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# 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 *ḥabs fi sabīl Allāh*, a permanent endowment for pious purposes that probably originated in voluntary contributions to jihād; and (2) the *ḥabs* 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 *ḥabs* in favor of persons was gradually modified until the institution eventually lost its temporary character. By the end of the 2nd century, the *ḥabs* in favor of persons had become a variation of the *ḥabs fi sabīl Allāh*: 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, ruqbā, ḥabs fi sabīl Allāh*, 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.[1] 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.[2] One study that does indeed explore early developments is P.C. Hennigan's *The Birth of a Legal Institution*, published in 2004.[3] This book does not fully live up to its title, for Hennigan's primary sources are the Ḥanafī scholars Hilāl al-Ra'y (d. 859 CE) and Khaṣṣāf (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.[4] 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 Mālik (d. 795 CE), the most common form of *ḥabs* 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 Mālik, who insisted that endow-

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1) For 19th century western scholarship on *waqf*, see David S. Powers: "Orientalism, Colonialism and Legal History: The Attack on Muslim Family Endowments in Algeria and India," *Comparative Studies in Society and History* 31:3 (1989), 535-71.

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

3) Peter C. Hennigan, *The Birth of a Legal Institution. The Formation of the Waqf in Third-Century A.H. Ḥanafī Legal Discourse* (Leiden & Boston 2004).

4) Joseph Schacht, "Early Doctrines on Waqf," *Fuad Köprülü Armağanı* (Istanbul 1953), 443-52.

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 '*ḥabs*' or '*ṣadaqa mawqūfa*'. I argue that *ḥabs* 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 *ḥabs* 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, *ḥabs* and *ṣadaqa mawqūfa* were alternative names for the *'umrā*: Settlors began to characterize their life estates as *ṣadaqa*s, a religious denotation that conferred legitimacy and merit on such endowments. The name '*ḥabs*' was chosen for the same reason: it was borrowed from an institution called *ḥabs fī sabīl 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 *ḥabs* or *ṣadaqa* did not succeed in conferring legitimacy on such endowments. The *ḥabs*, 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 *ḥabs* was one important step in this process. Another was the *ḥabs*-doctrine advanced by Shaybānī (d. 805 CE): He insisted that a *ḥabs* 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 '*sabīl Allāh*'—upon the beneficiaries' death. In other words, Shaybānī merged the life estate with the *ḥabs fī sabīl Allāh* from which, initially, it had only borrowed a name. As a result, the life estate became a variation of the *ḥabs fī sabīl Allāh*, 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 Ḥanafī 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:* Ṣadaqa, Hiba *and* Hadiyya

#### *1.1. Definition and Mutual Differentiation*

At the center of the early Islamic discussion of donations one finds the *ṣadaqa*, 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 *'aṭiyya*, derived from *a'ṭā*, 'to give' (see for instance Muḥammad b. Idrīs al-Shāfi'ī, *Kitāb al-Umm*, [9 parts in 5 volumes, together with the *Mukhtaṣar* by Muzanī (= Vol. 5)], ed. Muḥammad Zuhrī al-Najjār (Beirut: Dār al-Ma'rifa, 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 '*ṣadaqa*' was significantly shaped by its usage in the Qur'ān, where the term refers to *zakāt* 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).[7] In other words, the Qur'ān uses the term *ṣadaqa* 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 (*masākin*) or for a pious cause (*fī sabīl Allāh*) are usually referred to as "*ṣadaqas*".[8] Some jurists, however, did not treat the poverty of the recipient or the pious cause as an exclusive defining feature of a *ṣadaqa*. Shāfi'ī (d. 820 CE), for example, held that the recipient of *ṣadaqa* may be a rich person (with the result that the criterion of a pious cause is mooted).[9] Moreover, at least in classical law, a *ṣadaqa* 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 *ṣadaqa*.[10]

The jurists applied the terms *hiba* and *hadiyya* to all donations that were not a *ṣadaqa*. With regard to the distinction between *hiba* and *hadiyya*, there were different opinions. Early Ibāḍīs apparently assumed that a *hadiyya* is sent rather than conveyed personally.[11] This may be an

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[7] On the usage of *ṣadaqa* in the Qur'ān, see *EI²* s.v. Ṣadaḳa (T.H. Weir/A. Zysow), 709.

[8] See for instance Saḥnūn b. Sa'īd at-Tanūkhī, *Al-Mudawwana al-kubrā*, [together with the *Muqaddima* by Ibn Rushd], (Beirut: Dār al-Kutub al-'Ilmiyya, 1994), 4:309.4, 9, 17, 24; 420.4ff.; 429.20; Muḥammad b. al-Ḥasan al-Shaybnī, *Kitāb al-Ḥujja 'alā ahl al-madīna*, 4 vols. (Beirut: 'Ālam al-Kutub, undated = reprint of the Haiderabad edition 1965-71 [1385-90]), 58.4f.

[9] Shāfi'ī, *Umm*, 4:56.26ff.

[10] *EI²* s.v. Ṣadaḳa (T.H. Weir/A. Zysow), 710b.

[11] That the Ibāḍīs understood the *hadiyya* to be a donation made for the sake of obeisance may be inferred from a legal problem discussed in Abū Ghānim's *Mudawwana*: What happens to a *hadiyya* if the beneficiary dies before the gift "has arrived (*waṣala*)"? The Ibāḍīs held that the gift becomes invalid (see Abū Ghānim al-Khurāsānī, *Al-Mudawwana al-kubrā*, 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 (*qabḍ*) 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.[12] Shāfiʿī differentiates between *hadiyya* and *hiba* according to the intention of the donor. For Shāfiʿī, a *hadiyya* is characterized by an expectation of reciprocity: The donor gives with the intention to receive a *quid pro quo*—a "reward" (*thawāb*), as the jurists put it.[13] According to Mālik and the early Ibāḍīs, on the other hand, the expectation of reciprocity is not specific to the *hadiyya*—it may also be present in a *hiba*.[14] 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 *ṣadaqa*.

### *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 (*tamām*) and under what circumstances it may be revoked (*rujūʿ*). 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.[15] 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 *EI²*, s.v. Ṣadaḳa (T.H. Weir/A. Zysow), 712a, as well as *Al-Mawsūʿa al-fiqhiyya* (Kuwait: Wizārat al-Awqāf wa'l-Shu'ūn al-Islāmiyya, 1983 ff.), s.v. Ṣadaqa, 324 b.

[13] Shāfiʿī, *Umm*, 4:56.30ff. By calling this consideration a 'reward' (*thawāb*), the jurists distinguish it from the mandatory consideration in a sale transaction (*bayʿ*), which is called *ʿiwaḍ*. The sources are silent on how explicit the expectation of reciprocity must be in order to vitiate the quality of a donation as *ṣadaqa*.

[14] Saḥnūn, *Mudawwana*, 4:378.22ff., and Abū Ghānim, *Mudawwana*, 2:157.2ff.

[15] Muḥammad b. al-Ḥasan al-Shaybānī, *Al-Amālī* (Hayderabad: Maṭbaʿa Majlis Dāʾira al-ʿUthmāniyya, 1986), 21; Saḥnūn, *Mudawwana*, 4:404.24ff., 412.8ff.; Shāfiʿī, *Umm*, 4:61.14ff.; Abū Ghānim, *Mudawwana*, 2:157.4ff. and 14ff. Abu Ghānim attributes the

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'*).[16]

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 Ḥanafī 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—*ṣadaqa*, *hiba* or *hadiyya* (always on the condition that there was no expectation of reciprocity).[17]

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position in question to Abū '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 done, who must compensate him with the object's counter value (*qīma*) (see Saḥnūn, *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.]).

[16] Saḥnūn, *Mudawwana*, 4:387.22ff., 404.27f. 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 lil-thawāb*', see further Saḥnūn, *Mudawwana*, 4:404.27ff.

[17] For Mālik's position see Mālik b. Anas, *Al-Muwaṭṭa'* (Riwāyat Yaḥyā b. Yaḥyā al-Laythī), (Beirut: Dār al-Nafā'is, 2001), 534.5 ff.; Saḥnūn, *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.[18] If the donation in question is a *ṣadaqa*, 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.[19] 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:[20] 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-

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without *qabḍ* (see ibid.); regarding the *ṣadaqa*, Shāfi'ī attributes the same position to Ibrāhīm al-Nakha'ī (see Shāfi'ī, *Umm*, 4:63.11f. However, according to Abū Yūsuf, Ibrāhīm held that *hiba* and *ṣadaqa* are valid only if the beneficiary takes possession of them, see Abū Yūsuf Ya'qūb Ibrāhīm al-Anṣārī, *Kitāb al-Āthār*, ed. Khadīja Muḥammad Kāmil [Cairo: Dār al-Kutub wa-'l-Wathā'iq al-Qawmiyya, 2005], 163f., ḥadīth no. 751). Shāfi'ī himself held that a donation also becomes ineffective if the beneficiary dies before taking possession of the item (see Shāfi'ī, *Umm*, 4:52.1ff.). According to Mālik, in this case the beneficiary's heirs are entitled to take possession. The donor has no right to bar them from doing so (see Saḥnūn, *Mudawwana*, 4:398.7f., *Muwaṭṭa' Mālik* [recension of Yaḥyā b. Yaḥyā], 534.14f.).

[18] *Muwaṭṭa' Mālik* (recension of Yaḥyā b. Yaḥyā), 534.7f., 535.9; Saḥnūn, *Mudawwana* 4:398.7f. and 387.24ff.

[19] Saḥnūn, *Mudawwana*, 4:391.17ff. Mālik probably held this position because recipients of a *ṣadaqa* typically are not very powerful.

[20] We lack detailed biographical data on Abū l-Mu'arrij and 'Abdallāh Ibn 'Abd al-'Azīz. They both were contemporaries of Rabī' b. Ḥabīb, who died between 796 and 806 CE and, like him, they were pupils of the Ibāḍī scholar and imām Abū 'Ubayda, who died during the caliphate of al-Manṣūr (754 - 775 CE). Nor do we have any biographical data on Abū Ghānim al-Khurāsānī, who transmitted those two scholars' legal opinions in his *Mudawwana*. There is evidence, however, that he wrote the *Mudawwana* towards the end of the 2nd century AH. For detailed information on the above-mentioned Ibāḍī scholars and their works, see E. Francesca, "The Formation and Early Development of the Ibāḍī *Madhhab*," *Jerusalem Studies in Arabic and Islam* 28 (2003), 260-77, and idem, "Early Ibāḍī Jurisprudence: Sources and Case Law," *Jerusalem Studies in Arabic and Islam* 30 (2005), 231-63.

sion of it, and irrespective also of the donation's status as *ṣadaqa*, *hiba* or *hadiyya*.[21]

The positions attributed to Mālik and the early Ibāḍīs indicate that among some early jurists, the revocation of gifts met with fundamental disapproval. This disapproval is expressed dramatically in a prophetic ḥadīth that circulated in different versions, and which these jurists invoked to substantiate their legal position. The ḥadīth compares a donor who "returns" to his donation (*'āda*, 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 '*ṣadaqa*'.[22]

With regard to *ṣadaqa*, some jurists interpreted this tradition as a general prohibition for a donor to reacquire ownership of the gifted item: Mālik, for instance, maintained that a donor may not buy back the item he gave away as *ṣadaqa*, either from the donee or from anyone else who becomes its owner.[23] Some early Ibāḍīs discussed the possibility that a donor's *ṣadaqa* 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.[24] In short, these scholars interpreted the 'return' mentioned in the ḥadīth in a global sense: The reacquisition of the property rights to an asset one has given away as *ṣadaqa* was a general taboo—regardless of the manner in which those rights were reacquired.[25]

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] Abū Ghānim *Mudawwana*, 2:156.27ff. (regarding *hiba*), 158.12ff. (regarding *ṣadaqa*), 161.8ff. (regarding *hadiyya*).

[22] For the variant of the tradition referring to the donation as '*hiba*', see Abū Ghānim, *Mudawwana*, 2:156.1f.; for the variant referring to it as '*sadaqa*', see Saḥnūn, *Mudawwana*, 4:429.22ff. and Muḥammad b. al-Ḥasan al-Shaybānī, *Kitāb al-Siyar al-kabīr*, [with the commentary by Sarakhsī], 5 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 1997), 5:251.5ff.

[23] Saḥnūn, *Mudawwana*, 4:429.25f.

[24] Abū Ghānim, *Mudawwana*, 2:158.14ff. Abū Ghānim attributes the position in question to Abū 'Ubayda and Rabī' b. Ḥabīb.

[25] The notion that one must not reacquire one's own *ṣadaqa* is also found in classical law. Some classical jurists considered it problematic if a donor inherits his *ṣadaqa*, see *EI*[2] s.v. Ṣadaḳa (T.H. Weir/A. Zysow), 714 a.

(*qabḍ*)—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 ḥadīth attributed

to the Caliph 'Umar b. al-Khaṭṭāb (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.[26] 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 *qabḍ*: 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 Shāfi'ī and the Early Ḥanafī Jurists*

A second basic position regarding the completeness and revocability of donations was held by Shāfi'ī, by Shaybānī and—according to the latter's account—by the majority of Ḥanafī scholars, including Abū Ḥanīfa (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 Ibāḍīs, however, they held that a donation is also *revocable* until such time as the beneficiary has taken possession.[27] In other words, these scholars linked completeness and revocability to one and the same criterion, viz. *qabḍ*. 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 *hadiyya*.

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 'Abdallāh b. Mas'ūd (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*

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[26] Shāfi'ī, *Umm*, 4:54.9ff.

[27] Ibid., 4:52.1ff. and 56.7ff. On the Ḥanafīs, see Mālik b. Anas, *Al-Muwaṭṭa'* (Riwāyat al-Shaybānī), ed. 'Abd al-Wāhid 'Abd al-Laṭīf (Beirut: Al-Maktaba al-'Ilmiyya, 2000), 285.1ff. and 9ff., 287.3ff.

and the freedom given to a slave should be collected from the donor on the very day on which the donation is declared.[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 Shāfi'ī and the early Ḥanafīs, which deliberately ignored the aversion felt by Mālik 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 *ṣadaqa*, the classical jurists held a different position: Almost all classical jurists maintained that a *ṣadaqa*—unlike other types of donation—cannot be revoked under any circumstances.[29] Even the 'taboo of return', viz. the notion that a benefactor must not reacquire his *ṣadaqa* in *any* way—e.g., repurchase, inheritance or gift—is still present in classical law.[30] Thus the majority opinion in classical law was a compromise: It qualified Mālik's total negation of revocability without completely abandoning it.

## 2. *Life Estates:* 'Umrā, Suknā *and* Ruqbā

### 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.

Saḥnūn (d. 854 CE) relates of Ibn Shihāb al-Zuhrī (d. 741/2 CE) that he knew a form of donation called "*minḥa*", 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.[31]

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[28] Saḥnūn, *Mudawwana*, 4:429.18f.

[29] *EI²* s.v. Ṣadaḳa (T.H. Weir/A. Zysow), 713b.

[30] Ibid., 714a. See also *Mawsū'a Fiqhiyya* (Kuwait), s.v. Ṣadaqa, 324b and 343a.

[31] Saḥnūn, *Mudawwana*, 4:404.3ff. The *Mawsū'a Fiqhiyya* (Kuwait) provides a description of the *minḥa* (alternatively: *manīḥa*) that differs from the one provided by al-Zuhrī: 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 *ruqbā* and *'umrā*).

Mālik was familiar with this form of donation, which he called "*'umrā*". According to early Mālikī jurists, the *'umrā* could be used to transfer not only slaves but also livestock.[32] It appears, however, that in principle such a transfer was not restricted to slaves and livestock—indeed not even to movables: According to Mālik, a house could be donated as a life estate.[33] The early Mālikī jurists referred to the life estate in a house as "*suknā*" (literally "residence", i.e., the right of abode acquired by the life tenant).[34] The early Ibāḍīs apparently used the terms *'umrā* and *suknā* in a similar way: In Abū Ghānim's *Mudawwana*, *'umrā* is used as a general term for life estates, whereas *suknā* is used specifically with regard to houses.[35]

It is arguable whether *'umrā* and *suknā* should be regarded as 'donations' in the strict sense of the word. In his *Mudawwana*, Saḥnūn treats both terms in the chapter on full-fledged donations (*kitāb al-hibāt*) as well as in the chapter on loans (*kitāb al-'āriya*).[36] Indeed, *'umrā* and *suknā* 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, *'umrā* and *suknā* resembled a loan for a previously stipulated but undetermined period of time.[37] Indeed, the Ibāḍī scholar 'Abdallāh b. 'Abd al-'Azīz expressly characterized the *'umrā* as a kind of loan (*'āriya*).[38]

Early Islamic law also knew variations of the life estate that ultimately turned into a full-fledged donation. Al-Zuhrī relates that the above-mentioned *minḥa* could be made with the specific stipulation that the slave who is gifted as a life estate may become the alienable property of

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32) Saḥnūn, *Mudawwana*, 4:392.13ff. and 451.23ff.

33) Ibid., 4:392.13ff.

34) Ibid., 4:392.23ff.

35) Abū Ghānim, *Mudawwana*, 2:163.13ff. and 190.10ff. According to the early Ibāḍīs, a *suknā* could also be for a stipulated term (see ibid.).

36) Saḥnūn, *Mudawwana*, 4:392 and 451.

37) The early sources do not specify whether the beneficiary of an *'umrā* or *suknā* incurs any liability for damage or maintenance. It is possible that *'umrā* and *suknā* differed from an ordinary loan in this respect.

38) Abū Ghānim, *Mudawwana*, 2:164.20f., where Ibn 'Abd al-'Azīz states that the *'umrā* is made "in the manner of a loan (*'alā jihat al-'āriya*)" and that "it is a loan" (*innahā 'āriya*).

a third party after the life tenant's death.[39] Al-Zuhrī called this transaction a 'donation to the last' (*hiba li'l-ākhir*)—that is, a full-fledged donation to the last of a series of successive beneficiaries.[40] According to al-Zuhrī, 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.[41] The same position is attributed to 'Aṭā' b. Abī Rabāḥ (d. 734), who referred to the transaction in question as "*'umrā*".[42] However, a life estate that ultimately turned into a full-fledged donation was not restricted to slaves. Muḥammad b. 'Abd al-Raḥmān al-Qurashī,[43] for instance, accepted them with regard to any kind of wealth (*māl*).[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 (*'aqb*).[45] According to the Ibāḍī scholar Ibn 'Abd al-'Azīz, he could also stipulate that the asset be used for a pious cause (*fī sabīl Allāh*) after the life tenant's death.[46]

### *2.2. Critique of Life Estates*

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

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[39] Saḥnūn, *Mudawwana*, 4:404.5f. Mālik also accepted this form of donation, see ibid., 392.18ff.

[40] Ibid., 4:404.5f. Al-Zuhrī, in his description of the *hiba li'l-ākhir*, does not mention more than two successive beneficiaries. I assume, however, that in principal there was no restriction on the number of successive beneficiaries.

[41] Ibid., 4:404.6f.

[42] Abū Bakr 'Abd al-Razzāq b. Hammām al-Ṣan'ānī, *Al-Muṣannaf*, ed. Ḥabīb al-Raḥmān al-A'ẓamī, 11 vols. (Beirut: Al-Maktab al-Islāmī, 1983), 9:191, ḥadīth no. 16890. The Basran traditionist Qatāda (d. 735) apparently held the same position (see ibid. ḥadīth no. 16891).

[43] I have been unable to identify this scholar. His opinion was reported to Saḥnūn through a certain Ibn Lahī'a, probably 'Abdallāh b. Lahī'a (715-790 CE). On him see Raif G. Khoury: *'Abd Allāh Ibn Lahī'a (97-174/715-790); juge and grand maître de l'Ecole Egyptienne; avec édition critique de l'unique rouleau de papyrus arabe conservé à Heidelberg* (Wiesbaden 1986).

[44] Saḥnūn, *Mudawwana*, 4:404.7ff.

[45] Ibid., 4:392.23f. (where this position is attributed to Mālik); Shāfi'ī, *Umm*, 4:63.16ff., and Shaybānī in *Muwaṭṭa' Mālik* (recension of Shaybānī), 288.6, ḥadīth no. 812.

[46] Abū Ghānim, *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.[47] The same position is attributed to Mālik by Qurṭubī (d. 1273 CE).[48] 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.[49]

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

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47) *Mawsū'at silsilat al-maṣādir al-fiqhiyya*, ed. 'Alī Aṣghar Marwārīd, 40 vols. (Beirut: Dār at-Turāth al-Islāmī, 1996-2001), 28:210.9ff. (= Kāsānī, *Badā'i' al-ṣanā'i'*) and 204.12ff. (= Qudūrī, *Mukhtaṣar*).

48) Ibid., 28:65 (= Qurṭubī, *al-Kāfī*).

49) Ibid., 28:210.9ff. (= Kāsānī, *Badā'i' al-ṣanā'i'*) and 204.12f. (= Qudūrī, *Mukhtaṣar*).

*ruqbā* exclusively in this mutual form.[50] This suggests that the mutual form may have been the most common one, and that the *ruqbā* was indeed typically used as a means to circumvent inheritance law.[51]

Many early jurists rejected not only the *ruqbā*, but also the *'umrā*, without, however, denying the legitimacy of the *'umrā* outright. Instead, they treated the *'umrā* like an ordinary full-fledged donation (just as Abū Yūsuf did with the *ruqbā*): According to these jurists, an asset donated as *'umrā* becomes the inheritable property of the beneficiary. This position was held by Shāfi'ī, by the Ibāḍī imām and scholar Abū 'Ubayda (d. between 754 and 775 CE) and his pupil Abū l-Mu'arrij, by the Basran traditionist Qatāda (d. 735), the Meccan jurist 'Aṭā' b. Abī Rabāḥ (d. 734) and the Medinese traditionist Jābir b. 'Abdallāh (d. between 692 and 698),[52] as well as by Shaybānī and—according to the latter's account—by the majority of Ḥanafī scholars, including Abū Ḥanīfa.[53] Those who accepted the *'umrā* (i.e. who treated it as a life

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[50] Saḥnūn describes the *ruqbā* exclusively as a mutual arrangement. Mālik reportedly commented on the arrangement with the lapidary remark that "there is no good to it (*lā khayra fihā*)" (Saḥnūn, *Mudawwana*, 4:451.27ff.). Khalīl, in his *Mukhtaṣar*, also describes the *ruqbā* as a mutual arrangement. Like Mālik, Khalīl rejected the *ruqbā* (*Mawsū'at silsilat al-maṣādir al-fiqhiyya*, 28:319.3ff. [= Khalīl b. Isḥāq, *Mukhtaṣar*]). Kāsānī, in turn, describes the unilateral variation (ibid., 210.9ff. [= Kāsānī, *Bada'i' al-ṣanā'i'*]). The Ibāḍī scholar Abū Bakr al-Kindī (d. 1162 CE) describes both the mutual and the unilateral variation (Abū Bakr al-Kindī, *Al-Muṣannaf*, 42 vols. [Oman: Wizārat at-Turāth al-Qawmī wa'l-Thaqāfa, 1983], 27/1:223.2ff.).

[51] An alternative (or supplementary) explanation for the jurists' aversion to *ruqbā* 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-Miṣrī, *'Umdat al-sālik wa-'uddat al-nāsik*/*Reliance of the Traveller*, ed. and transl. Nuh Ha Mim Keller [Delhi, 1991], 378f., 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, 'Aṭā' b. Abī Rabāḥ and Jābir b. 'Abdallāh see Ṣan'ānī, *Muṣannaf*, 9:188, ḥadīth no. 16883; 191, ḥadīth no. 16893; and 192, ḥadīth no. 16897.

[53] Shāfi'ī, *Umm*, 4:65.15ff. Regarding the Ibāḍī scholars, see Abū Ghānim, *Mudawwana*, 2:164.5 and 190.7ff. and 15ff. Regarding the Ḥanafī scholars, see Muḥammad b. al-Ḥasan al-Shaybānī, *Kitāb al-Āthār*, ed. Khālid al-'Awwād, 2 vols. (Kuwait, Damascus and Beirut: Dār al-Nawādir, 2008), 2:594, ḥadīth no. 699; *Muwaṭṭa' Mālik* (recension of Shaybānī), 277f., ḥadīth no. 712. Interestingly, Shaybānī held a different position regarding *suknā*: he

estate) included Mālik, al-Zuhrī,[54] the Ibāḍī scholar ʿAbdallāh b. ʿAbd al-ʿAzīz and—according to the latter's account—the Iraqi jurist Ibrāhīm al-Nakhaʿī (d. ca. 717 CE).[55]

Abū Ghānim relates an argument between Ibn ʿAbd al-ʿAzīz and an anonymous interlocutor in which Ibn ʿAbd al-ʿAzīz fiercely attacks the position that the *ʿumrā* 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 ʿAbd al-ʿAzīz asked—for awarding the beneficiary full property rights even though the donor has obviously not intended a transfer of title?[56] 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 ʿAbd al-ʿAzīz's objection may seem, it misses the very point that his adversaries were trying to make. At bottom, Ibn ʿAbd al-ʿAzīz'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 *ʿumrā* 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 *ʿumrā* or *ruqbā* as an ordinary gift. According to Ibn ʿAbd al-ʿAzīz, however, a degree of contractual freedom should be allowed in the field of donations.

Mālik apparently held the same view. Saḥnūn, who relates Mālik's acceptance of the *ʿumrā* in his *Mudawwana*, adds by way of explanation that according to Mālik "the people follow their own stipulations"

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considered it a loan (*ʿāriya*) that reverts to the owner after the beneficiaries' death. This, according to Shaybānī, was the position of Abū Ḥanīfa and the majority of Ḥanafī scholars (see ibid., 288, ḥadīth no. 812). The same position is attributed to Ibrāhīm al-Nakhaʿī by Ṣanʿānī (see *Muṣannaf*, 9:193, ḥadīth no. 16904). We may infer that according to these scholars, a *suknā*—like any loan—may be revoked by the owner at will.

54) Ṣanʿānī, *Muṣannaf*, 9:188, ḥadīth no. 16883, and 190, ḥadīth no. 16887.

55) Abū Ghānim, *Mudawwana*, 2:164.3 (regarding both Ibn ʿAbd al-ʿAzīz and al-Nakhaʿī). Shaybānī, however, reports that al-Nakhaʿī treated the *ʿumrā* as an ordinary donation (see *Āthār*, 2:593, ḥadīth no. 698).

56) Abū Ghānim, *Mudawwana*, 2:164.3.

(*wa-qāla Mālik al-nās ʿalā shurūṭihim*).[57] 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 *Muwaṭṭaʾ*, the phrase is embedded in a tradition attributed to Qāsim b. Muḥammad (d. 724 or 726 CE): Asked about the *ʿumrā*, 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 illā wa-hum ʿalā shurūṭihim fī amwālihim wa-fī-mā aʿṭaw*).[58]

Critics of the *ʿumrā* could cite traditions in support of their position. In the abovementioned argument, Ibn ʿAbd al-ʿAzīz was confronted with a tradition attributed to the Prophet, according to which the *ʿumrā* belongs to the beneficiary "during his life and after his death (*ḥayātahu wa-baʿda mamātihi*)".[59] Ibn ʿAbd al-ʿAzīz was also confronted with the contention that "the way of *ʿumrā* is the way of inheritance (*sabīl al-ʿumrā sabīl al-mīrāth*)".[60] 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 *ʿumrā* must be treated as part of the beneficiary's inheritable estate, even though the phrase "*sabīl al-ʿumrā sabīl al-mīrāth*" may be interpreted in a different way).[61] Shāfiʿī, 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 *ʿumrā*.[62]

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[57] Saḥnūn, *Mudawwana*, 4:451.23f.

[58] *Muwaṭṭaʾ Mālik* (recension of Yaḥyā b. Yaḥyā), 536, ḥadith no. 1438. Shāfiʿī 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 *ʿumrā* is the way of inheritance" is not an analogy (*qiyās*), but simply an apodictic assertion. Ibn ʿAbd al-ʿAzīz 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] Shāfiʿī, *Umm*, 4:64.19ff. The tradition cited by Shāfiʿī, which is formulated differently than the statement attributed to Ibn ʿAbd al-ʿAzīz's anonymous interlocutor, is expanded in order to include the *ruqbā*: "*lā tuʿmirū wa-lā turqibū wa-man uʿmira shayʾan aw urqibahu fa-huwa sabīl al-mīrāth*". Another compiler who relates numerous traditions that support a critical position toward the *ʿumrā* is Ṣanʿānī (see *Muṣannaf*, 9:186, ḥadith no. 16875f.; 187, ḥadith no. 16770; 189, ḥadith 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 8th 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 *ruqbā* and *'umrā*—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 *ṣadaqa*, 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 *ṣadaqa* 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 *ṣadaqa* 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 *Ḥabs*

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 '*ḥabs*' (literally 'withholding' or 'retention'). The term '*waqf*', which is more common in classical law, was hardly used prior to the 9th century CE.[64]

The sources do not indicate when the term *ḥabs* was first used to signify an endowment. The term does not appear in the Qur'ān. Shāfi'ī refers to some legal practices mentioned (and prohibited) in Q 5:103, which he characterizes as 'pre-Islamic *ḥabs*' (*ḥabs al-jāhiliyya*), viz. the *baḥīra*, the *waṣīla*, the *ḥāmī* and the *sā'iba*. A *ḥāmī*, Shāfi'ī 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 *baḥīra* and *waṣīla* were pledges similar to that of the *ḥāmī*, and the *sā'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 (*mawlā*).[65] However, Shāfi'ī'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 *ḥabs*-critical ḥadīth

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[64] Ibid., 50. The earliest text in which I have found the term '*waqf*' is Shaybānī's *Kitāb al-Siyar* (see 5:267.2 and 275.5). Usually, however, Shaybānī uses the expression *ḥabs*.

[65] Shāfi'ī, *Umm*, 4:52.19ff.

material. That material—to be treated in greater detail below—included traditions stating that *ḥabs* had been "before Islam" and that it had been abrogated by revelation. In defense of *ḥabs*, Shāfiʿī argued that these traditions referred only to the 'pre-Islamic *ḥabs*'.[66]

Early references to *ḥabs* have come down to us in the form of legal opinions transmitted in early *fiqh* literature, notably in writings attributed to Shaybānī, Shāfiʿī, 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 *ḥadīth* material mentioned above, these legal opinions are the oldest extant information on *ḥabs*.

## *1. The* Ḥabs fī Sabīl Allāh

The type of endowment given most prominence in early legal literature is the *ḥabs fī sabīl Allāh*. The name of this institution is clearly inspired by the Qur'ān, which uses the phrase *fī 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 "*fī sabīl Allāh*" [Q 2:195, 2:261].

The one type of *ḥabs fī sabīl Allāh* used by the jurists as a model for discussing doctrinal questions is the endowment of weapons and horses for jihād. From this, one may infer that the *ḥabs fī 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 jihād the only legitimate purpose of a *ḥabs*).[67] That position, however, remained marginal. Mālik, for one, held that houses are appropriate items for *ḥabs fī sabīl Allāh*, and, according to Ibn al-Qāsim, the same

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[66] Ibid.

[67] According to Shaybānī, this was the position of Ibrāhīm al-Nakhaʿī, ʿĀmir al-Shaʿbī (d. between 721 and 728 CE) and ʿAbdallāh b. Masʿūd, 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 jihād, 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.[68] Shaybānī considered many different articles as legitimate items for a *ḥabs fī sabīl Allāh*: houses, land, slaves, copies of the Qur'ān, as well as articles of small value such as axes or cooking pots.[69] According to 'Abdallāh Ibn 'Abd al-'Azīz, even gold and silver may be donated as *ḥabs fī sabīl Allāh*.[70]

According to Shaybānī and Ibn 'Abd al-'Azīz, a *ḥabs fī sabīl Allāh* may be used for purposes other than jihād. Shaybānī, it is true, usually applies the expression "*fī sabīl Allāh*" to jihād, albeit not exclusively.[71] 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 *fī 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 jihād. 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 (*ṣila*) for the donor's next of kin.[72] Mālik, in turn, held that even though the expression *fī sabīl Allāh* may refer to a wide range of pious purposes, it must be construed as referring specifically to jihād whenever used in connection with a *ḥabs*.[73] 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.

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[68] Saḥnūn, *Mudawwana*, 4:418.4ff. (slaves), 8ff. (clothes and saddles), 417.18 (houses). Rabī'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, *Siyar*, 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, *Siyar*, 5:253.3ff., 257.10ff., 266.9, 278.2ff. An interpretation of the expression "*fī sabīl Allāh*" that gives no prominence to jihād 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" (*fī ṭā'at Allāh*). See Muqātil b. Sulaymān, *Kitāb al-Ashbāh wa'l-naẓā'ir*, ed. Dr. 'Abdallāh Maḥmūd Shaḥāta (Cairo 1975), entry no. 69, *al-sabīl*, 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] Saḥnūn, *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.[74]

The positions attributed to 8th century CE jurists suggest that even though the *ḥabs fī sabīl Allāh* 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 fī sabīl Allāh* as an endowment in favor of a purpose, not in favor of persons. According to Shaybānī, the settlor of a *ḥabs fī sabīl Allāh* 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.[75] In this sense, property designated as a *ḥabs fī sabīl Allāh* 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

74) Ibid., 4:417.18ff.

75) Shaybānī, *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 *ḥabs fī sabīl Allāh*, early Islamic law also knew the endowment in favor of persons. Such an endowment was mostly identified as '*ḥabs*', but sometimes also as a specific form of '*ṣadaqa*', 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 *ḥabs* 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 *ḥabs* as a kind of *ṣadaqa*. This is clear in a statement attributed to Yaḥyā b. Sa'īd (d. 760 CE):

> 1. If someone donates a house as *ṣadaqa* or as *ḥabs*—we treat these two as equal (*bi-manzila wāḥida*)—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]

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[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 *ḥabs fī sabīl Allāh*, 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 ḥabbasa dār*$^{an}$ *aw taṣaddaqa bihā qāla al-ḥabs wa'l-ṣadaqa 'indanā bi-manzila wāḥida qāla fa-in kāna ṣāḥib dhālika l-ladhī ḥabbasa tilka al-dār lam yusammi shay'*$^{an}$ *fa-innahā lā tubā'u wa-lā tūhabu wal-yaskunhā al-aqrab fa'l-aqrab minhu.*"

What exactly does Yaḥyā b. Sa'īd mean when he states that *ṣadaqa* and *ḥabs* 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 *ṣadaqa* becomes the property of the beneficiary, who may dispose of it at will (see section I. 1.1). A *ḥabs fī sabīl Allāh*, by contrast, does not become the property of the beneficiary, and the same applies to all other types of *ḥabs* (see below). Obviously, *ḥabs* and *ṣādaqa* are not always treated as equal. When Ibn Sa'īd states that they are, he actually refers to a very specific case of *ṣadaqa*, viz. the *ṣadaqa* 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'īd 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 *ṣadaqa* 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'īd refers when stating that *ṣadaqa* and *ḥabs* are treated as equal.

Why did Ibn Sa'īd 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.[78] In the absence of a specific stipulation from the settlor, he inferred that the settlor had in fact intended that his next of kind 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

78) It will be recalled that—at least in classical law—a *ṣadaqa* for relatives is regarded as the best form of *ṣadaqa*, 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 *ṣadaqa* 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 *ḥabs*.[79]

3. Some of Mālik's authorities held: Any *ḥabs* or *ṣadaqa* that is endowed in favor of indeterminate future persons—this is the *ḥabs 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 *ṣadaqa* is treated like a *ḥabs*.

In statement no. 3, an endowment in favor of an indeterminate group (be it *ḥabs* or *ṣadaqa*) is characterized as '*ḥabs 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 (*ṣadaqa* or *ḥabs*, respectively) created in favor of determinate persons.

As for the *ṣadaqa*, those legal consequences have already been mentioned above: A *ṣadaqa* 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

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79) Saḥnūn, *Mudawwana*, 4:420:8f.: "[...] *qāla rijāl min ahl al-'ilm minhum Rabī'a: idhā taṣaddaqa al-rajul 'alā jamā'a min al-nās lā yudrī bi-'adadihim wa-lā yusammī bi-asmā'ihim fa-hiya bi-manzilat al-ḥabs.*"

80) Ibid., 4:419, bottom line and ff.: "[...] *qāla ba'ḍu rijāl Mālik: kull ḥabs aw ṣadaqa kānat 'an majhūl man ya'tī fa-hiya l-ḥabs al-mawqūf mithla an yaqūla 'alā waladī wa-lam yusammihim fa-hādha majhūl. A-lā tarā annahu man ḥadatha min waladihi ba'da hādha l-qawl yadkhulu fihi wa-ka-dhālika law qāla 'alā waladī wa-'alā man yaḥduthu lī ba'dahum fa-hādha ayḍ*[an] *'alā majhūl man ya'tī wa-idhā sammā fa-innahum qawm bi-a'yānihim wa-qad fassaranā dhālika.*"

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

> 4. The *ṣadaqa mawqūfa* that may be sold if the donor so wishes [comes into existence] if a man donates a *ṣadaqa* 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 [*ṣadaqa*] '*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 *ṣadaqa mawqūfa* from an ordinary *ṣadaqa*: The beneficiaries must not alienate the asset. In this respect, Rabī'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, Rabī'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 Rabī'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 '*ḥabs mawqūf*' to signify a *ḥabs* (or *ṣadaqa*) 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 '*ḥabs mawqūf*' is used with the specific intention to distinguish the endowment under discussion (whether *ḥabs* or *ṣadaqa*) from a *ḥabs fī sabīl Allāh*: In contrast to the *ḥabs mawqūf*, the

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[81] Ibid., 4:420.9ff.: *"qāla Rabī'a: wa'l-ṣadaqa mawqūfa l-lati tubā'u in shā'a ṣāḥibuhā idhā taṣaddaqa al-rajul 'alā rajulayn aw thalātha wa akthar min dhālika idhā sammāhum bi-asmā'ihim qāla Saḥnūn wa-ma'nāhu mā 'āshū wa-lam yadhkur 'aqb'" fa-hādhihi l-mawqūfa l-lati yabī'uhā ṣāḥibuhā in shā'a idhā raja'at ilayhi."*

*ḥabs fī sabīl Allāh* results in the extinction of property rights in perpetuity, due to the fact that the 'beneficiary' of such a *ḥabs* is always a purpose and thus cannot 'die'. In fact, the understanding of '*mawqūf*' as the temporary suspension of property rights is even more evident in statement no. 3 than it is in no. 4 (Rabī'a), since in no. 3 it is precisely the temporary nature of the suspension that is expressed by qualifying the *ḥabs* as '*mawqūf*'.

My conclusion that, according to 8th century CE Medinese doctrine, a *ḥabs* in favor of an indeterminate group of people reverts to the settlor after the beneficiaries' extinction is corroborated by two further statements related in Saḥnūn's *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 *ḥabs* 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 (*ḥiba*). 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 (*wulāt*) of the person who gave [it as] a *ḥabs* and *ṣadaqa*.[82]

6. Rabī'a held: If someone endows his house in favor of his children and the children of another person and declares it *ḥabs*, it is a [valid] *ḥabs* 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 latters'] children, grandchildren or otherwise.[83]

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[82] Ibid., 4:421.19ff.: "*akhbaranī Ibn Wahb 'an Yūnus b. Yazīd annahu sa'ala Abā al-Zinād 'an rajul ḥabbasa 'alā rajul wa-waladihi ḥabsᵃᵐ mā 'āshū an-lā yubā'u wa-lā yūhabu wa-lā yūrathu qāla Abū l-Zinād: fa-hiya 'alā mā waḍa'ahā 'alayhi mā baqiya minhum aḥad fa-in inqaraḍū ṣārat ilā wulāt al-ladhī ḥabbasa wa-taṣaddaqa.*"

[83] Ibid., 4:420.27ff.: "[...] *man ḥabbasa dārahu 'alā waladihi wa-walad ghayrihi fa-ja'alahā ḥabsᵃᵐ fa-hiya ḥabs 'alayhim yaskunūnahā 'alā qadar marāfiqihim wa-in inqaraḍū akhadhahā wulātuhu dūna wulāt man kāna minhum ma'a waladihi idhā kānū waladᵃⁿ wa-walada waladⁱⁿ aw ghayruhum.*"

These two statements indicate that, according to early Medinese doctrine, the property rights to a *ḥabs* 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).[84]

Another statement related by Saḥnun 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 *ḥabs* but not as *ṣadaqa*:

> 7. According to Ibn Wahb, Makhrama b. Bakīr related the following from his father: It is held that if a man creates a *ḥabs* 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].[85]

This statement indicates that the early Medinese jurists treated *ḥabs* in favor of a determinate group of persons in the same way as they treated a *ṣadaqa* 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: 8th 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" (*wulāt*) 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 (*waratha*) who—depending on the circumstances—may be a completely different set of persons.

[85] Saḥnūn, *Mudawwana*, 4:420.24ff.: "*Ibn Wahb 'an Makhrama b. Bakīr 'an abīhi qāla: yuqālu law an rajul*[an] *ḥabbasa ḥabs*[an] *'alā aḥad thumma lam yaqul laka wa-li-'aqbika min ba'dika fa-innahā tarji'u ilayhi fa-in māta qabla l-ladhīna ḥabbasa 'alayhim al-ḥabs thumma mātū kulluhum ahl al-ḥabs fa-innahā tarji'u mīrāth*[an] *bayna warathat al-rajul al-ladhī ḥabbasa 'alā kitāb Allāh.*"

making the endowment (*ṣadaqa*/*ḥabs*/*ṣadaqa mawqūfa*) and, second, the nature of the group of beneficiaries (determinate/indeterminate). In principle, the terms *ṣadaqa* or *ḥabs* 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 "*ḥabs*", 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:

| Terminology | Nature of group of beneficiaries | Suspension of property rights |
|---|---|---|
| *ḥabs* | indeterminate | yes |
| *ḥabs* | determinate | yes |
| *ṣadaqa* | indeterminate | yes |
| *ṣadaqa* | determinate | no |
| *ṣadaqa mawqūfa* | determinate | yes |

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 *ḥabs fī 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. Saḥnūn relates only one statement that even hints at the possibility that a settlor of a *ḥabs* in favor of persons may stipulate that the asset be used for a good cause after the death of the beneficiaries.[86]

[86] Ibid., 4:420.4ff.: The statement is related by Ibn Wahb, who attributes it to "some earlier people of knowledge (*ba'ḍ man maḍā 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 *ḥabs* in favor of persons as a life estate. The legal effects of such a *ḥabs* are identical to those of the *ʿumrā* (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 "*ʿumrā*", the terms "*ṣadaqa*" and "*ḥabs*" have a strong religious connotation. It will be recalled that "*ṣadaqa*" is a Qurʾānic term and that it is commonly used to denote charitable, pious giving. The term "*ḥabs*", in turn, was closely associated with the *ḥabs fī sabīl Allāh*, probably the oldest form of *ḥabs*. It is conceivable that the *ḥabs* in favor of persons emerged from the *ʿumrā*, and that this development was driven by the efforts of early settlors 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 Shīʿī traditions, Jaʿfar al-Ṣādiq criticized people who erroneously used the expression "*ṣadaqa*" to signify an ordinary gift.[87] In the same fashion, early Muslims may have detached the term "*ḥabs*" from its original context—the *ḥabs fī sabīl Allāh*—and extended it to life estates. If this hypothesis is accepted, then the *ḥabs* in favor of persons took only its name from the *ḥabs fī sabīl Allāh*, whereas, on a conceptual level, it was inspired by an entirely different institution, viz. the *ʿumrā*.

Most of the extant early sources pay significantly more attention to *ḥabs* than to *ʿumrā*. Shāfiʿī and Saḥnūn mention the *ʿumrā* only in passing. The *Muwaṭṭaʾ* contains only a little more information. Early Ḥanafī positions regarding the *ʿumrā* have come down to us only because Shaybānī briefly mentions them in his recension of the *Muwaṭṭaʾ*. Only Abū Ghānim—who mainly relates the positions of earlier Ibāḍī scholars such as Abū ʿUbayda, Ibn ʿAbd al-ʿAzīz and Abū l-Muʾarrij—treats the *ʿumrā* in some detail. As for *ḥabs*, one arrives at the opposite result:

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such a *ṣadaqa* is a *ḥabs* 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" (*yarjiʿu* [...] *ilā mā sammā al-mutaṣaddiq bihā wa-sabbalahā ʿalayhi*).

87) *EI²*, s.v. *Ṣadaḳa* (T.H. Weir/A. Zysow), 712 a.

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

But the *ḥabs* 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 *ḥabs*—at least in its above-described form—was plainly an *ʿumrā*-in-disguise. Be that as it may, this type of *ḥabs* represented only a passing stage in the institution's development. Mālik already understood *ḥabs* 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 *ḥabs* and then give an account of Mālik's doctrine on *ḥabs*.

### 3. *Critique of* Ḥabs

One prominent scholar who was critical of *ḥabs* was Abū Ḥanīfa. Some legal positions attributed to him by Shaybānī suggest that he refused to accept *ḥabs* as a contract in its own right. Instead, he apparently treated *ḥabs* as though it were a simple loan (*ʿāriya*): According to Abū Ḥanīfa, a *ḥabs* is simply a "permission of use" (*ibāḥat al-manfaʿa*) 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 *ḥabs* in favor of persons in any work other than his *Kitāb al-Ḥujja* and his recension of Mālik's *Muwaṭṭaʾ*. However, he treats the *ḥabs fī sabīl 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, Abū Ḥanīfa treated *ḥabs* in the same way as he treated the *ruqbā* (cf. section I 2.2).

A critical position towards *ḥabs* is attributed to the majority of early Ibāḍī scholars, as well as to Ibrāhīm al-Nakha'ī. These scholars invoked a series of traditions on *ḥabs* 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 *ḥabs* and the "shares of God" (*farā'iḍ Allāh*), i.e., the rules of inheritance as prescribed in the Qur'ān.

In part, these traditions state that *ḥabs* was 'abrogated' by the 'shares of God'.[90] Abū Ghānim, for one, relates the following:

> I asked Abū l-Mu'arrij and Ibn 'Abd al-'Azīz [for their opinions] regarding a man who endows his house, his land, or any other asset (*māl*) as *ḥabs fī sabīl Allāh*. Abū l-Mu'arrij replied: I sat with Abū 'Ubayda when he was asked about this, and [Abū 'Ubayda] replied that Ibn 'Abbās said: "The *ḥabs* was before *Sūrat al-Nisā'* [i.e. Sūra 4, N.O.] was revealed, and when that Sūra was revealed, the 'shares' abrogated the *ḥabs* (*nasakhat al-farā'iḍ al-ḥabs*)". Ibn 'Abd al-'Azīz 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 *ḥabs* in defiance of the shares of God (*li-annahu lā ḥabs 'an farā'iḍ Allāh*).[91]

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words: Abū Ḥanīfa accepted a testamentary *ḥabs*. The passage in question does not tell us anything about the legal consequences of such a *ḥabs*.

[90] The contention that *ḥabs* 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 Ḥadith. The Formation of the Islamic Law of Inheritance* [Berkeley et al. 1986], 149ff.). The position is attributed *inter alia* to Ibn 'Abbās (ibid.), who is also the one who reportedly held that *ḥabs* was abrogated by the shares of God (see below).

[91] Abū Ghānim, *Mudawwana*, 2:162.21ff. Some scholars translate the phrase "*lā ḥabs 'an farā'iḍ Allāh*" as "no *ḥabs* in circumvention of the shares of God" (see e.g. Hiroyuki Yanagihashi, "The Doctrinal Development of *Maraḍ 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 *ḥabs* that actually

The phrase at the end of this quote—*lā ḥabs 'an farā'iḍ 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 Qāḍī Shurayḥ b. al-Ḥārith (d. between 697 and 717 CE). Shāybānī, for instance, relates the following version:

> Sufyān b. 'Uyayna related from 'Aṭā' b. al-Sā'ib: I said to Shurayḥ: Oh Abū Umayya, give me a *fatwā*! Shurayḥ answered: Oh my brother's son! I am a qāḍī, not a muftī! I replied: Egad, I do not intend litigation! [But] a man from the ward made his house a *ḥabs*. Then, just after [Shurayḥ] 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 ḥadīth material. According to Shāfi'ī, the statement "*lā ḥabs 'an farā'iḍ 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—Shāfi'ī argued—the *ḥabs* must be treated by analogy to an ordi-

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'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) Shaybānī, *Ḥujja*, 3:64.3ff. According to my interpretation of the text, the conversation between 'Aṭā' and Shurayḥ took place outdoors and was followed by Shurayḥ's entry—presumably into the court room—where he talked to the third, anonymous person. However, the text is not clear in this respect: "[...] *akhbaranā Sufyān b. 'Uyayna 'an 'Aṭā' b. al-Sā'ib qāla: qultu li-Shurayḥ: yā abā umayya aftinī, qāla: yā bna akhī innamā ana qāḍiⁱⁿ wa-lastu bi-muftiⁱⁿ, fa-qultu: innī wa-Allāhi lā urīdu khuṣūma inna rajulⁱⁿ min al-ḥayyi ja'ala dārahu ḥabsⁱⁿ, qāla: fa-sami'tuhu wa-qad dakhala wa-huwa yaqūlu li-rajul kāna yaqrabu al-khuṣūm ilayhi akhbara l-rajul al-lā lā ḥabsa 'an farā'iḍ Allāh.*" For a variation of this Shurayḥ-ḥadīth", 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*.[93]

Shāfiʿī interpreted the ḥadīth material under discussion in a manner that preserved the fundamental legitimacy of *ḥabs*. However, most early jurists whose interpretations of the material have come down to us took a different position: The early Ibāḍīs, for instance, interpreted the material as an outright ban on *ḥabs*—with the exception only of Ibn ʿAbd al-ʿAzīz, who accepted *ḥabs* if it was created *fī sabīl Allāh*.[94] Shaybānī relates a similar position from Ibrāhīm al-Nakhaʿī, according to whom every *ḥabs* is a *ḥabs* in defiance of the shares of God, except for weapons and horses endowed *fī sabīl Allāh*.[95] Moreover, Shāybānī relates a ḥadīth that is unequivocal in its blanket rejection of *ḥabs*, and which may well have been circulated in order to counter permissive interpretations, such as that of Shāfiʿī. The ḥadīth flatly states that "there is no *ḥabs* in Islam (*lā ḥabs fī l-islām*)."[96]

Clearly at least some early jurists took a very critical stance toward *ḥabs*. 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 *ḥabs* was "in defiance of the shares of God (*ʿan farāʾiḍ Allāh*)". Moreover, some jurists were categorical in their rejection of *ḥabs*, despite the fact that it is difficult to see how some types of *ḥabs* could possibly collide with the rules of inheritance. A *ḥabs fī sabīl Allāh*, for instance, does not affect inheritance more than any other alienation of property.[97]

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[93] Shāfiʿī, *Umm*, 4:57.15ff.

[94] Abū Ghānim, *Mudawwana*, 2:163.21ff.

[95] Shaybānī, *Ḥujja*, 3:65.1f.

[96] 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.

[97] Those jurists who cite the ḥadīth material to substantiate a categorical rejection of *ḥabs* may have understood "*lā ḥabs ʿan farāʾiḍ Allāh*" in a technical sense, which would bring us back to the abrogation-motif: There can be no legitimate *ḥabs* once Sūra 4 (which contains the *farāʾiḍ Allāh*) had abrogated that institution. According to this understanding, the preposition *ʿan* (in *lā ḥabs ʿan farāʾiḍ Allāh*) signifies a general collision, rather than a specific

On the other hand, criticism of *ḥabs* was not confined to outright rejection. Some *ḥabs*-critical jurists distinguished between various types of *ḥabs*: The endowment of weaponry and horses seems to have been more widely accepted than other forms of *ḥabs fī sabīl Allāh* (cf. Ibrāhīm al-Nakha'ī's position above), and *ḥabs fī sabīl Allāh* generally was more widely accepted than *ḥabs* in favor of persons (cf. the position of Ibn 'Abd al-'Azīz). In other words, the *ḥabs* in favor of persons was apparently regarded as particularly problematic. This may indicate that the institution envisaged by early jurists when rejecting the *ḥabs* in favor of persons was actually the *ḥabs* in favor of persons, as understood by the early Medinese, viz. a life estate analogous to the *'umrā*. 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 *'umrā*).

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

### *4. Mālik's Doctrine on* Ḥabs *in Favor of Persons*

Mālik's doctrine on *ḥabs* in favor of persons is documented in the *Mudawwana*,[98] where Saḥnūn presents his legal opinions in the same casuistic fashion as those of the earlier Medinese jurists: Saḥnūn's account is a series of statements, each of which refers to a specific combination of (1) the terminology used by the settlor (*ḥabs*/*ṣadaqa*/*ṣadaqa mawqūfa*) 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

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infringement of certain rules of inheritance. This understanding, however, is not explicit in the sources.

[98] For Mālik's legal position on *ḥabs* in favor of persons, see Saḥnūn, *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>
<tr><th></th><th>Terminology</th><th>Nature of the group of beneficiaries</th><th colspan="2">Legal effects</th></tr>
<tr><td>1</td><td>ṣadaqa</td><td>indeterminate</td><td rowspan="3">property rights are suspended ...</td><td rowspan="3">... and the settlor's next of kin enjoy the right of usufruct after the death of all beneficiaries</td></tr>
<tr><td>2</td><td>ḥabs</td><td>indeterminate</td></tr>
<tr><td>3</td><td>ṣadaqa mawqūfa or ḥabs ṣadaqa</td><td>determinate</td></tr>
<tr><td rowspan="2">4</td><td rowspan="2">ḥabs</td><td rowspan="2">determinate → (a), (b)</td><td>as above</td><td>as above</td></tr>
<tr><td>as above</td><td>... and the settlor or his heirs enjoy full property rights after the death of all beneficiaries</td></tr>
</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 *ṣadaqa* 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 "*ṣadaqa*", property rights are suspended only if he characterizes his donation as "*ṣadaqa mawqūfa*" (or, alternatively, as "*ḥabs ṣadaqa*", a term that is not considered in the statements attributed to earlier jurists). If the settlor does not distinguish his *ṣadaqa* 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 ("*ḥabs*" + determinate beneficiaries)—Saḥnūn informs us of a second, alternative position attributed to Mālik: According to that position, a *ḥabs* 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 Mālik'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 Mālik's position in this way, then the alternate position regarding constellation no. 4 may be interpreted as a residue of an earlier phase of Mālik'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 '*ḥabs*', but that in fact was a combination of the 'donation to the last' (*hiba li'l-ākhir*) 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 *ḥabs* 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 *ḥabs* could also be made in favor of more than two persons, but the *Mudawwana* does not explicitly state so. The *ḥabs* under discussion differs from the *hiba li'l-ākhir* 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 *ḥabs* 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 *ḥabs* 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 *ḥabs*-doctrine as a whole as follows: Mālik was not troubled by the prospect that *ḥabs* 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 *ḥabs* 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 *ṣadaqa*, 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 *ṣadaqa* was the reason why Mālik held that *ḥabs* must never again become the property of the settlor and that the settlor cannot reacquire even a usufructory right to his own *ḥabs*. For Mālik, *ḥabs* was conceptually related to *ṣadaqa*. Indeed, it was merely a type of *ṣadaqa*. 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 *ḥabs*: 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 *ḥabs* or *ṣadaqa* (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 *ḥabs*, 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 (*awlā al-nās bihi*) become entitled to the usufruct of a *ḥabs* after the death of the beneficiaries, they do so regardless of whether or not they are legal heirs.[100] 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-ḥāja*).[101] In other words, entitlement is enjoyed by the 'intersecting set' of the two groups regarded as the 'natural' beneficiaries of a *ḥabs*: viz. the needy and relatives.

Compared to earlier Medinese doctrine, Mālik went a step further in the conceptual integration of *ḥabs* and *ṣadaqa*: He reasoned that if *ḥabs* is a form of *ṣadaqa*, it must be subject to the same restrictions regarding the revival of property rights. The alternating positions attributed to Mālik regarding combination no. 4 ("*ḥabs*" + determinate beneficiaries) may also be interpreted in this light: In that combination, the benefactor does not explicitly designate his endowment as a *ṣadaqa*—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 *ḥabs* is always a *ṣadaqa*, irrespective of the terminology used by the settlor.

In view of the fact that Mālik accepted the *'umrā*, his position regarding *ḥabs* 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 *ḥabs* or *ṣadaqa*? 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*.

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[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" ([...]*tarji'u ilā awlā al-nās bihi* [i.e. *bi'l-muḥabbis*, N.O.] *min waladihi aw 'aṣabatihi dhukūruhum wa-ināthuhum yadkhulūna fī dhālika*), see Saḥnūn, *Mudawwana*, 4:392.23ff. In another statement attributed to Mālik, the grandchildren, too, are included among the beneficiaries ("[...] *'aṣabatuhu 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, Mālik's distinction between *ḥabs* and *'umrā* is more than mere formalism. Admittedly, Mālik did not forbid a benefactor from creating a life estate, but at the same time, he made it clear that life estates are neither *ḥabs* nor *ṣadaqa*, and thus are not pious acts entailing reward in the hereafter.

Mālik's doctrine on *ḥabs* is best understood as a compromise and concession to jurists who rejected both *'umrā* and *ḥabs*. Presumably, Mālik's novel conception of *ḥabs* was much more acceptable within these circles than the older conception of *ḥabs* as identical to *'umrā*. It no longer permitted what the *'umrā* allowed, viz. to donate assets without renouncing title in perpetuity. As a consequence, *ḥabs* could no longer interfere with the rules of inheritance. Instead, the donation of an asset as *ḥabs* 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 *ḥabs* 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 *ḥabs* notwithstanding his rejection of *'umrā*—viz. Shāfi'ī. Regarding *ḥabs* in favor of persons, Shāfi'ī held virtually the same position as Mālik: After the beneficiaries' death, the asset passes to the settlor's next of kin, who acquire the right of usufruct but not title.[102] As regards *'umrā*, it will be recalled, Shāfi'ī treated it as an ordinary gift (*hiba*) (cf. section I 2.2). Shāfi'ī, too, seems to have associated this position regarding *ḥabs* with the notion that *ḥabs* is subject to a 'taboo of return': The *ḥabs*, he states, is not merely irrevocable, nay it must not return to the settlor in any way—by way of either repurchase or inheritance.[103]

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[102] Shāfi'ī, *Umm*, 4:57.21ff.

[103] Ibid., 4:54.16f., 56.12f.

### 5. *Further Developments: Shaybānī, Hilāl al-Ra'y and Khaṣṣāf*

The understanding of *ḥabs* 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 Shāybānī a new understanding of *ḥabs* had emerged. This understanding was already fully developed in the doctrine of the Ḥanafī scholars Hilāl al-Ra'y (d. 859 CE) and Khaṣṣāf (d. 874 CE). Ultimately, it would prevail in classical law.

Shaybānī 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: *Ḥabs*, Shaybānī 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?[104]

Shaybānī held a different position. In his view, a *ḥabs* 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 '*fī sabīl Allāh*'.[105] Hilāl al-Ra'y and Khaṣṣāf held the same view.[106] 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.[107]

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[104] Shaybānī, *Ḥujja*, 3:46.4ff. In the passage under discussion, Shaybānī mentions the settlor's "heirs" (*waratha*). It will be recalled that Mālik held that the next of kin (*awlā al-nās bi'l-muḥabbis/aqrab al-nās bihī*) is entitled to the usufruct, including relatives who are not legal heirs (cf. section II 4).

[105] Shaybānī, *Ḥujja*, 3:65.4ff. and 67.1ff.

[106] Hilāl b. Yaḥyā b. Muslim al-Ra'y, *Aḥkām al-waqf* (Medina: Maṭba'at Majlis Dā'irat al-Ma'ārif al-'Uthmāniyya, 1355/1937), 4.6ff. and 9.8ff.; Abū Bakr b. 'Amr al-Shaybānī al-Khaṣṣāf, *Aḥkām al-awqāf* (Cairo: Maktabat al-Thaqāfa al-Dīniyya, 1996), 19.3ff.

[107] Khaṣṣāf, *Aḥkām*, 19.3ff. By holding this position, Khaṣṣāf basically treats an invalid *ḥabs* like a loan (*'āriya*), which is revocable at will and ceases to exist upon the lender's death. However, according to Khaṣṣāf, one person may grant another a lifelong right of usufruct by means of a bequest (*waṣiyya*). Both Khaṣṣāf and Hilāl al-Ra'y held that such a

Shaybānī's position did not result from the conviction that *ḥabs*—as a form of *ṣadaqa*—must serve some 'real charity' lest the requirements of a *ṣadaqa* not be met. It will be recalled that *ṣadaqa* is not exclusively defined as a donation to the poor, and that a donation in favor of relatives, for instance, qualifies as *ṣadaqa* even without an ultimate gift to charity (see section I 1.1). The special attribute of the purposes commonly summarized under the term "*fī sabīl Allāh*" is not that they are acceptable as a purpose for *ṣadaqa*. 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 ḥadīth, jihād also will last until the end of time.[108]

Why did Shaybānī and his later school companions insist that the settlor of a *ḥabs* stipulate some perpetual purpose? Like Mālik and Shāfi'ī, 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 Shāfi'ī 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 Shaybānī's criticism of Mālik's and Shāfi'ī'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

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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 Khaṣṣāf, *Aḥkām*, 19.15ff.; Hilāl al-Ra'y, *Aḥkām*, 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, ḥadīth no. 2532.

heirs full title—had failed to gain acceptance in legal discourse. Shaybānī's solution is more consistent: The prerequisite that the settlor of a *ḥabs* 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 Hilāl 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: Hilāl 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-masākīn*). Another was for the settlor to designate the endowment as "*ṣadaqa*", 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 "*ḥabs*" or "*waqf*", because those terms were equivocal: they implied donations to both poor and rich. What troubled Hilāl 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'. Hilāl illustrates this with another example of an invalid endowment, viz. a *waqf* created in favor of the orphans of a specific family. According to Hilāl, 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, Hilāl 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, Hilāl did not

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[109] Hilāl al-Ra'y, *Aḥkām*, 4.3ff.

[110] Ibid., 4.11ff.: "[...] *li-anna hādha waqf*"" *wa-lam yusammi subulahu wa-wujūhahu fa'l-waqf 'alā hādha bāṭil*". Abū Yūsuf and 'Uthmān al-Battī, in contrast, held that the term '*mawqūf*'—like '*ṣadaqa*'—always implies a donation to the poor (ibid.). Khaṣṣāf, on the other hand, held that the term "*ṣadaqa*" is insufficient to effect a valid *waqf*: it is necessary to add "for the destitute "(*li'l-masākīn*) or at least "for all eternity" (*li'l-abad*) (Khaṣṣāf, *Aḥkām*, 20.11. In another passage of that work, however, Khaṣṣāf apparently adopts the same position as Hilāl, 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, Hilāl 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 (*wajh min wujūh al-birr lā yanqaṭi'l lā yuḥāṭu*).[111]

The position held by Shaybānī 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. Shaybānī's doctrine meant that *ḥabs* 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 Shaybānī actually invoked this taboo in order to substantiate his position. He clearly was familiar with the ḥadīth material on which this taboo rested: Shaybānī himself relates the above-mentioned tradition that compares a donor who returns to his *ṣadaqa* to a dog that returns to its vomit.[112] However, the specific notion that *ḥabs* must not 'return' to the settlor or his heirs because that would amount to a return to one's own *ṣadaqa*, is unattested for Shaybānī. This may be due to the scarcity of information that has come down to us regarding Shaybānī's doctrine on *ḥabs*. On the other hand, Hilāl al-Ra'y and Khaṣṣāf, whose doctrines on *waqf* are well documented, make no reference to the 'taboo of return'. In their thinking, the notion that *ḥabs* involves a perpetual suspension of property rights has already assumed the quality of an axiomatic proposition. It has also assumed an all-encompassing character: Hilāl 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 *ḥabs*, Hilāl and Khaṣṣāf invoke the example of the Companions of the Prophet who reportedly understood *ḥabs* in the exact same way.[113]

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[111] Hilāl al-Ra'y, *Aḥkām*, 11.2ff. and 11ff.

[112] Shaybānī, *Siyar*, 4:251.5ff.

[113] Khaṣṣāf, *Aḥkām*, 19.3ff. Much of that exegetical reasoning is already put forth by Shaybānī (*Ḥujja*, 3:58.1ff. and 65.4ff.).

This understanding of *ḥabs* 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 *ḥabs* may be endowed temporarily (which includes *ḥabs* created as a life estate).[114]

The prevalence of the new understanding of *ḥabs* meant that life estates were no longer permissible—as either *'umrā* or as *ḥabs*. Instead, the life estate was merged with the institution whose name it had originally borrowed, viz. the *ḥabs fī sabīl Allāh*. According to the new understanding, a *ḥabs* in favor of persons is basically a variation of the *ḥabs fī sabīl Allāh*. It differs from an ordinary *ḥabs fī 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.[115]

The triumph of this new understanding of *ḥabs* 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 Ḥabīb b. Abī Thābit (d. 738 CE), who is said to have reported:

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[114] See *EI²* s.v. Waḳf (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 silsilat al-maṣādir al-fiqhiyya*, 28:65 (= Qurṭubī, *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 *ḥabs* in favor of persons as a mere variation of a *ḥabs fī sabīl Allāh* is particularly evident in a statement of Hilāl al-Ra'y: He describes the (valid) *ḥabs* in favor of persons as a *ḥabs* 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 *ṣadaqa*!" Ibn 'Umar replied: "That takes [the mare] even further away from you".[116]

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 *ṣadaqa*, 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 *ṣadaqa* 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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[116] Shāfi'ī, *Umm*, 4:63.13ff.: "[...] *kuntu 'inda bni 'Umar fa-jā'ahu rajul min ahl al-bādiya fa-qāla: innī wahabtu li-bnī hādha nāqa ḥayātahu fa-innahā tanātajat ibl*[m], *fa-qāla bnu 'Umar: hiya lahu ḥayātahu wa-mawtahu, fa-qāla: innī taṣaddaqtu 'alayhi bihā, qāla: dhālika ab'ada laka minhā*". For two slightly different versions of the tradition see Ṣan'ānī, *Muṣannaf*, 9:186, ḥadīths no. 16877 and 16879.