ADMINISTRATION OF WAQF’S PROPERTIES IN INDIA: RHETORIC OR REALITIES

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In the present socio-economic world, where capitalism rules the globe, there exists in the Islamic legal system the doctrine of Waqf. This concept has evolved over more than one and a half thousand years before the birth of the English doctrine of trusts and uses. No parallel system ever existed anywhere in this world before the advent of Islam. Waqf according to several jurists is the permanent tying up of an intangible or tangible property in the name of Almighty Allah for pious purposes in perpetuity. This legal expedient under the name of Waqf permitted an owner to settle his property for the use of beneficiaries in perpetuity. To set aside part of one’s earning or legacy and tie it up in perpetuity for charitable purposes is considered an act of piety. As such, generous Muslims adhering to the principles of 'endowment' enshrined in Islam often bequeath large and valuable portions of properties in the name of Allah. The usufruct from these properties is dedicated to meet the exclusive needs of the poor and also for the perpetual maintenance of the property so bequeathed.

The doctrine of Waqf is so intrinsically interwoven with the religious and social economy of the Muslims so as to become one of the most important institutions of the community. According to a joint Parliamentary committee headed by the then Rajya Sabha Chairman, Mr. K. Rehman Khan, the third largest ownership of land after the Indian Railways and the defence department is that of the waqf.¹ The waqf endowments in terms of land are unimaginably huge-to the tune of around 4 lakh registered properties and around 6 lakh acre of land. Almost 70% of waqf property has been encroached upon and of the remaining cases of blatant corruption abound. Land is disposed off to building markets, construct hotel, malls or industries at unimaginably shocking low rents.² Taking into account this vast public assets waqf can become successful machinery not only for the preservation of religious and charitable institutions but also for educational and economic development of the community. Auqaf support a large number of schools, colleges, technical institutes, libraries, reading-rooms, charitable dispensaries, musafirkhana and mosques, etc. which benefit the public irrespective of their religion or creed.

¹ http://www.deccanherald.com/content/31093/in-name-allah-waqf-corruption.html. (See Appendix-I)
² Ibid.
Given the situation it becomes utmost important, that auqaf be maintained properly and their resources objectively be utilized for fulfilling the objects and the purposes of dedications. But unfortunately, many of the existing auqaf have shown a steep decadence caused largely by neglect, misuse and hoards of mismanagement. If proper and well calculated measures have not been taken up the days are not far away when the waqf properties will be only on papers.

No doubt these auqaf could have assumed the position of life support system giving greater relief, solace and a provision for better opportunities to the poor, needy and the deprived masses of the Muslim community provided that the waqf properties get proper support in their management by the government concerned

Much has already been talked about theoretical aspects of auqaf by many jurists. Time is ripe now to adopt an analytical approach to the sorry state of affairs so far the management of auqaf is concerned. Effort should be made to create awareness about the socio-economic relevance of auqaf, and thereby cultivate an environment where both religious and secular laws can come together to prevent this pious and humane doctrine from destruction and mal-administration.

Mal-administration, encroachment, neglect of the waqf properties by the Mutawalli and others have prompted to pen down certain things in this regard. In this work we therefore tend to outline the law of waqf administration in India bringing out in detail its realities and the future prospects of auqaf in India in the light of the Wakf (Amendment) Act, 2013 and some recent pronouncements.

Theoretical Perspective
Before going deeper into the concept of waqf it is necessary to know what actually the meaning of waqf is.

1. According to Abu Hanifa; "it is the detention of a specific thing in the ownership of the waqf or appropriator, and the devoting its profit or usufruct to charity, the poor or other good objects, in the manner of areeat or commodate loan".

2. According to Abu Yusuf "waqf is the detention of a thing in the implied ownership of Almighty God in such a manner that its profits may revert to or be applied to the benefit of His creatures".

3. According to Shara-ya-ul-Islam "waqf is a contract the fruit or effect of which is to tie up the original and leave its usufruct free".

4. As defined under section 2 of the Mussalman Waqf Validating Act 1913, "Waqf means the permanent dedication by a person professing Mussalman faith of any property for any purpose recognized by Mussalman law as religious, pious or charitable".

5. As defined in Waqf Act, 1954, "Waqf means the permanent dedication, by a person professing Islam, of any movable or immovable property for any purpose recognized by the Muslim law as pious, religious or charitable".
6. As defined by the Wakf Act, 1995- Wakf means the permanent dedication by a person professing Islam, of any movable or immovable property for any purpose recognized by Muslim law as pious, religious or charitable and includes-
   (i) a waqf by user but such waqf shall not cease to be a waqf by reason only of the user having ceased irrespective of the period of such cesser;
   (ii) “grants”, including mashrat-ul-khidmat for any purpose recognized by the Muslim law as pious, religious or charitable; and
   (iii) a waqf-alal-aulad to the extent to which the property is dedicated for any purpose recognized by Muslim law as pious, religious or charitable and waqf means any person making such dedication.

7. As defined by the Wakf (Amendment) Act, 2013-Waqf means the permanent dedication by any person, of any movable and immovable property for any purpose recognized by the Muslim law as pious, religious or charitable and includes-
   (i) a waqf by user but such waqf shall not cease to be a waqf by reason only of the user having ceased irrespective of the period of such cesser;
   (ii) a Shamlat Patti, Shamlat Deh, Jumla Malkkan or by any other name entered in a revenue record;
   (iii) “grants”, including mashrat-ul-khidmat for any purpose recognized by the Muslim law as pious, religious or charitable; and
   (iv) a waqf-alal-aulad to the extent to which the property is dedicated for any purpose recognized by Muslim law as pious, religious or charitable, provided when the line of succession fails, the income of the waqf shall be spent for education, development, welfare and such other purposes as recognized by Muslim law and waqf means any person making such dedication;

Origin of auqaf
It has been opined that the doctrine of waqf traces its origin to the deeds of charity which is the outstanding feature of Islam. Devotion to the way of God or the way of goodness or piety and a strong desire to win Divine approbation has been the root cause of the origin and development of the institution.
The origin of waqf is to be sought, says Heffening, in the strongly marked impulse to charitable deeds which is characteristic of Islam. The institution, however, began to develop in the first century A.H. and assumed rigid legal form in the second century. Heffening feels that some foreign influence might have also worked on the development of the institution.3
Henry Cattan does not agree with this view and says that the institution of waqf has developed with Islam and there is no evidence that such a complex system of appropriating usufruct as a life interest to varying and successive classes of beneficiaries existed prior to Islam.4 We also subscribe to this view.

3 S. Akhtar Hussein & Syed Khalid Rashid, Waqfs Laws and Administration in India, p114.
4 Ibid.
Quran on Waqf

The Quran contains no reference to waqf but it abounds in injunctions in the matter of charity,

"And in their wealth the beggar and the outcaste had due share". 5
"They ask thee (O Muhammad) what they shall spend, say, that which ye spend' for good (must go) to parents and near kindred and orphans and the needy and wayfarer. And whatever good ye do, to I Allah is Aware of it” (2:215).

The true measure of charity is indicated in the following Quranic verses:

“Ye shall never attain to goodness till ye give alms of that which ye love, and whatever ye give, of a truth, God knoweth". 6

"It is not righteousness that ye turn your faces to the East and the West; but righteous is he who believeth in Allah and the Last day and the angels and the Scripture and the Prophets, and giveth his wealth, for love of Him, to kinsfolk and to orphans and the needy and the wayfarer and to those who ask, and to set slaves free; and observeth proper worship and payeth the poor-due (i.e., zakat). And those who keep their treaty when they make one, and the patient in tribulation and adversity and time of stress. Such are they who are sincere. Such are the God-fearing". 7

Hadith on waqf

Historically, the origin of waqf is traced to the prescriptions of the prophet; “The validity of Waqf” says the author of Ghait-ul-Bay” is founded on the rule laid down by the Prophet himself under the following circumstances and handed down in succession by ibn Anl Nafey and Ibn Omar as stated in the Tirmizi. Omar had acquired a piece of land in (the canton of) Khaibar and proceeded to the Prophet and sought his counsel to make the most pious use of it. (whereupon) the Prophet declared, "Tie up the property (asl-corporus) and devote the usufruct to human beings that it is not to be sold or made the subject of gift or inheritance; devote its produce to your children, your kindred and the poor in the way of God" 8

In accordance with this rule Omar dedicated the property in question as waqf which continued in existence for several centuries until the land became waste.

In a tradition narrated by Anas bin Malik, [it] is stated that the Prophet wished to Purchase gardens from the Banu Nujjar in order to build a mosque; (but) they refused to take the purchase money and gave the land for sake of God.

A third tradition of Anas bin Malik concerns a family endowment. In keeping with the pronouncement in Surah 111:86, Abu Talha gave the Prophet his favorite piece of ground, the Bairuha garden in Medina. The Prophet, however, gave it back to him with the observation' that he should make it an endowment for his relatives. Abu Talha gave the garden as a sadaka for Ubaiy and Hassan. 9

The Prophet further declared;

"That the best of all pious offerings is a provision for one's self, so that one may not need and the giving of sadaka should commence with those whose subsistence is obligatory".

"Giving alms to the poor has the reward of one alms, but that giving to kindred has two rewards". 9

Administration of Auqaf

After the creation of waqf the next important aspect is that of its administration. Generally it is administered by mutawalli appointed either by the waqif or the Court. However for the purposes of checks and balances there are certain statutes. Thus a waqf can be

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5 LI:19
6 III: 92
7 II: 177
8 Supra note 3
9 Aquil Ahmad, Mohammedan Law, edn 20th, p269 (Revised by the present author)
administered in two ways:
  • Non-statutory
  • Statutory

Non-statutory Administration

Mutawalli
The mutawalli is the manager of the waqf. The property does not vest in him but in the Almighty. He is there only to manage and superintend the property in consonance with the objects of the waqf. Any person who is competent to administer property may become a mutawalli irrespective of faith or sex. This rule however is not applicable where performance of religious duties is coupled with mutawalliship. Thus the following persons may act as mutawalli.
  • Waqif himself and his descendants
  • Females
  • Non-Muslims
  • Sunni in a Shia waqf or vice versa

Powers of a Mutawalli
The mutawalli is the manager and administrator of the waqf. He is duty bound to administer the waqf properties in consonance with the objects of the waqf. A Mutawalli of a waqf is supposed to administer the waqf property and its income in the same way as a prudent man would deal with his own property. He is required to be always vigilant because in the case of waqf properties, he is managing a property which has been vested in God. He should remember all the time that the intention of the waki dedicating the property was to get “Sawab” and any negligence, carelessness or misuse on his part is a great sin under Islamic Law. A mutawalli can do everything that is necessary and reasonable for the protection and administration of the waqf. He has the following powers:
  • He has the power of management and administration of waqf properties.
  • He can utilize the properties and spend them towards the achievement of the objects of waqf.
  • He can manage and supervise the waqf properties.
  • Subject to certain conditions he can grant lease.

Limitations
The powers of the mutawalli are in no case absolute. They are subject to the following limitations:
  • He cannot sell, mortgage or alienate waqf property, without the permission of the Court or of Waqf Board.
  • He cannot transfer his duties, functions and powers to anybody else, unless authorized by the waqf deed or any positive custom,
  • He cannot borrow money for spending it on beneficiaries, but can do so only for necessities, e.g. repairs,
  • He cannot lease waqf property for more than year in case of non-agricultural land, and for more than three years in case of agricultural lands, unless sanctioned by the court
  • He cannot spend on mere improvements of the waqf properties.
  • He cannot sue for the possession of waqf properties. The power is now vested in

10 Syed Khalid Rashid, Muslim Law, edn 3rd, p203
the Waqf Board by virtue of the Waqf Act 1954.\textsuperscript{11}

- Despite all these limitations, the Mutawalis are acting like a king and perhaps there is no reported case low showing any action against them.

**Removal of Mutawalli**

A mutawalli can be removed either by the waqif or by the court.

1. **By the waqif:** Abu Yusuf says that even the waqif has not reserved the right to remove the mutawalli in the waqf deed. He can nevertheless remove him. However Imam Mohammed has said that unless there is such a reservation, the waqif has no right to remove the mutawalli.

2. **By the court:** The court can remove the mutawalli on the grounds of breach and neglect of duties. The court can remote even the waqif himself if he happens to be the mutawalli and guilty of some offence. The authority of the court of law in matters of removal is first and final.

A mutawalli can also be removed by the Waqf Board in the exercise of its statutory powers. The same will be dealt later under the head statutory administration of auqaf.\textsuperscript{12}

**Statutory administration**

The history of statutory administration of auqaf can be stated under the following heads:

- The period of non-intervention 1765-1863
- The period of partial intervention 1863-1923
- The period of legislative efforts 1923-1954

**The period of non-intervention**

The statutory administration of auqaf can be traced back to the year 1765. This period saw the dawn of British administrative control in India. From the very beginning the British adopted a policy of noninterference so far as the personal laws of the Indians were concerned. It felt disinclined to foist "English ideas on a people who were not used to them".\textsuperscript{13} Thus for a while the company did nothing to interfere either in the administration of waqf or trusts that continued to be run on similar lines as under the Mughals.\textsuperscript{14} In pursuance of this policy the Regulation of 1772 was enacted. Section 27 of the Regulation provided as under:

"In all suits regarding inheritance, succession, marriage, castes and other religious usages and institutions, the laws of the Quran with respect to the Mohammedans and those of the Shashtras with respect to the Gentoos (Hindus) shall be invariably adhered to."

This policy continued to be followed up to 1810. But in 1810 The Regulation III of the Bengal Code was enacted in order to prevent the appropriation of produces of endowments contrary to the intentions of the donor. The Act coupled with Regulation VI of the Madras Code resulted in vesting the power of superintendence of endowments in the Boards of Revenue or Boards of Commissioners.

However in 1859, the British administration took a backward step and decided to divest itself of all obligations of superintending the native endowments. There was a growing realization that the personal laws of both Hindus and Muslims contained detailed provisions in matters of administration of trusts and auqaf. The British Crown now considered it appropriate to provide for an equal and impartial protection of law without making any special provision for its management. In furtherance of this policy The Religious Endowments Act 1863 was passed. As a result the landed and other properties relating to

\textsuperscript{11} Syed Khalid Rashid, op. cit, p203
\textsuperscript{12} Ibid
\textsuperscript{13} M.B. Ahmed, Administration of Justice in Medieval India: Aligarh 1941 p281.
\textsuperscript{14} Syed Khalid Rashid, Waqf Administration in India, 1978 p11.
mosques, temples or other religious endowments which were under the management of the Board of Revenue were transferred to trustees, managers or superintendents and local committees were appointed to exercise the powers of board of revenue.

**Period of Partial Intervention**

The Act of 1863 unburdened the Government officers from directly governing the native endowments. As a result the following consequences ensued:

- Regulation XII of 1810 of the Bengal Code and Regulation VII of 1817 of the Madras Code were repealed.
- The Act was applicable only to public endowments.
- The Government was divested of all responsibilities of managing the native endowments.
- Endowed properties were transferred to trustees or managers and local committees were constituted in accordance with the wishes of those interested in the maintenance of such institutions.
- The jurisdiction to try all disputes relating to auqaf was conferred on the District Courts. (S. 14 and 15)

However this step did not bear much fruits. The most important reason for its failure was the abolition of the posts of Qazis and Pundits who were earlier appointed to assist the English judge in matters of personal law. This led to gross miscarriage of justice so much so "that it is seldom that we come across a decision on a disputed question of Mohammedan law which is consistent with the instincts of Mohammedan law".15 Thus the Act put the affairs of the waqf in a greater mess than the one in which it was before the passing of the Act. All systems of checks and balances had given way. There was growing dissatisfaction over government’s policies and there was widespread urge to amend the Act of 1863. In a dispatch of the Madras Government made in 1876, the Government of India conceded that the Act of 1863 had miserably failed in preventing the maladministration of auqaf. It also invited the submission of a Bill providing for a powerful Central Indian Board to be appointed by the government. Similar proposals were made to be Governments of Bengal and Bombay. As a result several Bills were introduced were in the Councils and the Council of the Governor General of India. Later in 1890, the Charitable Endowments Act was enacted for the administration of public endowments of a non religious character. The Act provided for the appointed of a Treasurer of Charitable Endowments for the whole of the country. In further provided for the administration of trusts can be vested to the trustee provided aspect be made by the appropriate person. However the statistical aspects presented a very grim picture and very few waqfts were vested in the Treasurer. In the words of Dr Khalid Rashid "the malady was too deep rooted to be cured by such superficial treatment, a deeper cut was required but the Government was hesitant to take such a risky operation". In 1908 the Code of Civil Procedure was enacted. Provisions were made in this code by virtue of Sections 92 and 93 to prevent the mal administration of auqaf. But this step made the administration of auqaf more cumbersome in many ways than one. By the turn of the century, dissatisfaction gave way to agitation. There were recommendations, representations and resolutions from every corner of the country. Thus the government was forced to abandon its old policy of non-interference and the Waqf Validating Act of 1913 was enacted.

It touched private auqaf for the first time. Prior to this Act private auqaf were held void. But now it came to be recognized, The Privy Council in *Abdul fata Mohammed Irshad v*

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Russomoy dhur Choudhary\textsuperscript{16} laid down that if the primary object of waqf is the aggrandizement of the family and the gift to the charity is illusory whether from the small amount or from its uncertainty and remoteness, the waqf is invalid and no effect can be given to it. But such auqaf were held to be valid only when there was a substantial dedication of property to charitable use at some period of time or other.

1913- Present Day
All the regulatory or supervisory enactments referred to as above were of a general nature, governing endowments of every community and having limited scope. As these Acts had failed to curb malversation the Mussalman Waqf Act 1913 was passed "to make provisions for the better management of waqf property and for ensuring the keeping and publication of proper accounts". Section 3 of the Act made it mandatory for the mutawalli of every waqf, to furnish to the court, a statement containing such particulars of the waqf as description of property, income and expenditure. It provided for penalties for furnishing false accounts. However the Act suffered from the following drawbacks:

- It relied heavily on the Civil Courts in all matters which failed to strictly implement its provisions due to scarcity of time.
- It did not confer any authority on the court to direct a mutawalli to file a statement of accounts.
- It did not lay down a remedy in case the holder of property denied its waqf character.

Post-independent Legislations
1. **Bihar Waqf Act, 1947**: This Act was proposed to be introduced following the success of the Waqf Acts in Bengal, Delhi and UP. A bill was introduced and it was passed by the select committee but it could not receive the assent of the Governor-General and thus the Bihar Government accepted the extension of Waqf Act, 1954 to the State.
2. **Bombay Public Trusts Act, 1950**: It was enacted to regulate and to make provisions for the administration of public, religious and charitable trusts in the state of Bombay. It applied to the endowments of all communities. By virtue of this Act the Government assumed the duty of directly supervising the administration of endowments.
3. **Dargah Khwaja Saheb Act, 1955**: This Act was enacted to control the unscrupulous khadims of the Dargah Khwaja Sahib who were mal-administering the earnings of the Dargah. A committee was formed under the chairmanship of Justice Ghulam Hasan to enquire into its administration and the working of the Act of 1936. On the recommendations of this committee, the Act of 1936 was repealed and the present Act was modeled.
4. **Public Auqaf (Extension of Limitation) Act, 1959**: One of the many consequences of partition was that the waqf properties were occupied by their custodians or third persons. Some were returned while others still remained occupied. They could be recovered only through litigation but unfortunately most of them had become time-barred. To overcome such hurdle, this particular Act was enacted whereby the period of limitation for those disposed after 4\textsuperscript{th} of August, 1947 and before 7\textsuperscript{th} of May, 1954 was given exemption up to 15\textsuperscript{th} of August, 1967.
5. **The UP Muslim Wakfs Act, 1960**: The adverse state in which the auqaf were in the state of UP necessitated several amendments in the prevailing Act. However instead of amending the Act, it was thought better to enact a new legislation and hence The UP

\textsuperscript{16} (1894) 22 A.A. 76
The drafting of this Act is better than the Act of 1954 in many respects.

6. **The Wakf Act, 1954**: The Wakf Act, 1954 is a substantive piece of legislation. It is a landmark in the history of waqf administration in India. By constituting unofficial Boards vested with considerable authority and powers by imposing a precise obligation upon mutawallis and making their violation a penal offence by associating the State Governments in the supervisory responsibility and by conferring authority on the Central Government to lay down the policies to be adopted by the Boards, the Act has laid down a sound administrative structure to ensure proper administration of auqaf in the country. The Act contains a very useful provision regarding the assumption of direct management of waqf by the Board, which provides that the Board may assume direct management of the waqf for such period or periods not exceeding an aggregate of five years. as may be deemed necessary in the following cases:

- Where a vacancy in the office of the Mutawalli exists but no suitable person is available to be appointed under the terms of [the] deed of the waqf.
- Where the right of any person to act as [a] Mutawalli is disputed.
- Where a committee managing a waqf has exceeded or abused its powers or has failed in performing its duties (Section 43-A read with Sections 42 and 43(2)).

A Mutawalli of a waqf should every year prepare and submit a budget to the Board for approval for the next financial year showing the estimated receipts and expenditures in respect of the waqf during that financial year. The budget should be prepared in the form prescribed by the Waqf Board in the regulations made by them under Section 68 of the Act. Under Section 36 of the Act, it is the duty of the Mutawalli to furnish returns, statistics, accounts and other information called by the Board. Failure to do so is made penal under Section 41 of the Act. The Wakf Act, 1954, contains provisions in Sections 55 to 57 for filing of suits relating to auqaf. As stated before, the previous consent in writing of the Board is necessary for instituting a suit for obtaining any of the remedies mentioned in Section 92 of the Code of Civil Procedure (Section 14 of the Religious Endowment Act, 1863, having been omitted by the Wakf Amendment Act, 1964.

**The Wakf Act, 1995**

The Wakf Act, 1995 is an exhaustive piece of legislation which is in force all over India barring the state of Jammu and Kashmir and Dargah Khawaja Saheb, Ajmer which has a separate legislation to manage its affairs. This Act aims to provide for better administration and supervision of auqaf. Although the Act, 1954 was a good piece of legislation, its actual working revealed several flaws in it as also in the set up of the Wakf Boards, in particular the power of superintendence and control over the management of the individual auqaf. The Act was amended three times in 1959, in 1964, and in 1969. On the recommendations of the Wakf Inquiry Committee, comprehensive amendments were made in the Act in 1984. The amendments of 1984 were strongly opposed and it was decided to enact a new law. Thus, the Act of 1995 was enacted incorporating the features of the Act of 1954 and such provisions of the amending Act of 1984 on which there was a near consensus. On much pending demands of the Muslim community an amendment has been made in 2013 in the Act of 1995. Some of the important characteristics of the Act are hereby discussed.

**Waqf Boards: Constitution and Powers**

The Act provides for the establishment of Board of waqf for both Sunni ad Shia and for states and the Union Territories. The Board in case of Union Territories other than the National Capital Territory of Delhi consists of not less than three and not more than five members who are appointees of Central Government. There is also one Mutawalli as the
member of the Board. In case of the states and the National Capital Territory of Delhi, the Board consists of both elected and nominated members. It shall comprise of:

(a) a Chairperson:
(b) one and not more than two members, as the State government may think fit, to be elected from each of the electoral colleges consisting of-
   (i) Muslim Members of parliament from the State or, as the case may be, (National Capital Territory of Delhi)\textsuperscript{18}
   (ii) Muslim Members of the State Legislature,
   (iii) Muslim members of the Bar Council of the concerned State or Union territory: Provided that in case there is no Muslim member of the Bar Council of a State or a Union territory, the State Government or the Union territory administration, as the case may be, may nominate any senior Muslim advocate from that State or the Union territory, and\textsuperscript{19}
   (iv) Mutawallis of the [auqaf]\textsuperscript{20} having an annual income of rupees one lakh and above:

[Explanation I—For the removal of doubts, it is hereby declared that the members from categories mentioned in sub-clauses (i) to (iv), shall be elected from the electoral college constituted for each category.

Explanation II— For the removal of doubts it is hereby declared that in case a Muslim member ceases to be a Member of Parliament from the State or National Capital Territory of Delhi as referred to in sub-clause (i) of clause (b) or ceases to be a Member of the State Legislative Assembly as required under sub-clause (ii) of clause (b), such member shall be deemed to have vacated the office of the member of the Board for the State or National Capital Territory of Delhi, as the case may be, from the date from which such member ceased to be a Member of Parliament from the State or National Capital Territory of Delhi, or a Member of the State Legislative Assembly, as the case may be;]

(c) one person from amongst Muslims, who has professional experience in town planning or business management, social work, finance or revenue, agriculture and development activities, to be nominated by the State Government:

(d) one person each from amongst Muslims, to be nominated by the State Government from recognized scholars in Shia and Sunni Islamic Theology;

(e) one person from amongst Muslims, to be nominated by the State Government from amongst the officers of the State Government not below the rank of Joint Secretary to the State Government;\textsuperscript{22}

In case where a Board of Waqf has not been established as required by the Act, a Board of Waqf shall be established within six months from the date of

\textsuperscript{17} The Wakf Act, 1995, Sec 14(7)
\textsuperscript{18} Ibid, Subs. by the Wakf (Amendment) Act, 2013
\textsuperscript{19} Subs. by the Wakf (Amendment) Act, 2013
\textsuperscript{20} Subs. by the Wakf (Amendment) Act, 2013
\textsuperscript{21} Ins. by the Wakf (Amendment) Act, 2013
\textsuperscript{22} Subs. by the Wakf (Amendment) Act, 2013
Commencement of the Wakf (Amendment) Act, 1013.\textsuperscript{23}

The Boards are a body corporate having perpetual succession and a common seal with power to acquire, hold and transfer property and can sue and be sued.\textsuperscript{24} The Board can appoint committees for the supervision of auqaf for any particular area or areas.\textsuperscript{25} The Board is vested with several duties and powers, important ones are being referred here:

- the general superintendence of all auqaf in a state.
- exercise its powers in such a way as to ensure that the auqaf are properly maintained, controlled and administered and the income thereof is properly applied to the objects.\textsuperscript{26}
- maintaining records relating to the origin, income, object and beneficiaries of the waqf.
- to ensure that the objects of the waqf are fully met with.
- to give directions and settle schemes for the administration and management of auqaf.
- to appoint and remove Mutawallis in accordance with the provisions of this Act.
  - to institute and defend suits and proceedings relating to auqaf.
  - to administer the Waqf Fund
  - to investigate and determine the nature and extent of the waqf and waqf property, and to cause when necessary a survey of such waqf property.\textsuperscript{27}

Central Waqf Council

The Act envisages the establishment of a Central Wakf Council for the purpose of advising the Central Government, State Governments and the Boards on matters concerning the working of the Boards and the due administration of auqaf. The council is to consist of a chairperson and 20 members to be appointed by the Central Government.\textsuperscript{28} The council shall consist of —

(a) The Union Minister in Charge of (auqaf)\textsuperscript{29}— ex-officio Chairperson;
(b) The following members to be appointed by the Central Government from amongst Muslims, namely-
  (i) Three persons to represent Muslim organizations having all India character and national importance;
  (ii) (four persons of national eminence, one each from the fields of administration or management, financial management, engineering or architecture and medicine)\textsuperscript{30};
  (iii) Three Members of Parliament of whom two shall be from the House of the people and one from the Council of States;
  (iv) Chairperson of three Boards by rotation;
  (v) Two persons who have been judges of the Supreme Court or a High Court;
  (vi) One advocate of national eminence;

\textsuperscript{23} Ins. by the Wakf (Amendment) Act, 2013
\textsuperscript{24} Sec. 13(3)
\textsuperscript{25} Sec. 18
\textsuperscript{26} Sec. 32(1)
\textsuperscript{27} Sec. 32 (2)
\textsuperscript{28} Sec. 9
\textsuperscript{29} Subs. by the Wakf (Amendment) Act, 2013
\textsuperscript{30} Subs. by the Wakf (Amendment) Act, 2013
(vii) One person to represent the mutawallis of the (waqf)\(^{31}\) having a gross annual income of rupees five lakhs and above;
(viii) Three persons who are eminent scholars in Muslim Law, (provided that at least two of the members appointed under sub-clauses (i) to (vii) shall be women).

The Council shall have its own fund by the name of Central Wakf Fund. It shall consist of money received by the Council as donations, benefactions and grants.\(^{32}\) Every Board shall pay from its Wakf Fund, an annual contribution equivalent to one percent of the annual income of the Wakfs.\(^{33}\) The Council is also required under section 11 to maintain its account in such manner as may be prescribed. With a view to protect vacant Waqf land from encroachers and to develop it on commercial lines for generating more income in an order to widen welfare activities, Central Wakf Council has been implementing this scheme since 1974-75 with yearly grant-in-aid from the Central Government. Under the Scheme, loan is extended to various Waqf Institutions in the Country for taking up economically viable buildings on the Waqf land such as commercial complex, marriage halls, hospitals, cold storage etc. For this, the Central Government has released a total grant-in-aid amounting to Rs. 30 crores 26.36 lakhs only from September 1974 to March, 2007, and in turn the Central Wakf Council has extended loan to 119 projects approved by the Council as well as by the Government of India. Out of these 119 projects, 75 projects have been completed in all respect and are yielding income. The loan amount is repaid to the Council by the loaner institutions in easy installments and the amount thus received back forms a Revolving Fund, which is again utilized for giving loans up to Rs. 20 lakhs to the Minor Development Projects on Waqf properties. From this Fund, the Council had released a sum of Rs. 4 crores 64.89 lakhs to 87 projects up to 31.3.2007 out of which 66 projects have been completed.\(^{34}\) Happy to note, now the fund has been given to digitization of the records relating to auqaf (See table 1).

\(^{31}\) Subs. by the Wakf (Amendment) Act, 2013
\(^{32}\) Sec. 10 (2)
\(^{33}\) Sec 10 (1)
\(^{34}\) Report on the working of the Central Wakf Council extracted from the web page “central wakf council.org’’.

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Despite such exhaustive legal provisions the result is still pathetic. The reason is obvious: political appointment and corruption. The Chairman of the Board is always appointed by the concerned government and he is a man of politics. Moreover, implementation of the existing law is so poor that reflects as if there is no law.
Position of Mutawalli

Mutawalli are the persons who are mainly responsible for such a deteriorated position of waqf properties. They are treating waqf properties as their personal perspective using them for their ulterior motive. The properties which are worstly managed properties in India are waqf properties. Now the Act places numerous checks on Mutawallis. They are appointed and can he removed by the Board on the grounds mentioned in the Act. They are barred from instituting, defending and compromising suits relating to auqaf without the sanction of the Board. The Act makes it obligatory on Mutawallis to let the property and it account be audited by auditors appointed by the Board and at the discretion of the State Government. A mutawalli in general has no discretion so far as the administration of auqaf is concerned. He is no more than a mere officer of the Board. The Act lays down following duties of the mutawalli.\(^\text{35}\)

- to carry out the directions of the Board in accordance the provisions of this Act or any rule made there under.
- to furnish such returns and supply such information may be from time to time he required by the Board
- to allow inspection of waqf properties, accounts or records or deeds and documents relating to it
- to discharge all public dues
- to do an Act which he is legally required to do under this Act

Alienation of Waqf property:

Generally, any lease of any immovable property which is waqf property shall be respective of anything contained in the deed, the sale, gift, exchange, mortgage or transfer of waqf property shall be void but it the Board is satisfied that any waqf property may be developed for the purpose of the Act, it may take of the development of such property through such agency as the Board may determine. The most disturbing provision in this regard is the power of the government to acquire waqf properties for a public purpose under the Land Acquisition Act, 1894 with the consent of the Board. However, to safeguard adequately the interest and objectives of the waqf, the compensation shall be made at the prevailing market value or a suitable land with reasonable solatium in lieu the acquired property.

However, Sec. 56 of the Wakf Act, 1995 puts restriction on the power to grant lease of waqf property. It says that a lease for any period exceeding thirty years of any immovable property which is waqf property shall be void and of no effect.\(^\text{36}\) Such a lease for any period upto thirty years may be made for commercial activities, education or health purposes, with the approval of the State Government. It further provides that if such waqf properties are agricultural land then the lease of such property cannot exceed for more than three years. Otherwise, the lease would be void. The Act further requires that before making lease of any waqf property, the Board shall publish the details of lease and invite bids in at least one leading national and regional newspaper.

Penalties

A mutawalli can also be penalized for failure to perform his duties as mutawalli. Section 61 (1) of the Act lays down the grounds on which he can he penalized. They are as follows.

(1) If a Mutawalli fails—

- to apply for the registration of a waqf;
- to furnish statements of particulars or accounts or returns as required by this Act;

\(^{35}\) Sec. 50

\(^{36}\) Subs. By the Wakf (Amendment) Act, 2013

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to supply information or particulars as required by the Board;

to allow inspection of waqf properties, accounts or records or deeds and documents relating thereto;

to deliver possession of any waqf property, if ordered by the Board or Tribunal;

to carry out the directions of the Board;

to discharge any public dues or

to do any other act which he is lawfully required to do by or under this Act, he shall, unless he satisfies the court or the Tribunal that there was reasonable cause for his failure, be punishable with fine which may extend to eight thousand rupees;

if the mutawalli fails or omits to apply for the registration of waqf with a view to concealing its waqf character or he furnishes any information to the Board knowing it to be false, he can be punished with imprisonment for six months and fine which may extend to fifteen thousand rupees.

Removal of Mutawalli

The Board has been empowered to remove a mutawalli from his office if he -

- has been convicted more than once of an offence punishable under sec 61 of the Act, or
- has been convicted of any offence of criminal breach of trust or any other offence involving moral turpitude.
- is of unsound mind or is suffering from other mental or
- physical defect or infirmity, or
- is an un-discharged insolvent, or
- is proved to be drinking liquor or other spirituous preparations, or is addicted to the taking of narcotic drug, or
- is employed as a paid legal practitioner on behalf of, or against, the auqaf, or
- has failed to maintain regular accounts or does not furnish the yearly statement of accounts for two consecutive years, or
- Has any kind of financial interest relating to waqf property, or
- Continually neglects his duty, commits misfeasance or breach of trust in respect of waqf property, or
- Willfully disobeys the lawful orders of the Central Government or Board, or
- Misappropriates or fraudulently deals with the property of the waqf.

Waqf Tribunals

The Act has ousted the jurisdiction of civil courts in disputes relating to Waqf and has vested it in the Waqf Tribunals. Every Tribunal is to consist of one person who shall be a member of the State Judicial Service, not below the rank of a District, or a Sessions or Civil Judge Class I who shall be the Chairman. One person as a member from State Civil Services not below the rank of ADM and one person as a member having knowledge of Muslim law and jurisprudence. The Tribunal shall have all the powers of a civil court exercised by it under the Code of Civil Procedure 1908. Its decisions shall be binding on the parties and shall have the force of a decree of a civil court. The Tribunal has jurisdiction to entertain appeals against decisions of the Board and Chief Executive Officer. That there can be no appeal against the decision of the Tribunal, be it interim or final. If any question arises as to-

- whether a particular property is waqf property or not, or
- whether a particular waqf is a Shai waqf or Sunni waqf.

37 Sec. 64 cl. (1) (a-k)
38 Sec 83.
The Board or the mutawalli of the waqf or any person interested therein may institute a suit in a Tribunal for the decision of such question and the decision of the Tribunal in respect of such matter shall be final. The period of limitation for instituting a suit is one year from the date of the publication of the list of aqaf. In Mutawalli v. Kerala Jamaat Islami Hind and Ors., the court gave wide interpretation to the term “person interested in aqaf”. The court held that the following persons can make an application to the Tribunal for the determination of any dispute, or other matter relating to waqf. These persons are:

- any mutawalli;
- any person interested in waqf;
- any person aggrieved by an order made under this Act.

Thus for approaching the Waqf Tribunal there is no precondition regarding the registration of Waqf in question, the only jurisdictional factor is that the application by any of the above mentioned persons should be for the determination of any dispute, question or other matter relating to waqf. In Board of Waqf, Best Bengal v. Anis Fatima Begum, deciding the point of jurisdiction, the Supreme Court held that the Waqf Tribunal can decide all disputes, questions or other matters relating to a waqf or waqf property. The words “any dispute, question or other matters relating to a waqf or waqf property” should be given wide commutation. Any dispute, question or other matters whatsoever and in whatever manner arises relating to a waqf or waqf property can be decided by the Waqf Tribunal.

But in matters of tenancy and other civil matters the Tribunal will have no jurisdiction to try such cases and that matter will be decided by the Civil Court. In Akkode Jumayath Palli Paripalana Committee v. P.V. Ibrahim Haj, the question that arises for consideration in this appeal is whether the Waqf Tribunal has got jurisdiction to entertain suit for injunction restraining the defendants from interfering with the administration, management and peaceful enjoyment of the Mosque and Madarsa run by it.

The Supreme Court held that the dispute that arises for consideration in this case is with regard to the management and peaceful enjoyment of the mosque and madarsa and the assets which relate to Waqf. Nature of the relief clearly shows that the Waqf Tribunal has got jurisdiction to decide those disputes.

Preserving Perpetuity of Auqaf

The administration of aqaf over the years has proved unworthy of any credit. There is one or the other impediment that hastens all that ought to be done to fulfill the objects of the waqf. To safeguard the existence of a large number of Waqf properties in India, a comprehensive Wakf Act was passed by Parliament in 1954. Over the years, during the process of the implementation of the Waqf Act, many lacunae and loopholes were noticed and the Waqf Inquiry Committee recommended amendments that were incorporated in the Wakf Act of 1995. Despite these efforts, the management of the Waqf Boards and the properties remains unsatisfactory. This is due to inadequate empowerment of the State Waqf Boards and the Central Waqf Council. Now, to further improve the management and administration of waqf properties the Wakf (Amendment) Act, 2013 has been passed. Various problems encountering waqf administration can be enlisted as under:

Uninterested mutawallis

There are instances where auqaf are treated by Mutawallis as their personal properties. From Dargah the offerings are sometimes appropriated by them. The management of the

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39 Sec. 6
40 AIR 2007 Ker 2653
42 AIR 2013 SC 3530
waqf Boards and the properties remain unsatisfactory due to inadequate empowerment and independent of the State Waqf Boards and Central waqf Council. There are frequent interventions by the State Government in the functioning of the Waqf Board. Waqf properties which sub-serve the larger public interest should be protected as such. However, waqf properties where specific religious rites are observed because of the importance of the site should be respected. Such a policy will lead to effective social cohesion and economic development. Therefore an effort should be made not to include such properties in land acquisition.

**Improper Records**

The records of Waqf properties are still not well maintained and are prone to the vagaries of weather, mutilation and loss. These records are in most of the cases tempered. This calls for immediate remedial action. These should be digitized under a Government program. The Central Government may consider special grants through the Central Waqf Council to undertake this task and supervise the quality of documentation. In spite of listing of aqaf in statutory surveys often, the properties are not registered as aqaf in revenue records and in record of the Local Self Governments. These lacunae and inaction on the part of the state governments are the source of prolonged litigation. From the records available, it is clear that reference of only 314422 waqf properties is available and out of it only fifty percent aqaf are registered. Digitizations of only thirty-seven percent of waqf properties have been completed.

**Illegal encroachments**

Waqf properties are supposed to be the properties belonging to no one (but Allah). So encroachments on the waqf properties are made not only by private persons but also by the government and its agencies across the country. The encroachments are in two forms: (1) an absolute usurpation of property with no rents or other payments of any sort, and (2) those where the occupying party pays a nominal rent which has not been revised for decades. The number of private encroachments is very large. They are scattered all over the country and are often involved in litigation. This is the eye-opener fact—almost seventy seven percent of Delhi was owned by the waqf but most of it properties have been illegally occupied, including the CGO complex, Jawahar Lal Nehru Stadium, Delhi Court, Delhi Public School (Mathura Road), Anglo Arabic School, News papers offices on Bahadurshah Zafar Marg, besides umpteam Central Govt. Offices. All these properties were lost because waqf management laws were inadequate and the Central Waqf Council is toothless body. Ironically, the list of encroachers, illegal occupiers and perpetrators of misappropriation waqf properties include the name of personalities as prominent as Ahmad Bukhari, the Iman of Jama Masjid, Delhi, Maulana Muazzam Ahmad, the Naib Imam of the Shahi Masjid, Fatehpuri, Delhi and some other well-known organizations and individuals. Focused attention is, therefore, called for on encroachment by the State that is the custodian of the waqf interests. It is therefore submitted that special laws be enacted to deal with the trespassers.

**Overruling or Conflicting Orders by State Governments**

The Minorities Department of U.P. Government has unauthorizedly passed orders overruling the quasi-judicial orders given by the Waqf Board, a copy of the most recent example of the U.P. government overruling the Waqf Boards orders is available with the community. The Department has, in this way, been staying, overruling and vacating the Board orders. Such
actions are ultra vires the Waqf Act. Both Sunni and Shia Boards drafted and submitted in 2004 the proposed Rules for the functioning of the Waqf Board and for implementation of the Wakf Act 1995. But the Department has yet to take action thereupon. While the UP Government could be advised to look into the matter, the Wakf Act, 1995 may be amended to prevent such interference.44

**Governmental indifference**

It would be seen that the attitude of the state governments and their agencies has resulted in large-scale abrogation of the cherished and charitable objectives of the auqaf for which such endowments were created. In fact encroachment by the State on the waqf lands, besides causing embarrassment to the authorities and emboldening private encroachers has stood in the way of reform and reconstruction.

**Waqf Board and Corruption**

In India, Waqf Board and corruption has very closed friendship. There is a long time, systematic daylight robbery in India. It is in the wheeling and dealing of waqf land by the Waqf Boards which is given them in the name of Allah by the affluent for the upkeep of orphans, widows, divorced women, educational and charitable purposes. There is a nexus between politicians, police, bureaucrats and land mafia who have always eyed waqf land which cannot be sold or its use changed till eternity. They are given on lease in lieu of money that fills the offers of officials. How the Waqf Board has become an establishment deeply mired in corruption can be gauged from some land scams like the one at the Maharashtra Waqf Board that has given 4,535 sq mts in the upmarket Attamount Road to Mukesh Ambani for his 27-storey Apartment. Similarly in Bangalore, the Windsor Manor Hotel worth more than 600 crore has been leased for a petty Rs.12000 per month.45 The Sachar Committee Report suggested that an overhauling of the Waqf Board is required as the government does not get proper CEOs in most of the states and those who are there are either manning this post as an additional charge or are simply not qualified.

**Conclusion and Suggestions**

The sorry state of affairs of auqaf calls for administrative and organizational reforms. At present, the management of waqf properties is seriously impaired both due to high incidence of litigation and poor management. Often important waqf cases, and thereby valuable properties, are lost because of lack of financial and administrative resources. Therefore strengthening Waqf Boards administratively with necessary financial and legal back-up is absolutely necessary. The following steps are recommended:

- The auqaf can be developed on modern lines to grow in consonance with their objects. For e.g. it can be developed as a shopping centre, market, housing flats and the like. Thus development and charity both can be attained.
- The administrative and judicial process concerning auqaf should be enhanced and quickened.
- Frequent reports should be given to the Waqf Board and to waqf council relating to development works undertaken to improve auqaf.

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44 Report of Rajinder Sachar Committee relating to management of waqfs: Jan-Feb. 2007.
• Greater interest and involvement of the Muslim community is needed to gauge and monitor the purity of intent of those responsible for the management of auqaf of all levels.

• Encroachment of waqf property should be made a cognizable offence, and in case of any such dispute, an FIR must be registered by the police.

• Waqf’s related disputes should be disposed off within certain time frame. Lingering on the disputes virtually zeroed the object of the waqf.

• Auqaf meant for poor should be treated differently from others. If not properly managed such auqaf should be taken over by the Board and should be managed and used for the betterment of the needy at large.

Appendix-I