff.).
This understanding of *habs* as an endowment that by definition involves a perpetual suspension of property rights would prevail in later legal discourse. In classical law it is maintained by jurists of all schools. Only in the Mālikī tradition does one occasionally find the notion that a *habs* may be endowed temporarily (which includes *habs* created as a life estate).114

The prevalence of the new understanding of *habs* meant that life estates were no longer permissible—as either 'umrā or as *habs*. Instead, the life estate was merged with the institution whose name it had originally borrowed, viz. the *habs fi sabīl Allāh*. According to the new understanding, a *habs* in favor of persons is basically a variation of the *habs fi sabīl Allāh*. It differs from an ordinary *habs fi sabīl Allāh* only in that the ultimate donation to the perpetual cause is temporarily preceded by the lifelong entitlement of those persons whom the settlor specifically designated as beneficiaries.'

The triumph of this new understanding of *habs* was also a triumph of those circles who wished to restrict freedom of contract in the realm of donations. Mālik's effort to preserve some latitude for donors to arrange their beneficence according to needs and circumstances was eventually unsuccessful. Shāfi'ī relates a tradition that beautifully encapsulates the conflict between these opposing attitudes towards contractual freedom, but also foreshadows the eventual victory of the restrictive position. The tradition is attributed to Habīb b. Abī Thābit (d. 738 CE), who is said to have reported:

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114 See *EP* s.v. Wakf (R. Peters), 61b and 63b, and Layish, “The Mālikī Family Waqf according to Wills and Waqfiyyāt,” *Bulletin of the School of Oriental and African Studies* 64:1 (1983), 1-32 [at 4f.], with further references. These findings are consistent with the evidence regarding 'umrā: The 'umrā is still widely accepted in classical Mālikī law, see *Mawsū’a Fiqhiyya* (Kuwait), article ‘umrā, and *Mawsū’at ilsilat al-maṣādir al-fiqhiyya*, 28:65 (= Qurṭubi, al-Kāfī) and 308 (= Ibn Rushd, *Bidāyat al-Mujtahid*). Ibn Rushd characterizes the acceptance of the ‘umrā as the position of “Mālik and his companions”. Ibn Rushd himself, however, holds that an ‘umrā returns to the donor or his heirs only if the donor gives the ‘umrā to a person without giving it to that person’s offspring as a second class of beneficiaries. Otherwise the ‘umrā must be treated as an ordinary gift, viz. the asset becomes the inheritable property of the beneficiary.

115 This understanding of the *habs* in favor of persons as a mere variation of a *habs fi sabīl Allāh* is particularly evident in a statement of Hilāl al-Ra’y: He describes the (valid) *habs* in favor of persons as a *habs* in favor of the poor, the proceeds of which are reserved for the persons in question so long as they live (Hilāl al-Ra’y, *Aḥkām*, 9.14ff.).
I was with Ibn 'Umar when a Bedouin approached him, saying: "I gave this son of mine a camel mare as a donation for life, and it has calved". Whereupon Ibn 'Umar replied: "[The mare] is his during his lifetime and upon his death". The Bedouin [objected]: "[But] I gave it to him as sadaga!" Ibn 'Umar replied: "That takes [the mare] even further away from you".

In this account, the Bedouin's point of view stands for a naïve interpretation of the law, viz. the view that it is equitable to claim the mare back from the son now that she has calved. After all, the donation was a sadaga, which presumably indicates that the father gave the animal to the son in order to save him from hardship or as seed capital for economic independence. Now that the animal has calved, the son can spare the mare. Why then should the Bedouin, who has acted as caring father, be denied the right to reclaim the camel? Alas, the experts disabuse the Bedouin of that notion. The law does not allow such 'flexible giving'. The fact that the Bedouin had given the camel as sadaga does not entail that he can revoke the gift. To the contrary: that circumstance entails that the father may not recover the camel from his son by any means, including purchase, donation or inheritance.

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