



الأمانة



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Fondation Publique des Awqaf du Koweït

# AWQAF

Refereed quarterly journal, specialized in waqf and voluntary activities

zero issue shaaban 1421 AH, November 2000



## **Awqaf Legislation in South Asia : A comparative study**

Prof. Syed Khalid Rashid



## **Le rôle socio-économique du Waqf dans la société musulmane: historique et perspectives**

Prof. Abderrazek Guessoum

## ***AWQAF***

*AWQAF* is an academic refereed journal specialized in Waqf and voluntary activities, issued by Kuwait Awqaf Public Foundation (KAPF). It is based on a firm conviction that Waqf -as a concept and experience - has a high potential which entitles it to play a prominent role in managing the future of Muslim communities and cope with the challenges confronting them. The Islamic history reflects the rich experience of the Waqf touching the various aspects of life and contributes to resolving social problems. Waqf managed to maintain those remarkable achievements and guarantee their sustainability over the ages. Nowadays, the Islamic world is witnessing a clear tendency towards mobilizing their potentials and resources to work out an original human developmental vision.

The basic idea of Waqf centers round volunteerism, with the civil society as its natural arena. This causes the Waqf to get into direct contact with different intellectual areas, such as the civil issues, charitable behavior, and open-mindedness.

### **Objectives of *AWQAF***

- 1- Reviving the culture of Waqf through familiarizing the reader with its history, developmental role, jurisprudence, and achievements which Islamic civilization witnessed up to date.
- 2- Intensifying the discussions on the actual potential of Waqf in modern societies through emphasis on its modern instruments.
- 3- Investing the current Waqf projects and transforming them into an intellectual product in order to be exposed to specialists. This is hopefully expected to induce dynamism among researchers and establish a link between theory and practice.
- 4- Promoting reliance on the repertoire of the Islamic civilization in terms of civil potential resulting from a deep and inherent tendency towards charitable deeds at the individual's and nation's levels
- 5- Associating the Waqf with the other social activities within the framework of an integrated trend in order to strengthen the Arab and Muslim civil society.

Through this approach, *AWQAF* seeks to naturally embrace all intellectual topics directly or indirectly related to the Waqf such as volunteerism, civil society debate, NGOs social contribution, and development. It calls researchers and other concerned people to contribute to and react with the journal in the hope of warding off the challenges facing the *Umma*. *AWQAF* invites original articles; discussion papers; short notes; book reviews and comments; reports on researches getting underway, important developments and events relating to the Waqf as subscribed by researchers, scholars, and professionals.

# AWQAF

*Refereed Journal, specialized in Waqf and voluntary activities.*

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### *AWQAF Publication Regulations*

The journal publishes original Waqf-related researches in Arabic, English and French. It also accepts summaries of approved M.A's and Ph.D's, reports on conferences, symposia, and seminars dealing with in the field of Waqf.

Contributions are accepted in Arabic, English or French, provided they abide by the following regulations:

- 1- They should not be published before, or meant to be published anywhere else.
- 2- They should abide by the scientific conventions related to the attestation of references, along with the academic processing.
- 3- All papers must include a brief abstract and should fall into 4000-10000 words.
- 4- Material meant for publication should undergo a confidential refereeing.
- 5- Coverage of Material once sent for publication, whether published or not, is unreturnable.
- 6- *AWQAF* is entitled to re-publish any material separately.
- 7- All responsibility for the opinions expressed and the accuracy of facts rests solely with the author(s)
- 8- seminars and conferences is acceptable

*Opinions expressed in this journal are solely of their authors and do not necessarily reflect those of the journal*

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***Awqaf Legislation in South Asia:  
A comparative study***

Syed Khalid Rashid\*

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**1. Introductory Remarks:**

There are about 300 million Muslims in South Asia, a geographical entity consisting of India, Pakistan, Bangladesh, Sri Lanka, Maldives, Nepal and Bhutan. However, for purposes of this, Myanmar is included in this grouping as it remained part of India upto 1937 and many Indian laws, including those relating to waqfs, still apply to waqfs in this country.

During the Inter-State Waqf Conference organized in 1960 by the Waqf Section, Government of India, one of the recommendations was to undertake a comparative study of waqf administration in various countries. No one ventured to take up such a study. A brief paper on this subject presented last year in Kuala Lumpur by Prof. Tahir Mahmood<sup>1</sup> and this paper now being presented by me may prompt some scholars to take up this long overdue comparative study in a very fascinating and challenging area.

The waqf legislation in countries of this region does not cover substantive law of waqf. All of these statutes exclusively deal with supervisory and administrative matters. The substantive law of waqf applicable in these countries remains part of the unwritten Muslim Personal Law which is based on Islamic law but nurtured by the courts in such a way as to make it a distinct entity. The countries covered by this study are: India, Pakistan, Bangladesh, Sri Lanka, Myanmar and Maldives. For reasons of non-availability of material and paucity of time, Nepal and Bhutan have not been covered. However, as no waqf legislation exists in these two countries, this omission may not materially affect the coverage of this paper.

**II. Chronological History of Waqf Legislation in South Asia**

**(i) India:**

1810 Regulation 3 of the Bengal Code

1817 Regulation 6 of the Madras Code

[These regulations gave the superintendence of endowments (including waqf) to the Board of Revenue or Board of Commissioners] Both regulations were repealed by Act 20 of 1863.

1863 No. 20 of 1863 – Religious Endowment Act.

[The Regulations of 1810 and 1817 were repealed by this Act. All

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endowments (including waqfs) were given back to the trustees/mutawallis, and from then on they were supervised by the newly formed Local Committees. The institution of Qadi was abolished in India by Kazees Act 2 of 1864, thus depriving waqfs of their traditional guardian. Waqf disputes were now to be taken to the Courts, having judges not qualified in Shari'ah.

Repealed by Waqf Act 1954

- 1878 No. 15 of 1878 Hussainabad Endowment Act  
[An act to provide for the supervision of Hussainabad Immabara at Lucknow.]
- 1890 No. 6 of 1890 – Charitable Endowment Act  
[To administer public endowments (including waqfs) of non-religious character through a Treasurer of Charitable Endowment, as and when a mutawalli wished to be so governed. The Act failed miserably. Repealed by the Waqf Act 1945.]
- 1908 No. 5 of 1908 – civil Procedure Code, sections 92 and 93 [in case a public trust (including a public waqf) is mismanaged, two or more persons interested could bring a suit against the trustee/mutawalli, provided they obtain prior permission of Advocate-General. This rider diluted the usefulness of this law. By virtue of section 69, Waqf Act, 1954 the application S. 92 to waqf ceased.]
- 1913 No. 6 of 1913 – Mussalman Waqf Validating Act.  
[A declaratory law validating waqf alaulad in the wake of Privy Council's judgement in Abul Fata Mohamed's Case (1894) 22 I.A 74. This act neither contains any substantive nor procedural law relating to waqfs except a definition of "waqf" which is repeated in nearly every subsequent waqf legislation of India, Pakistan, Bangladesh, Sri Lanka and Myanmar. This Act was amended in 1930 to give it retrospective effect.]
- 1920 No. 14 of 1920 – Charitable and Religious Trusts Act  
[The courts were given the supervisory role, without placing any statutory obligation on trustees to maintain accounts and getting them audited. The act was a total failure, at least in matters of waqf.] It was repealed.
- 1923 No. 42 of 1923 – Mussalman Waqf Act  
[Mutawallis of public waqf were required to sent to the Court full particulars of the waqf. The Act heavily relied on Court to inspect in detail the particulars of the each waqf. It was too much to expect from the Court. The Act failed.] Repealed by Waqf Act, 1954.
- 1934 No. 13 of 1934 – Bengal Waqf Act  
[Waqf Board was established, consisting of nominated and elected members. Commissioners of waqf presided over the Board.]

- 1935 No. 18 of 1935 – Mussalman Waqf (Bombay Amendment) Act.  
[The Bombay Act amended the Mussalman Waqf Act, 1923 in its application to Bombay to make it more effective. Repealed.]
- 1936 No. 13 of 1936 – U.P. Muslim Waqf Act  
[Waqf board for Shia and Sunni Waqfs established. Repealed by the U.P Waqf Act. 1960]
- 1936 No.22 of 1936 – Dargah Khwaja Saheb Act  
[For the regulation of affairs of Ajmer Dargah and Khadim's right to receive nazar. Dargah Committee was established. Repealed by the Act of 1955.]
- 1939 Hyderabad Endowment Regulation  
[All endowments including waqfs to be directly governed by the government. ceased to apply to waqfs since 1957 when Waqf Act. 1954 was extended there.
- 1947 Bihar Waqf Act  
[Separate Majlises for Shia and Sunni waqfs in the state. No provision for survey, and the Act suffered with many defects. It was repealed in 1974 by the Central Act. ]
- 1950 No. 29 of 1950 – Bombay Public Trusts Act  
[This Act replaced the Bombay Waqf (Amendment) Act, 18 of 1935. Trusts including waqf in certain areas of Bombay and Gujrat were directly governed by State appointed officials. Now, this Act no more applies to waqfs since 1997 when the Waqf Act, 43 of 1995, was extended to these two States.
- 1954 No. 29 of 1954 – Waqf Act  
[A landmark waqf legislation extending to the whole of India except U.P, Bihar, Bengal, Delhi, J & K, Bombay and certain parts of Gujrat. Very soon it replaced the local waqf Acts in Bihar and Delhi. It established Waqf Boards, started survey, created a Central Waqf Council, and a regime of regulations. Repealed by the Waqf Act, 1995.]
- 1955 No. 36 of 1955 – Dargah Khwaja Saheb Act  
[to regulate the affairs of Dargah of Ajmer] This act is in force. It repealed Act 23 of 1936 of similar name].
- 1959 Public Waqfs (Extension of Limitation) Act  
[To extend the statutory period of limitation for filing suits in respect of public waqf dispossessed at any time after August 4, 1947 and before May 7, 1954 upto August 15, 1967. Further extensions have been given several times. Stands indirectly repealed by section 107 of the Waqf Act, 1995 which exempts waqfs from the operation of the Limitation Act, 1963 for the institution of suits to repossess waqf illegally encroached upon.]



- 1959 Jammu & Kashmir Muslim Waqfs Act  
[Contains provisions for survey. Board of waqf is advisory only. Government appointed Waqf Committees exercise real control. This Act was repealed by J. & K. Muslim Waqf Act. 1978]
- 1978 No. 11 of 1978 – J. & K. Waqfs Act  
[Tehsil Waqf Committee wholly elected by an electoral college in every Tehsil to supervise waqfs in its area. A waqf board for each province of 18 members, 12 of which to be elected by Tehsil Waqf Committee and 6 to be nominated by the state government. Good measures for the eviction of unauthorized occupants of waqfs]
- 1984 No. 49 of 1984 – Waqf (Amendment) Act
- 1995 No. 43 of 1995 – Waqf Act  
[Board to be constituted on the basis of election and nomination. Waqf Commissioner was replaced by Chief Executive officer, who is subordinate to Board. Waqf Tribunals are retained, and they may follow their own procedure, not that of Civil Procedure Code. Civil Courts have no jurisdiction to entertain suits regarding waqfs. This Act extends to the whole of country including U.P. West Bengal, parts of Gujrat and parts of Maharashtra and some of the North-Eastern States, where local laws were in force. The Act does not apply to Jammu & Kashmir, Dargah Khwaja Saheb, Ajmer, and waqf Al-aulad.]

**Waqf legislation currently in force in India**

1. Mussalman Waqf Validating Act, 6 of 1913
  2. Dargah Khwaja Saheb Act, 36 of 1955
  3. Jammu and Kashmir Waqf Act, 11 of 1978
  4. Waqf Act, 43 of 1995
- (ii) **PAKISTAN:** [Some of the pre-1947 enactments were adopted after 1947 and are still in force in Pakistan, as indicated below]
- 1913 No. 6 of 1913 – Mussalman Waqf Validating Act  
[A declaratory legislation affirming the rights of Muslims to create waqf al-aulad]
- 1923 Mussalman Waqf Act  
[This Act was applicable to those parts of India which became East and West Pakistan. The Act required every Mutawalli to furnish all the relevant information and accounts of the waqf to the Court.]
- 1935 Mussalman Waqf (Sindh Amendment)  
[The above three enactments of pre-1947 Act period were allowed to remain in force and were repealed only in 1959 by the West Pakistan Waqf Properties Ordinance, 21 of 1959].

- 1935 Mussalman Waqf (Bombay Amendment) Act, 1935 as applicable in the District of Karachi.  
[this Act was repealed by the W.P. Waqf Properties Ordinance, 28 of 1861]
- 1937 Punjab Act 7 of 1942 – Music in Muslim Shrines  
[A ban was imposed on female singing and dancing Act in a Muslim Shrine. It was made a penal offence, punishable with fine or 6 month imprisonment or both. Any person abetting the offence was also punished still in force. ]
- 1949 State of Bahawalpur Act – Qanun-I-Waqf-I-Islami  
[Repealed by W.P. Waqf. Ord. 1961]
- 1949 No. 8 of 1949 – NWFP Charitable Institutions Act.
- 1950 No. 20 of 1950 – NWFP Charitable Institutions Act North-West Frontier Province Charitable Institutions (Amendment) Act.  
[In NWFP, an Administrator of Charitable Institutions was appointed to administer waqfs. Failure to surrender endowed property to Administrator was made a penal offence. The NWFP Act was repealed by W.P. Waqf Ordinance, 1961.
- 1950 Punjab Act No. 36 of 1950 – Punjab Muslim Awqaf Survey Act.  
[Appointment of Nazim-i-ala-i- Awqaf with whom every waqf shall be registered. Nazim had powers of a civil court under CPC, 1908. Failure of Mutawalli to register the waqf with Nazim was made penal. The Act was amended in 1951 (No. 19 of 1951) to make it more effective. The Act was repealed by Punjab Muslim Awqaf Act, 1951].
- 1951 Punjab Act No. 6 of 1952 – Punjab Muslim Awqaf Act.  
{A 12 –member Board of Waqf elected by Muslim members of Punjab Assembly, two of whom must be Shia. Registration of waqfs with Board was made compulsory. Adalat-i-Awqaf (Waqf Tribunal) were established for deciding waqf cases, but in accordance with Civil Procedure Code, 1908 Five percent contribution to be made by every waqf towards administration costs. Audit by auditor appointed by government, but report to be made to Board. Final action to be taken by the government. This Act was repealed by West Pakistan Waqf Properties Ordinance, 1959]
- 1959 West Pakistan Ordinance No. 21 of 1959 – W.P. Waqf Properties Ordinance.  
[“Waqf” is defined very comprehensively. Board abolished. Administrator of Waqfs appointed, assisted by his Deputies and staff. No jurisdiction of Civil or Revenue Courts in many matters where waqf administrator exercised his powers. This ordinance was repealed by W.P. Waqf Properties Ordinance, 28 of 1961].

- 1961 West Pakistan Ordinance, 28 of 1961 – West Pakistan Waqf Properties Ordinance.  
[It is identical to the 1959 Ordinance except that now rent and lease monies in respect of waqf properties may be recovered as arrears of land revenue; that Administrator may call for returns from mutuawallis, and disobeying Administrator's directions was made punishable with fine. Repealed by Awqaf (Federal Control) Act, 56 of 1976.]
- 1962 East Pakistan Waqfs Ordinance, EP Ordinance 1 of 1962.  
[For details, see under Bangladesh.]
- 1976 No. 56 of 1976 – Awqaf (Federal Control) Act.  
[It extended to the whole of Pakistan. Administrator-General of Awqaf for Pakistan appointed by the government. He appointed Chief Administrator. Administrators and Deputy Administrator for each province. Administrative General may take over any waqf property, but not during waqifs lifetime. Eviction of persons wrongfully in possession of waqf properties by the Administrator. Lease may be terminated by the Administrator. Sale of waqf property to be authorized by the government alone. Court's jurisdiction barred in some cases. Five years imprisonment or fine or both for floutation of any direction under the Act. Repealed by Ord. No. 22 of 1979.]
- 1979 No. 2 of 1979 – Awqaf (Federal Control) (Repeal) Ordinance, 1979.  
[On repeal all waqf properties vesting in Administrator General stood transferred to the Government of that Province.]
- 1979 Baluchistan Ordinance No. 4 of 1979 – Baluchistan Waqf Properties Ordinance.
- 1979 North-West Frontier Province Ordinance No. 1 of 1979 – N.W.F.P Waqf Properties Ordinance.
- 1979 Punjab Ordinance No. 4 of 1979 – Punjab Waqf Properties Ordinance.
- 1979 Sind Ordinance No. 9 of 1979 – Sind Waqf Properties Ordinance.

After the decentralization of waqf administration in Pakistan, these four identical Ordinances were passed. All waqf properties in a Province now vest in the Chief Administrator of Awqaf. The provisions of these four Ordinances are an adaptation of provisions of the Awqaf (Federal Control) Act, except that the Federal Government has nothing to do with waqfs, and its place is taken over by the government of each province. The office of Administrator-General of Awqaf for Pakistan stands abolished.

***Waqf Legislation Currently in Force in Pakistan***

1. Mussalman Waqf Validating Act, 6 of 1913 (and its 1930 amendment)
2. Music in Muslim Shrines Act, No. 7 of 1937 of Punjab

3. Baluchistan Waqf Properties Ordinance, 4 of 1979
4. N.W.F.P. Waqf Properties Ordinance, 1 of 1979
5. Punjab Waqf Properties Ordinance, 4 of 1979
6. Sind Waqf Properties Ordinance, 9 of 1979

**iii) BANGLADESH**

- 1863 No. 20 of 1863 – Religious Endowments Act  
[Section 4 of Waqfs Ordinance, 1962 exempts such waqfs from being governed by all or any of the provision of the waqf Ordinance. Some of the waqfs are still under the superintendence of the Board of Revenue. So long they so remain, the Waqf Ordinance, 1962 would not apply to them].
- 1931 No. 6 of 1931 – Mussalman Waqf Validating Act  
[The Act which validated the waqf al-aulad in the whole of Indo-Pakistan sub-continent. It still applies in Bangladesh.]
- 1923 No. 42 of 1923 – Mussalman Waqf Act  
[The Act solely relied on District Courts to exercise supervisory control on waqfs without giving them any regulatory power to do so. The Act could no do much, and was repealed by the Bengal Waqf Act, 13 of 1934.]
- 1934 No. 13 of 1934 – Bengal Waqf Act.  
[In 1947 this Act was adopted for East Pakistan and even after the waqfs Ordinance, 1 of 1962, this Act continues to apply to waqfs in so far as its provisions do not come in conflict with the Ordinance. It provided for Waqf Boards and a Waqf Commissioner and for Shia representation on the Board. But after 1962, the Administrator of Waqfs appointed under the 1962 ordinance looks after waqfs]
- 1950 East Bengal Act No. 22 of 1951 – Bengal Waqf (Extension to Sylhet) Ordinance, 1950.  
[Bengal Waqf Act, 1934 which was applicable to East Pakistan, except the district of Sylhet, where the Mussalman Waqf Act, 1923 applied, was extended to Sylhet also. Repealed by itself.]
- 1952 East Bengal Act No. 12 of 1952 – East Bengal board of Waqfs (Validation) Act, 1952.  
[To remove difficulties as to the preparation of electoral rolls for the election of members of Waqf Board, and also to declare valid the constitution of board of Waqfs, East Bengal on 9<sup>th</sup> Sept., 1948.
- 1962 No. 1 of 1962 – Waqf Ordinance.  
[The original title of this ordinance was East Pakistan Waqf Ordinance, 1 of 1962 The words ‘East Pakistan’ were dropped by PO 48 of 1972. This enactment did not repeal those provisions of the Bengal Waqf Act, 1934 which were not inconsistent with this Ordinance. This

Ordinance provides for the appointment of an Administrator, his Deputy and Assistants, who are given vast powers. Waqf Committee to be established at the national level. Punishments for erring mutawallis were laid down.]

- 1975 No. 17 of 1975 Islamic Foundation Act  
[An Islamic Foundation for founding, managing and assisting mosques and Islamic centers, academic institutions, etc. A board of Trustees appointed by the government runs the Foundation.]
- 1986 No. 2 of 1986 The Chittagong Shahi Masjid Ordinance  
[To establish a separate committee for managing the historical Shahi Masjid of Chittagong.]

**Waqf Legislation Currently in Bangladesh**

1. Mussalman Waqf Validating Act, 6 of 1913 (as amended in 1930)
2. Bengal Waqf Act, 13 of 1934 (in so far as it is not inconsistent with any provision of the Waqfs Ordinance, 1 of 1962).
3. Waqfs Ordinance, 1 of 1962.
4. Islamic Foundations Act, 17 of 1975.
5. Chittagong Shahi Masjid Ordinance, 2 of 1986.

**iv) SRI LANKA**

- 1918 No. 9 of 1918 – Trusts Ordinance  
[Sections 100 to 108 dealing with “charitable trusts”, applied to charitable waqfs. Action could be taken against trustee by The Commissioner appointed by the Government on the application of a person interested. The application of sections 100 to 108 to waqfs was ousted by S. 55 of the Muslim Mosques and Charitable Trusts or Waqfs Act, 1956. In settling some schemes for the management of waqfs, court shall have regard to Islamic law. Waqf by user was implied in certain situations to form part of waqf.]
- 1931 No. 10 of 1931 – Muslim Intestate. Succession Ordinance.  
[The law applicable to “donations” (i.e. waqfs) made by Muslims shall be Muslim Law governing the sect to which the donor belongs. Waqf will only be treated as irrevocable if “it is so stated in the deed”. Delivery of waqf deed to the donee amounts to delivery of possession of the dedicated property whether movable or immovable. Sections 5 to 24 of this Act dealing with waqfs are repealed by Acts 51 of 1956.]
- 1956 No. 51 of 1956– Muslim Mosques and Charitable Trusts for Waqf Act.  
[To register mosques and other waqfs, and to regulate powers of trustees of these institutions. No definition of “waqf” is given in the Act. A commissioner of Waqfs and his deputy and a Waqf Board supervise waqfs. All waqfs, except mosques, have to give

contribution to the waqf Fund. Board appoints trustees of every registered mosque, who exercise their rights under Board's supervision, and can be removed. Mutawallis of Waqfs may only be removed by the Courts. Waqf disputes are referred to the Waqf Tribunals. This Act is amended twice by the amending Act No. 21 of 1862 and Act No. 33 of 1982.]

**Waqf Legislation Currently in Force in Sri Lanka**

Muslim Mosques and Charitable Trusts or Waqf Act, 51 of 1956/

v) **MYANMAR:**

- 1890 No. 6 of 1890 – Charitable Endowments Act.  
[To administer public endowments of non-religious character. On the application of mutawalli, a waqf may be vested in the Treasurer of Charitable Endowments. Then for such waqfs, the government may frame a scheme if requested by mutawalli. Section 12 of the Mussalman Waqf Act, 1923, which is in force under the Act no. 6 of 1890.]
- 1908 No. 5 of 1908 – Civil Procedure Code.  
[Sections 92 and 93 says:- two or more persons may file a suit after obtaining prior permission of the A.G. against a mutawalli guilty of mismanagement or misappropriation of funds of a public waqf.]
- 1913 No. 6 of 1913 – Mussalman Waqf Validating Act.  
[To declare waqf al-aulad as valid]
- 1923 No. 42 of 1923 – Mussalman Waqf Act.  
[This outdated law is still in force in Myanmar. This Act does not apply to such waqfs which are governed under another outdated Charitable Endowments Act., 6 of 1890, and are under Treasurer of Charitable Endowments.]

**Legislation Currently in Force in Myanmar:**

All the above four enactments do apply to waqf in one way or another. The main legislation, is the Mussalman Waqf Act, 42 of 1923.

- vi) **MALDIVES:** [No comprehensive waqf legislation dealing with administration of waqfs exists in this country. There are, however, two legislations which deal with waqfs.]
- 1970 No. 2 of 1970 – Law on Transfer of Waqf Lands from Male' and Prohibition of Waqfs in Male'.  
[This law simply says; "Transfer of waqf lands from Male' to other islands. Such transfer would be executed to a place where the government thinks appropriate. Hereinafter dedication of land as waqf is prohibited in Male'"]. The reason for this seems to be that Male, the capital of the island of Maldives, is small in size and needs land for general developmental purposes. Hence this law.
- 1976 No. 28 of 1976 – Law on the Sale and disposition of properties registered with the Government.  
[Any property registered with the government (including waqf) could

only be sold after ascertaining the indebtedness of the seller to the any government body. No sale of property is allowed where the debts are owed to private persons. The fact of indebtedness would be ascertained by the Ministry of Defense and National Security or the High Court of the Maldives. The necessary proportion of the sale proceeds shall go to settle the debt.]

vii) **NEPAL:** [Adequate information could be obtained.]

There are about half a million Muslims in Nepal. Many mosques and graveyards are there, particularly in Kathmandu and Terai. No waqf legislation exists. Some information on Nepal; Muslims could be gathered from the two articles written by Hamid Ansari and Marc Gaborieau.<sup>2</sup>

viii) **BHUTAN:** No information is available.

### **III A Comparative Analysis of Awqaf Legislation in South Asia**

#### **1. A Marked Preference for Federal Laws:**

A marked preference is shown in South Asia for legislating a federal law governing waqfs. In five out of six countries it is so. In India the Waqf Act, 1995 and before that to some extent, the Waqf Act, 1954 dispensed away with local Waqf legislation in the State of West Bengal, Bihar, Delhi, U.P. Maharashtra and Gujrat. Jammu and Kashmir is now the only State in India which still have its own Waqf Law (probably on account of political considerations, and the Dargah Khawaja Saheb of Ajmer, due to the popularity and individual history of this Dargah.) In Bangladesh, the Waqfs Ordinance, 1962 applies to the whole of country except to Chittagong Shahi Masjid and those few mosques governed by the Islamic Foundation Act, 1975. In Sri Lanka, the federal law No. 51 of 1956 as amended in 1962 and 1982 govern all the waqfs nationwide. In Myanmar also this is so. In Maldives, although there is no waqf legislation, the two sundry legislations that exist are enacted by the national government.

Pakistan is the only country where beginning with state waqf legislation [1949 (Bahawalpur; 1949 (NWFP); 1950 (Punjab)] it went to regional level [1959 (West Pakistan); 1961 (West Pakistan) 1962 (East Pakistan)], then to the national level [Awqaf (federal control) Act, 1976]. Then in 1979 things reverted back to provincial level waqf legislation, one each for the four Provinces of Baluchistan, NWFP, Punjab and Sind. However, all the four legislation are identical and similar to 1976 federal law, except that now the federal government has no hand in waqf matters of the State.

Notwithstanding the federal waqf law in operation in India, each State exercises statutory administrative control on waqfs. Federal government is given the power under Section 106, Waqf Act, 1995 to constitute a Common Waqf Board for several States and Boards for Union Territories. This, however, is an exception to the general rule of leaving waqf administration to the States. In this respect, the position in India is similar to Pakistan, which

even if it have no federal waqf legislation and all four provinces have their own separate laws, but these are identical and are based on a model law drafted by the federal government.

In Bangladesh, Sri Lanka, Myanmar and Maldives, states or local regions enjoy no autonomy in matters of waqf.

## 2. Definition of Waqf:

### a) Non-Muslim As A "Waqif":

In four out of six countries of the region, namely, India, Pakistan, Sri Lanka, and Myanmar, only a "person professing Islam" can create waqf. In Bangladesh, a Muslim as well as a non-Muslim may create waqf. The position in Maldives is not known. A possible reason for providing that persons professing Islam could alone make a waqf may be attributable to the psyche that was created by a similar definition of waqf in the Mussalman Waqf Validating Act, 6 of 1913 which also used exactly the same wordings – "persons professing Islam" – in its definition of waqf. As this was the first statutory definition of "waqf" ever coined in South Asia, it was but natural for the later waqf legislation of the region to be influenced by it – more so because the whole region was at that time under the British control. The point seems to be missed that the definition of "waqf" in the Act 6 of 1913 was for the purposes of the Act, which was to validate waqf al-aulad. Hindus with their Joint Family Property system were never known to have created waqf al-aulad, nor the members of any other religious community. But Hindus have created public waqfs, and their validity was upheld by the Courts.<sup>3</sup> Islamic law allows non-Muslims to create waqf. Hanafis allow such waqfs if the object is valid both according to Islamic law and the creed of the settlor.<sup>4</sup> Ameer Ali rightly asserts that "Islam is not a necessary condition for the constitution of a waqf. Any person of whatsoever creed may create a waqf, but the law requires that the object for which the dedication is made should be lawful according to the creed of the dedicator as well as the Islamic doctrines".<sup>5</sup>

The obvious rationale behind the drafting of a definition of "waqf" which confines the creation of waqf to "persons professing Islam" alone could be that as the purpose for which charitable and pious institutions of other communities stand are also regarded charitable under Islamic law, there is a possibility that endowments of other communities would come under the purview of the waqf legislation. But if this is the only problem, it could easily be taken care of by coining a suitable definition, as done in Bangladesh<sup>6</sup>.



Other waqf legislation should emulate the Bangladesh provision to correct this existing anomaly.

**b) *In India, Non-Muslims can Indirectly Create Waqfs:***

Section 104 of the (Indian) Waqf Act, 1995 allows non-Muslims to make donations in favor of “(a) a mosque, idgah, imambara, dargah or maqbara: (b) a Muslim graveyard: (c) a choultry or a musafirkhana”, and such donations are “deemed to be comprised in that waqf”. The only problem with section 104 is that it allows non-Muslims to create waqf in favour of mosques, which is neither valid under Islamic law nor the personal of other religious committees in India.

In Pakistan, the non-Muslims (dhimmis) shall be given the right to create waqf, as they are so allowed under Sharia. As such, the relevant definition contained in section 2e in the waqf legislation of all the four provinces not allowing Muslims to create waqf is ultra vires the Sharia, so also words “property of any kind’ which must read’ property recognized as such under Shariah’.

**c) *Inclusive definitions of ‘Waqf’ are elaborative:***

Among the definitions of Waqf contained in the waqf legislation in India, Pakistan, Bangladesh and Myanmar, the ones in India and Pakistan are most elaborate, as they include many points laid down in various judicial decisions. Accordingly, in these definitions, ‘waqf’ includes:

- I. Waqf by user ( India Pakistan, Bangladesh and Sri Lanka).
- II. Grants, including mashrut ul Khidmat (India and Bangladesh).
- III. Property allotted in lieu of waqf property left in India (Pakistan).
- IV. Property acquired with the sale proceeds of a waqf, in exchange of, or from the income of a waqf, or from subscriptions raised for any purpose recognized by Islam as religious, pious or charitable (Pakistan and Bangladesh), and
- V. Nazar or offerings dropped in boxes placed at shrines, or articles presented to a shrine (Pakistan and Bangladesh).

**d) *Waqf al-aulad are excluded***

In the definition of “waqf” given in the various waqf legislation, waqf al-aulad is generally excluded. In India, Pakistan and Myanmar this exclusion is there; except in Jammu and Kashmir where the Act covers waqf al-aulad.<sup>7</sup> What it implies is that such waqfs are not subject to any statutory administrative control, which applies to other types of waqf alone.

In Bangladesh, if less than half of the income of a waqf is reserved for family purpose and the rest for any religious or charitable purpose, then the whole waqf is “deemed to be a trust for public purposes of a charitable or religious nature within the meaning of section 92 of the Code of Civil Procedures, 5 of 1908 and section 14 of the Religious Endowments Act, 20 of

1863”<sup>8</sup>. It is a curious provision. Such waqfs ought to be regarded as charitable waqfs not trusts.

The very title of the Sri Lankan waqf legislation – Muslim Mosques and Charitable Trusts or Waqfs Act – reveals that waqf al-aulad is not covered. There is no provision in it touching upon such type of waqfs. Moreover, the word waqf is not defined in this enactment.

In Maldives, the absence of any statutory administrative control affects all waqfs including family waqf.

### **3. Survey of Waqf Properties**

For purposes of effective supervision and administration of waqfs in a country, it is necessary that their number, valuation, income, object, etc. must be known. Unfortunately, the waqf legislation in Pakistan, Bangladesh, Sri Lanka and Myanmar has no provision for the survey of waqfs in the country.

In Maldives also, no survey of waqfs was ever conducted. In Pakistan, as back as in 1950, the Punjab Muslim Awqaf Survey Act was passed for conducting a survey of waqf in the Province, but the Act was repealed within two years by the Punjab Muslim Awqaf Act, 1951 (No. 6 of 1952), which only provided for registration and not active survey of waqfs. Since then no other enactment passed in the country, past or present, provides for survey of waqfs.

Chapter II (Ss. 9-12) in the Waqf Act, 1995 (43 of 1995) of India provides for survey of waqf. Before this enactment, the Waqf Act, 1954, Bengal Waqf Act, 1934 and the U.P Muslim Waqf Act, 1936 and 1960 provided for survey of waqfs. The deacons of the Survey of Commissioners, who conduct survey under the Act 43 of 1995, cannot be challenged in any Court of law except in waqf Tribunals, whose decision is final (s. 7). Chapter V (Ss. 36 –43) of the Act 43 of 1995 provides for registration, which should not be regarded as substitute for and confused with survey. Survey done under the waqf Acts of 1954 and 1995 is of substantial nature and has succeeded in unearthing a very large number of hidden waqfs.

In Jammu and Kashmir Waqf Act, II of 1978, provisions relating to survey are contained in chapter II (ss. 4-6) A special Officer possessing judicial powers conduct survey of waqfs. His decision on the nature of property is only appealable to the State Government whose decision is final [S.5 (1)]. There is a bar on Civil Courts’ jurisdiction in matters of survey [S.5 (3)].

### **4. Registration of Waqfs**

In India, Bangladesh and Sri Lanka, every mutawalli is legally obliged to apply to Waqf Board (India and Sri Lanka) or to the Director of Waqfs (Bangladesh) for the registration of waqf under him. Mutawalli’s application shall contain all the details specified in the act about the waqf (or in Sri Lanka, the mosque). On receipt of such an application, an inquiry is to be made about

the authenticity of the information furnished in the application, and if everything is found to be correct, the waqf is registered in a Register kept for this purpose<sup>9</sup>. These three enactments (India, Bangladesh, and Sri Lanka) also provide that the Waqf Board or Director may also make inquiries on this own and register a property if found to be waqf, and those aggrieved may petition to the Waqf Tribunal (India and Sri Lanka) or the Court (Bangladesh)<sup>10</sup>.

The laws of Pakistan simply provide that every mutawalli or the waqif of a newly created waqf must get registered with the Waqf Administrator<sup>11</sup>.

In Myanmar and Maldives, there is no provision for registration of waqfs. In the absence of any provision for the survey, the number of waqfs in these two countries is anybody's guess.

There is no provision for survey in the waqf legislation in force in Sri Lanka. In Maldives, no survey of waqfs was ever conducted and in the absence of a waqf legislation, there is no statutory provision either for registration or survey of waqf.

## **5. Statutory Supervisory Set-up for Waqfs:**

### **I. Administrator, Boards or Committees:**

Except for Maldives, the other five countries under study – India, Pakistan, Bangladesh, Sri Lanka and Myanmar – have statutory set up for the supervision of waqfs. Government appointed officers are exclusively entrusted with waqf administration in Pakistan, Bangladesh and Sri Lanka. India has a Waqf Board, and a government appointed Chief Executive Officer, whereas in Myanmar, supervision lies in the hands of Shari'ah Courts and their Qadis who decide cases in accordance with Islamic law.

According to all four waqf enactments of Baluchistan, N.W.F.P., Punjab and Sind, waqf in each Province vest in the Chief Administrator of Awqaf, who is a Muslim, appointed by the Provincial government<sup>12</sup> which may also appoint Deputy Administrators for different areas<sup>13</sup>. The necessary staff is appointed by the Chief Administrator. All of these officers are regarded as public servants within the meaning of S.21 of the Pakistan Penal Code (5 of 1890).

In Bangladesh, there is a Government appointed Muslim Administrator of Waqfs for Bangladesh, who holds office for 5 years,<sup>14</sup> and is treated as a "corporation sole", having "perpetual succession"<sup>15</sup>. The Government appoints in consultation with the Administrator as many Deputy

Administrators and Assistant Administrators as necessary<sup>16</sup>. A committee of Waqf is also established for a term of five years by the Government for assisting and advising the Administrator. The committee is chaired by the Administrator and consists of ten members appointed by the Government, of whom one is a Shia mutuwalli and there are Sunni mutawallis, and the remaining six "shall be from among the prominent, respectable and benevolent citizens of the Muslim Community, well versed in Muslim law"<sup>17</sup>.

In Sri Lanka, a Government appointed "Director for Mosques and Muslim Charitable Trusts or Waqf" and a number of his Deputies and assisting staff administer waqfs, and exercise supervisory powers given under the Act<sup>18</sup>. A seven member Government appointed Board whose members hold the office for 3 years is known as "Mosques and Muslim Charitable Trusts or Waqf Board" and is entrusted with many duties under the Act<sup>19</sup>.

Disqualified from becoming members of the Board are non-Muslims, Senator or a Member of Parliament or a trustee of a registered mosque, a Muslim shrine or place of religious resort or a Muslim charitable trust or waqf.<sup>20</sup> One of the members of the Board, other than the Director, is appointed by the Government as Chairman of the Board<sup>21</sup>. The Board may delegate to the Director any of its powers, duties or functions. The position of the Director is like Chief Executive Officer, subject to the directions of the Board.

In Myanmar, no administrative machinery exists to look after waqfs. Both the Mussalman Waqf Act, 42 of 1923 and section 92 of the Code of Civil Procedure, 5 of 1908 which are applicable to Waqfs, places a heavy burden on the Courts of law (under the 1923 Act) and on members of general public (under CPC) to file a civil suit to check the malversation of a public charitable waqf. In CPC, 5 of 1908 section 92 and 93 provide that in cases specified herein, two or more persons can bring a suit against a trustee, provided they obtain prior permission for doing so from the Advocate-General. The highly costly, cumbersome and dilatory process which a civil suit involves, hardly prompts anyone to come forward to undertake this onerous responsibility.

The Act 42 of 1923 heavily relies on Civil Courts in all matters from the inspection of waqf accounts furnished by the mutawallis, if at all they do so, to the imposition of penalty. The courts are not generally inclined to devote their time to such extra legal duties. In the process, waqfs in Myanmar are

practically without a supervisory authority, and ironically the government is least bothered about this<sup>22</sup>.

**II. Details of Various Supervisory Set-Ups:**

In the whole of India, except Jammu and Kashmir, Waqf institutions are supervised by:

A Waqf Board for the State, or where the number or income of Shia wakfs is 15% or more of the total number of wakfs in the state or their income, then the two separate Wakf Boards, one for Shias and the other for Sunnis<sup>23</sup>. If there is only one Board, then the number of Shia and Suuni members that the Board must have is determined by the State government, keeping in view the number and value of Shia and Sunni waqf in the State<sup>24</sup>.

Chief Executive Officer, appointed by the Government in consultation with the Board, discharges duties assigned to him under the Act,<sup>25</sup> mainly day to day administration of the Board and waqfs.

The State Government, may assume all the powers given under the Waqf Act, 1995 to supervise waqfs in case it decides to supersede the Board on any of the five grounds listed in section 99. All waqf properties vesting in the board would vest in the State government after supersession [section 99 (2)] The initial period for such take over is 6 months [section 99 (1)], but this period may be extended, if necessary [section 99 (3)].

Central (federal) Government has certain powers of its own under section 96 (1) of the Waqf Act, 1995 for the purpose of regulating the "secular activities" of waqfs which is defined to include "social, economic, educational, and other activities".

The Central Government thereby assumes the power:

"a) to lay down general principles, and policies of waqf administration in so far as they relate to the secular activities of the waqfs;

"b) to coordinate the functions of the Central Waqf Council and the Board, in so far as they relate to their secular functions;

"c) to review administration of the secular activities of waqfs generally and to suggest improvements, if any" [Section 96 (1)].

Waqf Boards in India consist of upto 8 members elected from electoral colleges consisting of Muslim MPs from the State concerned, the Muslim MLAs of the State concerned, the Muslim members of the State Bar Council, and Mutawallis of the waqf having an annual income of RS 100,000 or more<sup>26</sup>.

Another upto 4 members are nominated by the State Government from "eminent Muslim organizations" and "recognized scholars of Islamic

Theology<sup>27</sup>, and a fifth nominated person is some officer of the State Government not below the rank of Deputy Secretary<sup>28</sup>.

To sum up, Pakistan, Bangladesh and Sri Lanka have an administrative set-up for waqfs which is totally State controlled and State appointed; India, has Waqf Boards which are partly elected and partly nominated, with a provision that the state Government may assume full control of waqfs if it decides to supersede the State Waqf Board. The Central (federal) Government has powers to lay down general principles and policies of waqf administration and to review the "social, economic, educational and other activities" of waqfs. Provisions for supersession of the Board are found only in federal waqf law of India and in the waqf law of Jammu and Kashmir. Although Waqf Committees or Boards are also there in Bangladesh and Sri Lanka, there is no provision for their supersession.

Myanmar has left the waqfs in the hands of the Courts under the obsolete waqf law of 1923 [Mussalman Waqf Act, 42 of 1923], while Maldives has no separate waqf law and waqfs are left with mutawallis, without supervisory control of any state agency. In India, the process of democratization is very welcome. The number of governmental nominations may be further reduced, and there may be more elected members out of some new electoral colleges; for example, Muslim judges of the State judiciary, including the retired Muslim judges of the Supreme Court belonging to the State. In small size Union Territories like Lakshdweep Islands and Andaman and Nicobar islands, members may be elected through elections in which all Muslim adults are allowed to vote. In other countries of South Asia, there is a need to start this democartisation process that has been started in India.

In India, and only in India, there is a statutory Central Waqf Council for the purpose of advising the Central (federal) government and reviewing the working of Waqf Boards in the country<sup>29</sup>. The Council has don some good work since its establishment in December 1964 and deserves appreciation and encouragement, but probably it needs to do more to justify its existence and expenditure of one percent of the annual income of nearly 250,000 waqfs in India – a substantial amount indeed.

In Pakistan, there is statutory provision which empowers the provincial Government to frame rules for the appointment of Advisory Committees consisting of public representatives, Ulema and other experts. [Section 25 (k) of Waqf Ordinance, 1979 of all the four Provinces.] it is not known whether such committees have ever actually been constituted.

### III. The Establishment in Jammu and Kashmir:

According to the J & K Waqf Acts, 1978 (11 of 1978), the administrative set-up for waqfs in the state is as follows:

- 1- A board of Waqf for each province, having members of Tehsil Committees<sup>30</sup>.
- 2- One or more Tehsil Committee in each Tehsil, consisting of 9 members, out of which 3 are nominated by the Government and 6 are elected by an electoral college consisting of elected Muslim members of, The Municipal Council, The Notified Area Committee, the Town Area Committee, the Panchayats; and The State Legislature. Hailing from the Tehsil for which a Committee or committees are constituted. Where for any reason it is not possible to elect members, the Government may nominate all the members of a Tehsil Committee<sup>31</sup>. The Government has the power to supercede the Committee for any period if it is not satisfied with its performance<sup>32</sup>.

The Tehsil Committee directly manages all the waqfs within the Tehsil under the overall control of the Waqf Board<sup>33</sup>. The position of the mutuawalli is only marginal, as the management scheme as well as the budget of every waqf is prepared by the Committee<sup>34</sup>.

#### **6. Meeting the cost of Waqf Administration:**

In Pakistan, all expenses on waqf administration are borne by the Government. There is no provision in any of the four provincial waqf legislation regarding any contribution to be made by waqfs out of their income to run the office of Administrator of Waqfs. In any Islamic country, this is how it should be.

In India, Bangladesh and Sri Lanka, a certain percentage of the annual income is to be paid to meet the cost of running the administration. In India, it is 7 % to be paid by every waqf, the net annual income of which is not less than Rs. 5,000.<sup>35</sup> In the Jammu and Kashmir State of India, the whole income of every waqf vests in the Waqf Board and Tehsil Committees, out of this amount<sup>36</sup>. The rate is 5 % in Bangladesh, but it is to be paid by every waqf.<sup>37</sup> In Sri Lanka, the rate of contribution for the Muslim shrines is 10 % and it is 6% in case of other waqfs<sup>38</sup>.

In Myanmar and Maldives, there are no expenses on administrative set-up as none exists. The courts are entrusted with the responsibility of looking after waqfs in Myanmar under the Mussalman Waqf Act, 42 of 1923 and in Maldives no arrangement for supervision of waqf exists.

## 7. A Sampling of Statutory Controls on Waqfs:

### I. Audit of Waqf Accounts:

Audit of waqf accounts is provided in all the five countries which have their own waqf legislation, but not in Maldives in which there is no waqf legislation. In India, the account of only two percent of waqfs having income less than Rs 10,000 per year are audited annually. The auditors report is made to the Board. The cost of audit is borne by the waqf audited<sup>39</sup>.

In Jammu and Kashmir, the accounts of the Board and the Tehsil Committee, which controls the whole of waqf, are to be audited annually, and the report is to be submitted to the Government<sup>40</sup>.

In Pakistan, the waqf laws of all the four provinces provide that the accounts maintained by the Chief Administrator of waqfs should be audited annually and report is to be sent to the Provincial Government<sup>41</sup>.

The accounts submitted annually by each waqf to the Administrator of Waqf in Bangladesh is audited and report is sent to the Administrator<sup>42</sup>.

Sections 5 and 6 of the Mussalman Waqf Act, 42 of 1923 which is in force in Myanmar requires every mutuwalli to prepare and furnish to the Court with an audited copy of the accounts.

In Maldives, as there is no waqf legislation, it is presumed that waqf accounts are not audited.

### II. Checks on Alienation of Waqf Properties

Except in Myanmar, legal restrictions are imposed on the alienation of waqf properties in India, Pakistan, Bangladesh, Maldives and Sri Lanka. These restrictions cover sale, mortgage, gift, exchange, and lease in India<sup>43</sup> and Bangladesh<sup>44</sup>, while these are confined to lease and sale in Pakistan<sup>45</sup>, only to sale in Maldives, and to lease alone in Sri Lanka<sup>46</sup>. The restrictions imposed in the various statutes differ in their nature. In India, all alienations are void without the prior approval of the Waqf Board even if these are provided for by the waqif,<sup>47</sup> while in Bangladesh, restrictions on alienations can be waived if the waqif has permitted them.<sup>48</sup> In India, any lease or sublease of waqf property for any period exceeding three years is void, even if otherwise permitted by the waqif, and a lease up to three years is valid only if made with the Board's prior permission<sup>49</sup>.



The waqf laws of three countries – India, Bangladesh and Sri Lanka – consider the legal consequences of an alienation are made in contravention of the law. In India, the Board, the assistance of the Collector within whose jurisdiction the waqf property may be situated, may recover its possession. Any person aggrieved by this action may appeal to the Waqf Tribunal, whose decision is regarded as final<sup>50</sup>. In Bangladesh, the administrator may remove the guilty mutawalli; but may recover possession by filing suit in the Civil Court<sup>51</sup>. The Sri Lanka Statute requires the Board to institute legal proceedings for the recovery of waqf property illegally leased out<sup>52</sup>.

In Pakistan, the Provincial government may authorize the administrator to sell a waqf in order- “to secure the maximum economic benefit out of such property and to avoid loss or damage to such property, or b)” to serve the best public interest and public purpose for which such property was dedicated, or “to give effect to such wishes of the person dedicating the property as can be ascertained; “in the absence of evidence of express or dedication, to enable the property to be used for which it has been used for any purpose recognised by Islam as religious, pious or charitable; or to provide maintenance to those who, on account of unemployment, sickness, infirmity or old age are unable to maintain themselves; or to provide education, medical aid, housing, public facilities and services such as roads, sewerage, gas and electric power; or to prevent danger to life, property or public health”<sup>53</sup>.

As the sale of waqf property is allowed under Islamic law only on the ground of zarurat (legal necessity), with a condition that the sale proceeds must be used to purchase another property which will be deemed to be waqf on objects as that of waqf sold, the validity of provisions (e), (f) and (g) in section 16 of the Waqf Properties Ordinance of all the four Provinces of Pakistan appears to be doubtful. The corpus of waqf cannot be consumed for these purposes.

**a. Removal of Mutawalli:**

A Mutawalli may be removed on certain grounds according to the waqf laws of India, Bangladesh and Sri Lanka. The laws of Pakistan and Myanmar are silent on this point, while in the Maldives he could presumably be removed by the Qadi under the general principles of Islamic law.

In India, the waqf Board is empowered to remove a mutawalli on eleven grounds including dishonesty, conviction, addiction to liquor or drugs, negligence, etc. Once removed, he cannot be reappointed for a period of 5

years.<sup>54</sup> Similar grounds for removal are contained in the waqf law of Bangladesh, except that nothing is there about reappointment<sup>55</sup>.

In Sri Lanka, the trustee of a mosque may be removed by the Director of waqfs for inability to perform efficiently<sup>56</sup>. However, the mutawalli of a waqf cannot be so removed, and the relevant provisions in section 39 of the Act relating to his removal were repealed by the Amending Act 21 of 1962<sup>57</sup>. The reason for this may be the reluctance of the government to remove a mutawalli appointed by the waqif, whereas the trustee of the mosque is appointed by the Board, so he may removed by the Board as well.

**b. Eviction of Unauthorised Occupants of Waqf Properties:**

In India, Pakistan and Sri Lanka it is possible to evict unauthorised occupants of waqf properties (in Sri Lanka, only properties belonging to mosques) through administrative action, whereas in Bangladesh, Myanmar and the Maldives, court action is necessary.

In India, <sup>58</sup> on request of the chief executive of the Board, and in the State of Jammu and Kashmir, the Tehsil Committee<sup>59</sup>, the Magistrate within whose jurisdiction the waqf property is situated, shall make an order directing the encroacher to remove the encroachment, and ,if necessary, to take the assistance of the police.

In Pakistan, the Administrator is given the legal authority to summarily evict any encroacher with the use of necessary force<sup>60</sup>. The person to be evicted by petition to District Judge, that the property is not waqf<sup>61</sup>. Appeal against the decision of the District Court lies in the High Court, whose decision is final.<sup>62</sup> In matters of eviction, no temporary injunction or order "shall" be issued by the District Court and High Court<sup>63</sup>.

In Bangladesh, if there is no mutawalli, or he refuses or neglects to act in the matter, the Administrator of Waqfs may, inter alia, institute a suit or proceeding in a Court against a stranger to the waqf for "the recovery of any waqf property wrongfully possessed, alienated or leased"<sup>64</sup>.

The relevant provisions in Sri Lanka are similar to India,<sup>65</sup> but these relate only to properties belonging to a mosque. Regarding other types of waqf

properties, there is no provision in this enactment. A normal law suit has to be filed in other cases.

In Myanmar and Maldives, in the absence of any legal provision directly relating to this point, eviction of unauthorized occupants will be carried out under the routine legal process.

**c. Taking-Over of Waqf Properties**

Sometime when a waqf property is persistently being mismanaged or abused by its mutawalli or caretaker, the only way to save such a waqf is to take over its administration by the statutory waqf authority. Such a taking over is provided in the waqf legislation of the India, and Bangladesh but no Sri Lanka, Myanmar and Maldives.

The taking over of waqf management is possible if there is anything contrary contained in any law, court decree or deed or instrument. In India, such take-over is confined to waqf having a gross annual income of Rs. 500,000. The Board may appoint an Executive Officer to run the administration of such a waqf.<sup>66</sup> In Pakistan, the Chief Administrator of Waqfs takes over the administration if he so thinks fit. But he cannot do so if the waqif of that waqf is alive, unless the consent of waqif<sup>67</sup> is obtained.

In Bangladesh, the Administrator may take over the administration, and control of "any waqf property including any shrine, dargah, imambara or other religious institutions appertaining to such waqf property"<sup>68</sup>, without assigning any reason or for reason of mismanagement<sup>69</sup>.

**d. Control on Imams of Mosques:**

Section 70 of the (Bangladesh) Waqfs Ordinance, 1 of 1962 provides that the Administrator of Waqfs may fix the minimum qualification and remuneration of the Imam of a mosque, and can himself appoint or remove any Imam from office if he thinks fit. Administrator's instructions should be abided by those in-charge of mosques. No other waqf legislation in South Asia has such a provision. The Indian Supreme Court decided recently that Waqf Board should pay a proper remuneration to the Imams of all the mosques, whether or not they have appointed them and have enough financial resources for this purpose, because this duty, according to Supreme Court, is theirs by virtue of the responsibility reposed in them to administer waqf.<sup>70</sup> The judgement is not logical, because if the Board is responsible to pay the salary since it is incharge of waqf affairs, then in accordance with this logic, the Central government ought to pay the salaries as section 96 of the Waqf Act, 43 of 1995 entrusts to it the supervision and regulation of all "secular activities of

waqf". Fixation and payment of salary is indeed a 'secular' activity. However, the very idea of fixation and payment of salary of Imams by a non-Muslim government, is alien to Shari'ah. It is therefore good that none of the waqf legislation, except that of Bangladesh, try to regulate this matter statutorily. The matter must be left to the community. Boards are neither legally bound nor financially capable of paying the salary of Imam not appointed by the Boards.

## **8. Judicial Adjudication of Waqf Disputes:**

### **I. Civil Court's Jurisdiction Barred**

In matters of waqf disputes, the waqf legislations of India<sup>71</sup>, Pakistan<sup>72</sup> and Sri Lanka<sup>73</sup> have placed a bar on Civil Court's jurisdiction. There is no such bar in other three countries – Bangladesh, Myanmar and Maldives – because there is no alternative forum for the settlement of such disputes existing in these three countries.

### **II. Waqf Tribunals**

Provisions for the establishment of Waqf Tribunals were made, for the first time, in the Uttar Pradesh Waqf Act, 16 of 1960 (sections 70 to 76) then in Sri Lanka through the 1982 amendment to the Muslim Mosques and Charitable Trusts or Waqfs Act, 51 of 1956 (section 9 D to 9J), and now in the Waqf Act, 43 of 1995 (of India) (Sections 83 to 85). The jurisdiction of Civil Courts is ousted in all such matters which are entrusted to decide<sup>74</sup>. To expedite their proceedings, Tribunals follow their own procedure, and not that laid down in the Civil Procedure Code, 5 of 1908<sup>75</sup>.

### **III. Bar to Compromise of Suits:**

In India<sup>76</sup> and Bangladesh<sup>77</sup>, there is a statutory bar to compromise of suits by or against mutawalli, unless a prior permission of the waqf board is obtained in India and that of the Administrator in Bangladesh. It is a useful provision worthy of being adopted by other waqf legislation.

### **IV. A Curious Provision in the Bangladesh Law**

Section 86 of the Waqf Ordinance 1 of 1962 of Bangladesh says:

"All costs and expenses incurred by the Administrator in connection with any suit or proceedings in respect of any waqf property to which the Administrator is party and all costs decreed against the Administrator by the Court, shall be payable out of the funds of such waqf".

Now, there is a mandatory provision (section 71) for taking 7 % contribution out of the annual income of every waqf to finance the office of the Administrator. Any expenses or litigation to which he becomes a party

should be payable out of the funds available with the Administrator and not out of funds of that particular waqf.

**V. Provision for Court Ordered Arbitration Replaced in Sri Lanka**

Sections 48 and 49 of the Muslim Mosques and Charitable Trusts or Waqf Act, 51 of 1956 of Sri Lanka provided that in the adjudication of certain types of waqf disputes, the court may refer the matter for arbitration. However, through the 1982 amendment, both of these sections were replaced<sup>78</sup> But arbitration is such a useful technique of settling any dispute that it deserved to be retained in the Act. In other countries too, there is a need to provide for not only arbitration but also mediation and conciliation, as today these methods are becoming increasingly popular as inexpensive and expedient mode of alternative dispute resolution (ADR).

**VI. Concluding Appraisal and Remarks:**

Nearly all the countries in South Asia have waqf legislation in spite of the fact that none except Pakistan is an Islamic country. The reason is that a very long history of Islam and Muslims in these countries gave birth to a large number of waqfs. During the British colonial domination of the region, considerations of political expediency prompted the British to leave endowments of every community, including waqfs, in the wasting hands of mutawallis and trustees, so much so that the communities, including Muslims, themselves demanded the enactment of some regulatory laws. The Britishers were however very reluctant to get involved in such sensitive issues, of the laws passed initially and whose spirit in later years extended to nearly all the countries of the region, left waqf administration in the hands of courts, requiring mutawallis to submit waqf accounts to be examined, or expecting two or more public spirited persons to file a suit against an erring mutawalli after obtaining prior approval of the Advocate-General. It was too much to be expected out of courts and the public zeal of ordinary citizens. Waqfs and their administration naturally suffered in consequences and malversation thrived.

In India the States of Bengal and United Provinces were the first to have passed comprehensive waqf legislation in 1934 and 1936 respectively. The Bengal Waqf Act 1934 was still in force in West Bengal upto 1996 and in Bangladesh till today (but in so far as it does not come in clash with the Awqaf Ordinance, 1 of 1962).

These two enactments prompted Bihar and Delhi to enact their own waqf legislation in 1947 and 1943 respectively. After independence, entries No. 10 and 28 in the Concurrent List attached to the 7th Schedule of the Constitution of India made supervision and administration of religious and charitable endowments the responsibility of both the Central and State Governments. In keeping with this new spirit, the Government of India passed the Waqf Act, 29 of 1954. It was a private bill moved in the Lok Sabha by S.M. Ahmad Kazmi, with active support of Maulana Hifzur Rahman and Maulana Abul Kalam

Azad. This Act was amended several times, but the most comprehensive amendment was undertaken in 1984<sup>79</sup> on the recommendations of the Waqf Inquiry Committee<sup>80</sup>. The Waqf boards were made subservient to a government-appointed Waqf Commissioner in each state, and in specified circumstances, Waqf Boards were empowered to assume direct control of waqfs. These and some other provisions<sup>81</sup> attracted much opposition from the Indian Muslim community, and consequently the amending Act was never forced in full as law. Ultimately, both the Waqf Act, 1954 and the amending Act of 1984 were repealed by the new waqf Act, 1995 which came into force on the 1<sup>st</sup> January 1996.

In Pakistan, after experimenting with many waqf enactments, two major enactments for West and East Pakistan were passed in 1961 and 1962. These Ordinances place the administration of waqfs in the hands of Administrators, doing away with the system of Boards. Soon afterwards in 1976, the (Federal Control) was passed, taking away waqf administration from the hands of the Provincial Governments and placing it again in the hands of the Federal government. But political considerations again prompted a change, and four separate Waqf Ordinances were passed in Punjab, Sind NWFP and Baluchistana, decentralizing waqf administration.

In Bangladesh, the Waqfs Ordinance, 1962 and those provisions of the Bengal Waqf Act, 1934 which are not in conflict with the 1962 Ordinance apply to waqfs. This is not a very ideal situation and considerations of certainty demand the enactment of a new comprehensive law governing waqf administration in the country. The new law may also cover those waqfs and mosques currently covered by the Islamic Foundations Act, 17 of 1975 and probably the Chittagong Shahi Masjid for which the Chittgong Shahi Majsid Ordinance, 2 of 1986 exists, unless the significance of this mosque is same as that of Dargah of Ajmer in India for the administration of which a federal law – Dargah Khwaja Saheb Act, 23 of 1936 and then 36 of 1955 – was passed.

In Sri Lanka, the Muslim Mosques and Charitable Trusts or Waqf Act, 51 of 1956 establish separate supervisory set up for the mosques and other waqfs. It is a lengthy piece of legislation, like the Indian Waqf Act, 1995 and need to be condensed. The enactments should know that brevity is the beauty of law.

In Myanmar, the waqf law stands frozen at the 1923 stage, ignoring the developments in the adjoining countries. The law of 1923 and section 92 of the CPC are so obsolete and unsatisfactory that the Myanmar government should enact a new comprehensive waqf legislation involving the Muslim community in Waqf administration. A survey of waqfs must also be conducted.

Maldives have many mosques, graveyards, dargahs and other types of waqfs, but does not have a waqf legislation<sup>82</sup>. The economic potentiality of waqf may be better realized if waqfs are administered effectively and developed to increase their income.

A study of waqf legislation in South Asia reveals a marked preference for federal waqf legislation. India, Bangladesh, Sri Lanka and Myanmar have federal waqf laws, and Pakistan had it up to 1979. However, if federal law is preferred for the sake of uniformity throughout the country, then even Pakistan could be said to have one, as the waqf laws in all the four Provinces are exactly identical.

The definition of "waqf" contained in all the waqf legislation follows the one given in the Mussalman Waqf Validating Act, 6 of 1913 according to which only a Muslim may be waqif and "any property" may be made waqf. Both of these two suppositions are incorrect according to the Islamic law and as such the definitions in the various waqf legislation need to be reviewed. The enabling provision in the (Indian) Waqf Act, 43 of 1995 which treats as waqf all donations made by non-Muslims in favor of mosques is not correct in so far as non-Muslims cannot make waqf in favor of a mosque.

The lengthy and inclusive definitions of "waqf" contained in the Indian and Pakistani waqf legislation may be tolerated keeping the fact in view that such definitions may really help to avoid quite much of litigation; two countries already have more than enough of petty litigation on waqfs.

In this long list of inclusions, waqf al-aulad is expressly excluded, except in the waqf legislation of Jammu and Kashmir. It is not correct to exclude waqf al-aulad from the preview of waqf legislation, because unlike private trusts in Common law, family waqfs are for perpetuity, and are regarded as charitable in Islamic law as giving to the general public. Future generations of beneficiaries do have a claim of the corpus of these waqfs. So, if the present generation of beneficiaries are left to their own devices, they may even eat up the corpus, leaving nothing or very little for the future generations of beneficiaries. As waqf al-aulad is also waqf, and if it is the Constitutional responsibility of the Government of India and the States to supervise and administer waqfs, this responsibility automatically extends to waqf al-aulad, notwithstanding the hue and cry of those having a vested interest in such waqfs. This applies equally to Pakistan, Bangladesh, Sri Lanka, Myanmar, and Maldives. The amount of regulation and supervision might be minimal in comparison with other waqfs, but at least something must be there. Or, let us make such waqfs non-perpetual, or completely abolish them. Because, left to their present fate, they are going to become extinct very soon.

Survey of waqf properties is necessary because no effective administration scheme could be formulated unless the number, nature, value and income of all waqfs in a country are known. As such, enabling provisions

should be inserted in the waqf laws of Pakistan, Bangladesh, Sri Lanka, and Myanmar, preferably based on the experience in India where survey has successfully brought to light a large number of waqfs. In the 1960s, their number was 100,000 and today is reported to be 250,000 and the survey is still not finished in some places.

The experience gained in India in the aftermath of the waqf (amendment) act 49, of 1984 and out of the Muslim community in State appointed bodies to administer waqfs. Although some effort towards democratization is made in constituting Waqf Boards, yet the amount of State control exercised through nomination of Board members, the Chief Executive Officer of the Board, then the authority of the State to supersede the Board and above all the power given to the State and Central Governments to lay down policies and directions for the waqf administration make the Muslim public very uneasy. Probably this erosion in the confidence of the community may be attributed to the fast declining image of the government as an efficient and neutral organ of administration.

In Pakistan too, the long innings played by the system of total government control has not produced any noteworthy beneficial result. Even such a basic thing as development of waqf properties and generation of additional income from waqfs to be used for education and economic betterment of Muslims has not found serious attention. Thus in Pakistan, community participation in waqf matters should be given serious thought. This is also true in other countries of the region, particularly Myanmar and Maldives which are doing nothing for the betterment of waqfs.

The statutory control of various matters like audit of accounts, alienation, etc. are satisfactory in all countries of the region except Myanmar and Maldives. Also in Pakistan, three objectionable provisions which allow sale of waqf properties for reasons entirely unknown to Islamic law must be revoked. These are sub-sections (e) and (g) of section 16 of the waqf ordinance in all the four provinces of Pakistan, allowing sale of waqf properties inter alia:-

(e) "to provide maintenance to those who, on account of unemployment, sickness, infirmity or old age are unable to maintain themselves; or (f) "to provide education, medical aid, housing, public facilities and services such as roads, sewerage, gas and electric power, or (g)"to prevent danger to life, property or public health."

The above problems are so pervasive in every society including that of Pakistan that if even all the waqfs in the country are sold out, the sale proceeds would not be enough to give fraction of relief even for a short time.

The waqf Laws in India and Pakistan have the best provisions for speedy and inexpensive eviction of unauthorized occupants of waqf properties. These do not require filing of suit, and administrative action is enough. But in Bangladesh, Sri Lanka (except in case of mosques), Myanmar and Maldives,



court action is necessary. There is need of suitable legislation in these countries on the lines of India and Pakistan..

In matters of legal adjudication of waqf disputes, it is desirable that, in the interest of speed and inexpensiveness, Waqf Tribunals must be established as provided in the waqf legislation of India and Sri Lanka.

Pakistan and Bangladesh would especially stand to benefit much from the establishment of the Waqf tribunals due to the large number of court cases relating to waqfs. The amount spent on adversarial litigation surely comes out of the coffers of waqf. So if the amount of litigation cannot be reduced, reduce the cost litigation by establishing Circuit waqf Tribunals which may go to places instead of mutawallis and others connected with waqf administration spend waqf money on travelling and lodging, to go to stay at the place where the Waqf Tribunal is situated. If waqf legislation could also provide for mediation/conciliation and arbitration, it might save much of the precious waqf resources.

An overview on waqfs in South Asia shows that not much effort has been made to exploit the latent capability in many waqf properties that can be developed for generating enormous wealth to be used for educational and economic betterment of the community and society. Legislating the right type of the waqf legislation is the first step forward in this direction.

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#### Notes

- <sup>1</sup> See Tahir Mahmud, "Contemporary Awqaf Legislation in Muslim Countries and Communities", (20 pages) paper presented at the International Seminar on Awqaf and Economic Development, 2-4 March, 1998, Kuala Lumpur, Malaysia (organized by IRTI, IKIM and BIRT).
- <sup>2</sup> See. Hamid Ansari, "Muslims in Nepal", Journal of Institute of Muslim Minority Affairs (HUNNA), vol. 2, No. 2 (1980) and vol. 3, No. 1 (1981), pp. 138-158 and Marc Gaborieu, "Urban Traders and Rural Artisans: Muslim Minorities in the Kingdom of Nepal", JI
- <sup>3</sup> See Mst. Mundaria v Shyaam Sunder, AIR 1963 A.P. 98; Kassimiah Charities v M.S. W. board AIR 1964 Mad. 18; Arur Singh v Badar Din AIR A 1940 Lah. 119; Piratha Peda Venkatasubbaayudu v Haji Silar Saheb (1930) 58 MLJ 524 at 529; Moti Shah v. Abdul Ghaffar AIR 1956 Nag. 38 at 42.
- <sup>4</sup> Fatawa-I-Alamgri vol. 4, p. 62, Urdu tr. By Moulvi Ameer Ali, (Delhi, 1988), Reprint of the 1931 original ed.
- <sup>5</sup> Syed Ameer Ali, Mahommedan Law, vol. 1, 5<sup>th</sup> ed. P. 200 (Lahore, n.d.)

- <sup>6</sup> Section 2(10), Waqfs Ordinance, 1 of 1962 defines “waqf” as “the permanent dedication by a person professing Islam and a waqf created by a non-Muslim”. The use of word “waqf” by a Hindu itself indicates his intention to create a trust recognized by Muslims under the name of waqf. There was a time when Hindus used the word waqf to denote their own endowments. But not anymore.
- <sup>7</sup> Section 3 (r), Waqf Act, 43 of 1995 and section 3(d), J. & K. Waqf Act, 11 of 1979. See section 2(e), Waqf Properties Ordinance 4 of 1979 (Baluchistan) 4 of (Punjab), 1 of 1979 (NWFP) and 9 of 1979 (Sind), 1923.
- <sup>8</sup> See section 2(1), (Bangladesh) Waqfs ordinance 1 of 1962.
- <sup>9</sup> Section 36 and 37, Waqf Act, 43 of 1995, section 47 and 48 Waqfs Ordinance 1 of 1962, section 10 and 12, Muslim Mosques and Charitable Trusts or Waqfs Act, 51 of 1956.
- <sup>10</sup> Section 40, Waqf Act, 43 of 1995, section 50, Waqfs Ordinance, 1 of 1962 and Section 13B, Muslim Mosques and Charitable Trusts or Waqfs Act, 51 of 1956.
- <sup>11</sup> Section 6, Waqf Ordinance, 4 of 1979 (Baluchistan), No. 1 of 1979 of NWFP, No. 4 of 1979 of Punjab and No. 9 of 1979 of Sind. The provisions of all these ordinances are similar.
- <sup>12</sup> See section 3 of Waqf Ordinance, No. 4 of 1979 of Baluchistan, No. 1 of 1979 of NWFP, No 4 of 1979 of Punjab and No. 9 of 1979 of Sind. The provisions of all these ordinances are similar.
- <sup>13</sup> See section 4, *Ibid.*
- <sup>14</sup> (Bangladesh) Sections 7(1), (2) and (3) Waqf Ordinance, 1 of 1962.
- <sup>15</sup> Section 11, *Ibid.*
- <sup>16</sup> Section 13, *Ibid.*
- <sup>17</sup> Section 29, *Ibid.*
- <sup>18</sup> Section 3 and 4, (Sri Lanka) Muslim Mosques and Charitable Trusts or Waqfs Act, 51 of 1956 as amended in 1962 and 1982.
- <sup>19</sup> Eg. Registration of mosques, and cancellation of registration is in the hands of Board, see Meor Mohideen Mohammed Marhroof, “The Enactment of “waqf” Legislation in Sri Lanka: the Law in context”, Journal: Institute of Muslim Minority Affairs, vol. 6 No. 2 (1985), pp 283 – 294.
- <sup>20</sup> Section 6 of the 1956 Act (51 of 1956)
- <sup>21</sup> Section 5(3), *Ibid.*

- <sup>22</sup> The Mussalman Waqf Act, 42 of 1923 was brought into force in Burma on 1<sup>st</sup> August, 1924. See Burma Gazette, 1924, part 1, page 600; see also the Burma Code, Vol IX, page 164. Mr U Khin Maung Sein of the Faculty of Law, International Islamic University, Malaysia provided this author information about Myanmar. He is the author of Islamic Law written in Burmese language ( Yangon, 1987)
- <sup>23</sup> See section 13, Wakf Act, 1995(43 of 1995)
- <sup>24</sup> Section 14 (6), Ibid
- <sup>25</sup> Section 23, Ibid. Powers of CEO, see Ss. 26, 28, 29, 33, 34, 35, 45, 54, 73, 105.
- <sup>26</sup> Section 14 (1) Waqf Act, 1995 (43 of 1995).
- <sup>27</sup> Section 14 (1), (c) and (d), Ibid
- <sup>28</sup> Section 14 (1) (e), Ibid. Section 99 Waqf Act, 43 of 1995 and sections 32 J & K Waqf Acts, 11 of 1978.
- <sup>29</sup> Section 9-12, Ibid. (And S. 8A, Waqf Act, 43 of 1995 and section 32 J & K Waqf Act, 11 of 1978. V
- <sup>30</sup> Section 25, J & K Waqf Act, 1978 (11 of 1978)
- <sup>31</sup> Section 7 and 8, Ibid.
- <sup>32</sup> Section 51, Ibid.
- <sup>33</sup> Section 7(2), Ibid.
- <sup>34</sup> Section 13 (1), (e), Ibid.
- <sup>35</sup> Section 72, Waqf Act, 43 of 1995 (India)
- <sup>36</sup> Section 30, J & K Waqf Act, 11 of 1978.
- <sup>37</sup> Section 71, Waqf Ordinance, 1 of 1962 (Bangladesh).
- <sup>38</sup> Section 43, and Schedule 1, Muslim Mosques and Charitable Trusts or Waqf Act, 51 of 1956
- <sup>39</sup> Section 47 and 48, Waqf Act, 43 of 1995.
- <sup>40</sup> Section 33, J & K Waqf Act, 11 of 1978.
- <sup>41</sup> Section 18 (3), Waqf Properties Ordinance, 4 of 1979 (Baluchistan), 1 of 1979 (NWFP), 4 of 1979 (Punjab) and 9 1979 (Sind).
- <sup>42</sup> Section 53, Waqfs Ordinance 1 of 1962 ( Baluchistan).
- <sup>43</sup> Section 51, Waqf Act 43 of 1995(India)

- <sup>44</sup> Section 56, Waqf Ordinance, 1 of 1962 (Bangladesh).
- <sup>45</sup> Section 9, 16, 25 (c), Waqf Properties Ordinance 4, 1979 (Baluchistan), 1 of 1979 (NWFP), 4 of 1979 (Punjab) and 9 of 1979 (Sind).
- <sup>46</sup> Section 2, Muslim Mosques and Charitable Trusts or Waqf Act, 51 of 1956 (Sri Lanka)
- <sup>47</sup> Section 51, Waqf Act, 43 of 1995.
- <sup>48</sup> Section 56, Waqf's Ordinance, 1 of 1962.
- <sup>49</sup> Section 56, Waqf Act. 43 of 1995.
- <sup>50</sup> Section 52, Ibid.
- <sup>51</sup> Section 56(4) and (5), Waqfs ordinance, 1 of 1962
- <sup>52</sup> Section 22 (3) Muslim Mosques , Charitable Trusts or Waqf Act, 51 of 1956.
- <sup>53</sup> Section 16(e) and(f) of the Waqf Properties Ordinance 1979 of the four provinces of Pakistan.
- <sup>54</sup> Section 64, Waqf Act, 43 of 1995.
- <sup>55</sup> Section 32, Waqfs Act, 1 of 1062
- <sup>56</sup> Section 29(3), Muslim mosques and Charitable Trusts or Waqfs Act, 51 of 1956.
- <sup>57</sup> Before its amendment in 1962, section 39 had ten grounds on which the director or any five persons interested in a trust, were entitled to institute an action in the relevant District Court, "for removing from office any trustee of the trust or waqf."
- <sup>58</sup> Section 55, waqf Act, 43 of 1995.
- <sup>59</sup> Sections 42-44, J & K Wakfs Act, 11 of 1978.
- <sup>60</sup> Section 8 of the Waqf Properties Ordinance, 4 of 1979 (Baluchistan), 1 of 1079 (NWFP), 4 of 1979 (Punjab) and 9 of 1979 (Sind).
- <sup>61</sup> Section 11, Ibid.
- <sup>62</sup> Section 14, Ibid.
- <sup>63</sup> Section 13, Ibid.
- <sup>64</sup> Section 83, Waqfs Ordinance, 1 of 1962.
- <sup>65</sup> Section 15 A(3), and (4) , Muslim Mosques and Charitable Trusts or Waqfs Acts, 51 of 1956.

- <sup>66</sup> Section 38, Waqf Act, 43 of 1995.
- <sup>67</sup> Section 7, Waqf Properties Ordinance, 4 of 1979 (Baluchistan), 1 of 1979 (NWFP), 4 of 1979 (Punjab) and 9 of 1979 (Sind).
- <sup>68</sup> Section 34, Waqfs Ordinance, 1 of 1962.
- <sup>69</sup> Section 39, Ibid.
- <sup>70</sup> See, All India Imam Organization v Union of India (1993) 3 SCJ 45.
- <sup>71</sup> Section 85, Waqf Act, 43 of 1995
- <sup>72</sup> Section 21, Waqf Ordinance, 4 of 1979, (Baluchistan), 1 of 1979 (NWFP), 4 of (Punjab), 9 of 1979 (Sind):
- <sup>73</sup> Section 9J, (Sri Lanka) Muslim Mosques and Charitable Trusts or Waqf Act, 51 of 1956 ( as amended in 1982).
- <sup>74</sup> Section 9G, Ibid., and section 83 (6), Waqf Act 43 of 1995 (India).
- <sup>75</sup> Section 9 G, Ibid., and section 83 (6), Waqf Act, 43 of 1995 (India).
- <sup>76</sup> Section 93, Waqf Act, 43 of 1995.
- <sup>77</sup> Section 80, Waqf Ordinance, 1 of 1962.
- <sup>78</sup> See section 26 of the Muslim Mosques and Charitable Trusts or Waqfs (Amendment) Act, 33 of 1982.
- <sup>79</sup> See, Waqf (amendment) Act, 49 of 1984.
- <sup>80</sup> Final Report 1976 – Waqf Inquiry Committee, Part I & II, Government of India, Ministry of Law, Justice & Company Affairs (Legislative Department), (Government of India Press, 1976) See also, Interim Report 1973, Waqf Inquiry Committee, Ministry of Law, Justice and Company Affairs (Legislative Department).
- <sup>81</sup> For details of changes brought about by amending legislation, see Furqan Ahmad, “The Waqf Amendment Act 1984 – An Analysis”, and Ateeque Khan, “The Waqf (Amendment) Act 1984 : A Plea for Reconsideration “ , both in Islamic & Comparative Law Quarterly, vol. 5 No. 1 (1985), pp. 81, 84, 85, 90.
- <sup>82</sup> Some of the information about Maldives have been obtained from Mr. Mohamed Jameel Ahmad, previously of he Attorney-Generals” Chamber, Maldives, who is now doing MCL at the International Islamic University, Malaysia.



## Le rôle socio-économique du *Waqf* dans la société musulmane: historique et perspective.

Abderrazek Guessoum \*

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### Introduction

Toute tentative d'étude du concept *Waqf* et son rôle dans la vie socio-économique de la communauté islamique nous amène nécessairement à une étude plus globale et plus profonde de la vision islamique de la propriété, de la richesse et du bien en général.

Elle nous permet également, de mieux percevoir, le lien étroit, qui existe entre le *Waqf* ou le *Habous* selon l'usage terminologique maghrébin, d'une part, et la *Zakat* (donation, aumône) d'autre part, dans l'organisation de la vie économique et financière de la collectivité islamique, ou la *Umma*, conformément aux prescriptions de l'Islam.

C'est en effet dans le cadre de cette vision, qu'il faudra envisager le concept *Waqf* comme dénominateur commun des différents aspects de la notion de propriété.

A la différence des autres religions, l'Islam conçoit le *Waqf* à la fois comme volonté spirituelle et en tant que stimulateur du développement économique dans la société. Ainsi, le *Waqf* peut jouer, au sein de la société, le rôle de catalyseur dans des domaines très diversifiés appartenant aux champs culturels et scientifiques.

Ceci explique d'ailleurs l'importance accordée par l'Islam au *Waqf* et la place importante qu'il occupe dans la politique visant à faire la part des choses entre le bien de l'État et celui de la *Umma*. C'est grâce à l'institution du *Habous* que la civilisation islamique a su faire face aux multiples défis à travers sa longue histoire, et a pu, par la même occasion, sauvegarder l'indépendance de son identité à l'égard de toutes tentatives d'assimilation.

Par souci d'exhaustivité, notre étude sur le *Waqf* se propose de faire brièvement l'historique du concept, avant de procéder à une analyse détaillée des diverses composantes de l'institution du *Waqf* ainsi que des différents impacts sur la vie aussi bien de l'individu que de la communauté islamique. Cette étude envisage aussi de faire la comparaison entre le *Waqf* et la *Zakat* donation et aumône, et ceci dans

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le but de souligner les voies et moyens offerts par l'islam en vue d'une meilleure prise en charge des différentes couches de la société, notamment les plus démunies parmi elles. Une telle approche est difficile à concrétiser étant exposé, limité dans son espèce et son temps; Notre souci consiste à cerner les divers aspects du *Waqf* ainsi que ses implications sociales et culturelles, le rôle qu'il a joué au niveau de la et la relation qu'il a entretenue avec les pouvoirs politiques.

De ce qui précède, on peut dire que l'étude des *Habous* nous offre de nombreuses perspectives qui militent en faveur d'une redynamisation de cette institution qui, une fois relancée, permettra de contribuer à rétablir l'équilibre socio-économique et garantir une stabilité tant défendue par l'islam. Dans cette perspective le rôle des intellectuels est plus primordial que jamais surtout que les *Awqaf* ont joué historiquement dans le sens de leur faciliter une indépendance financière et un renforcement de leur rôle en tant que garant des valeurs de l'islam.

#### A. Définition du *Waqf*

Sur le plan étymologique nous relevons qu'aussi bien le *Waqf* que les *Habous* indiquent un arrêt de mouvement, un état stationnaire, d'où une première signification qui va à l'encontre du concept *māl* (fortune, richesse, bien) qui implique l'écoulement, le flux, l'échange, c'est à dire que le mouvement et c'est sa règle générale. Alors qu'un bien *Haboussé* constitue l'exception de cette règle puisqu'il marque l'arrêt de la gestion du bien. Ainsi donc toutes les écoles jurisprudentielles –à quelques exceptions près- s'accordent à dire que le *Waqf* est un des états exceptionnels qui atteignent le bien en tant que propriété, pour geler sa potentialité de vente ou d'achat, en lui interdisant toute possibilité de libre échange pour rendre temporairement ou durablement, *Haboussé* au profit de la cause divine.

Ainsi, le bien *Haboussé* change de propriété et de gérant, et entraîne une interdiction de vente ou d'achat en tant que capital, sans pour cela, porter atteinte à son profit qui pourrait être destiné à une activité quelconque individuelle ou collective. Il est ainsi clair que le *Habous* concerne le bien; Or le bien désigne selon la majorité des *Fuqaha* tout ce qui a une valeur matérielle et qui entraîne un profit licite.

Tenant compte de ces remarques, nous déduisons déjà un ensemble de facteurs qui ont marqué l'historique et l'évolution du *Waqf*:

- 1- Le *Waqf* tel qu'il a été institué par l'expérience islamique est unique du genre dans l'histoire de l'humanité.
- 2- Le *Waqf* est un moyen accordé par l'Islam à la communauté musulmane lui permettant de mieux gérer son patrimoine, de lutter contre toute forme d'injustice politique, économique, sociale, et culturelle.
- 3- En face de l'institution officielle de l'État, le *Habous* a un caractère civil, et dont la direction est confiée à un gérant (individu ou institution).
- 4- Le *Waqf* n'est pas une obligation religieuse pour le musulman (à l'instar de la *Zakat* par exemple), mais un acte volontaire recommandé par une compréhension large et diverse de ce que le Coran et les *Hadiths* ont instauré à propos du comportement social des individus tel que la *aya* « jamais vous ne parviendrez à la véritable piété sans avoir sacrifiée de ce que vous aimez et quelque aumône que vous fassiez, Dieu, en vérité le sait parfaitement » (Coran 3 :92). Les commentateurs du Coran, et les écoles jurisprudentielles considèrent ce verset, particulièrement comme une recommandation en faveur du *Waqf*, de la donation, et de l'aumône en général.
- 5- L'institution du *Waqf* est dotée de plusieurs garanties en vue d'assumer convenablement sa noble tâche. Il suffit de passer en revue les modalités de gestion du *Waqf* pour se rendre compte de sa rigueur. Parmi ces modalités nous pouvons citer :
  - a- La répartition des revenus entre les bénéficiaires et les gérants
  - b- La diversité des sources de revenus.
  - c- Le rendement annuel résultant des modes

C'est ce que les juristes ont essayé de prouver à travers les conditions qu'ils ont développé concernant la nature et la viabilité tant juridique que sociale du *Waqf*. Leurs conditions touchent tous les aspects que le *Waqf* pourrait intégrer et les formules juridiques conséquentes afin qu'il se constitue en un Contrat valide (la gérance, les bénéficiaires, la désignation, la substitution, le remplacement, etc.) .

Une fois les fondements du *Waqf* sont énumérés nous tacherons de passer en revue les divers aspects du rôle socio-économique du *Waqf* dans l'organisation de la communauté musulmane.

### **B. Le rôle socio-économique du *Waqf***

Il n'est pas possible d'étudier le rôle socio-économique du *Waqf* dans l'histoire de la civilisation musulmane, sans pour cela faire appel à



la notion de piété qu'inculque l'Islam chez ses adeptes, qui est en fait à l'origine de l'apparition du *Waqf* en tant que concept et en tant qu'institution.

D'autre part, on pourrait dire sans exagération que la civilisation musulmane demeure fortement imprégnée par les *Ha bous*, de telle sorte que faire son historique revient à retracer l'histoire du *Waqf*. La place des *Awqaf* se lit à travers la multitude d'exemples des *Awqaf* qui ont touché les divers pays musulmans et dans des secteurs très variés. C'est grâce aux revenus des *Awqafs* que des secteurs comme ceux de l'enseignement, la santé, la formation religieuse et autres ont été pris en charge. Dans cette direction il est important de souligner que ce sont ces institutions civiles qui ont bel et bien créé la civilisation de l'Islam. Le gigantisme de cette civilisation nécessitait la disponibilité d'énormes ressources humaines et financières. En réalité deux institutions ont collaboré chacune à sa manière dans cette grande entreprise qu'est la civilisation musulmane. D'un côté, l'État avait comme mission de mener les conquêtes et de propager l'Islam et sa langue dans les quatre coins de la planète, de l'autre les institutions du *Waqf* assurent les fonds nécessaires au développement social et culturel de la communauté qui s'agrandissait.

Il suffit à juste titre de passer en revue quelques exemples des divers domaines financés par les *Awqaf* pour avoir une idée sur l'étendu de cette institution et de son rôle socio-économique qu'elle a joué :

- Les mosquées : avec ce qu'elles représentent de jonction entre l'adoration de Dieu, et le règlement des affaires qui touchent les différents aspects de la vie de la communauté.
- Les écoles : flambeaux de la science grâce auxquelles la civilisation musulmane a rayonné.
- Les bibliothèques : Ils avaient offert gratuitement la science aux chercheurs, tout en conservant les manuscrits, les chefs-d'œuvres et les monuments historiques, comme signe de grande civilisation.
- Les polycliniques : Des institutions aux diverses spécialités, qui assurent le traitement des maladies physiques et mentales.
- Voyageurs de passage : une prise en charge leur est assurée jusqu'à leur retour chez eux.
- Pèlerins : une aide destinée spécialement aux musulmans n'ayant pas les moyens d'accomplir le pèlerinage.
- Mariage : constituer un trousseau de mariage pour les mariés démunies

- Maison d'assistance sociale : Un lieu qui abrite les orphelins, les couples faisant faces à des difficultés, les handicapés etc.
- Fonds social : Aide aux endettés, aux familles de prisonniers, aux jeunes désireux de se marier, et aux nécessiteux en général.

Nul doute que ces formes de solidarité sociale, n'étaient pas réalisables s'il n'y avait pas, d'une part, un fond disponible offert par l'institution du *Waqf*, et une administration judicieuse symbolisée par les gérants. Tel est le génie de l'Islam, pris dans ses dimensions les plus humaines, et caractérisé par les nombreuses marques d'entraide et de solidarité, exprimés par la Zakat, l'aumône, la donation, et enfin le *Waqf* ou le *Habous*.

Au regard de la réalité islamique d'aujourd'hui, il semble que ces vertus aux milles avantages, tendent à diminuer ou à disparaître, dans certaines régions du monde musulman, d'où la nécessité d'œuvrer pour une revivification de nos valeurs et par conséquent une redynamisation de nos institutions fondées sur le concept de piété tels le *Waqf*, La Zakat la donation et l'aumône.

### ***C-Pour une redynamisation du rôle du Waqf***

Une médiation objective de la crise que traverse aujourd'hui le monde musulman, laisse apparaître de nombreuses causes ayant engendré une telle crise. Nous nous pouvons qu'insister sur le rôle qu'avait joué la colonisation dans ce processus, puisque c'est l'administration coloniale qui a donné le coup fatal aux diverses institutions islamiques tel les *Awqaf* soit en les expropriant, soit en les déviant de leurs objectifs véritables. La décolonisation politique n'a pas remédié au mal colonial; bien au contraire, force est de constater que dans de nombreux pays musulman indépendants, les biens du *Waqf*, ont été spoliés, expropriés, dilapidés, etc.

Bien que certaines institutions du *Waqf*, continuent à subsister ici et là, et que des efforts louables sont encore déployés dans quelques pays musulmans traduisant des initiatives beaucoup plus personnelles que collectives, ces institutions et ses efforts sont loin de refléter la richesse réelle de la *Umma*, ou de satisfaire les besoins énormes de la société musulmane. Mais l'espoir demeure dans la relance d'une action concertée, qui aura pour premier objectif un recensement des biens du *Waqf* dans chaque pays en vue de réorganiser ces biens, sur des bases de d'ordre de rationalité. Nous estimons que cette étape permettra une meilleure organisation de ses institutions.

Sur un deuxième plan, nul ne doute de la place prépondérante de l'économie dans nos sociétés contemporaines. C'est ce qui renforce le rôle des intellectuels et des Ulémas dans le sens de contribuer à une prise de conscience des potentialités dont recèle notre patrimoine islamique. Leur tâche est aussi primordiale afin de mieux appréhender les questions d'ordre socio-économiques et d'y voir la place éventuelle du *Waqf* dans une époque marquée par un ordre quasi-économique.

Un tel rôle, s'il est bien mené, aura un impact considérable sur la situation économique et sociale du monde musulman. Il aura comme objectif principal, l'élimination du spectre de pauvreté, de misère, d'indigence, et de famine qui demeurent malheureusement les caractéristiques de la société musulmane.

Nous estimons que pour atteindre cet objectif, un effort de recherche devrait se concentrer autour des thèmes suivants :

- Une étude profonde et objective des causes de la discontinuité du *Waqf*.
- Une analyse à l'échelle *macro* des avantages du *Waqf* afin de le rendre apte à jouer un rôle économique distingué.
- L'appréciation du rôle du *Waqf* dans la lutte contre le chômage, la pauvreté, et le perfectionnement des capacités individuelles.
- La reconnaissance du *Waqf* en tant que composante principale de la société civile.
- La complémentarité entre le *Waqf* et la *Zakat* dans le système de sécurité sociale.

Nous estimons aussi que d'autres mesures devraient se faire sur le plan législatif, notamment :

- La séparation du *Waqf* par rapport aux biens de l'Etat, et la restitution par l'Etat de tout ce qui est considéré comme *Habous* à l'institution indépendante du *Waqf*.
- Abrogation de toutes les mesures et les lois limitant ou interdisant les *Awqafs*, qui ont été pris dans le cadre des nationalisations des biens publics ou privés.
- Délivrer le *Waqf* du rôle réduit qui lui a été attribué et qui consiste à le placer exclusivement dans un domaine commercial très étroit, tels les boutiques traditionnelles, les bains maures, les boulangeries, etc., afin de lui permettre une expansion économique et un investissement diversifié de ses ressources.

Une fois associées et résolues, ces conditions devraient à notre avis, une meilleure approche, capable de procéder à une redynamisation du rôle du *Waqf*.

## Conclusion

Telle que conçue théoriquement et dans la pratique historique l'institution du *Waqf*, représente une autre ressource pour nos sociétés musulmanes afin de résoudre l'épineuse question de la dépendance économique et politique, et pourrait constituer de ce fait le fer de lance pour un développement économique sain et durable. Abordée à travers tous ses angles, l'institution du *Waqf* ou des *Habous* devient le genre de catalyseur, qui fait la jonction entre la spiritualité de la personne et son comportement social, et c'est particulièrement ce passage qui fait sa force et le rend plus qu'utile dans notre monde actuel.

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