
A CRITICAL EXAMINATION OF THE CONSTITUTIONAL VALIDITY OF THE WAKF ACT, 1995

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ABSTRACT

The Wakf Act, 1995 is a highly disputed legislation in terms of its constitutional validity. The legislation aims to regulate and supervise wakfs dedicated under Muslim Law. This work seeks to encapsulate the legal framework relating to wakfs with specific reference to the Wakf Act, 1995- and discusses in detail, certain provisions that are repeatedly called into question. In the face of various amendments and changes being made to the law by judicial as well as legislative actions, it is necessary to examine the Wakf Act in its earliest form, including various provisions that indicate how such wakfs are to be managed, and how disputes relating to wakfs are to be resolved. Particularly, there is a detailed exploration of the Writ Petition filed by Ashwini Kumar Upadhyay, challenging the constitutional validity of this legislation. The various impugned provisions are looked into in detail, and suggestions have been made in order to improve the status of wakfs in India. The main focus of this article is to employ a doctrinal method, and look into various case laws and articles, in order to convincingly present the available opinions on the administration of wakfs in India, and analyse means of improvement from the legal perspective.

INTRODUCTION

The Wakf Act, 1954 was enacted to provide for better administration and supervision of Wakfs under Mussalman law. Subsequently, this Act was repealed, and in its place, the Parliament promulgated the Wakf Act, 1995 for the same purpose, while bringing about certain key changes, including establishment of Boards. The Wakf Act has both prospective and retrospective effect, ie. It applies to all those “wakf” whether created before or after the commencement of the Act, as stated in S. 2. The term Wakf is defined as under S. 3(r) of the Wakf Act, 1995 as follows- ““waqf” means the permanent dedication by any person, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable.” Wakf is considered as a religious dedication to Allah, and is managed by a Mutawalli, as defined in S. 3(i) of the Act. The concept of Wakf is subtly different from a trust as under the Indian Trust Act, 1882- as the Indian Trust Act is applicable to all citizens of India, whereas wakf is a concept within Muslim Personal Law alone. A wakf, may, however, be considered as a trust for legal purposes, under certain conditions. This Act also established Wakf Boards for the Sunni and Shia people as under S.13, and common boards under S. 106- to regulate and manage all properties related to Wakf- while having the legal status of a body corporate. The establishment and functions of the Wakf Boards are dealt with under Part IV of the Wakf Act, 1995. This Act was challenged through various petitions, and has been alleged as unconstitutional and unfair by said petitioners.

NATURE, SCOPE AND EFFECTS OF WAKF

Wakf is a concept which exists only in Muslim law. Wakf may be any movable or immovable property- dedicated permanently for pious, religious or charitable purposes.¹ Wakf is irrevocable and perpetual in nature.² The property characterised as Wakf by a person leads to a loss of ownership by said person. The property is henceforth considered as being owned by Allah.³ In order to be a valid Wakf, such property must be tangible, and not exhaustible from use.

Wakf can be declared by a living person during his lifetime, at his deathbed (marj-ul-maut), in the form of will, or may be implied through continuous use of such property for religious,

¹ M Kazim vs A Asghar Ali, AIR 1932.

² Iqbal Ali Khan (Dr.) Professor of Law, on Aquil's Mohammadan Law, CLA, Allahabad, W, Ed. 1999, p. 260.

³ Md. Ismail vs Thakur Sabir Ali, 1963 SCR (1) 20.

pious, or charitable purposes. The motive of Wakf is inherently religious, and not secular.⁴ Any person who is above the age of majority, is of sound mind, and is a Muslim- may dedicate his/her property as Wakf, thus assuming the title of ‘waqif.’

The completion of such dedication occurs when the Mutawalli is duly appointed, and delivery of such possession is complete. Further, once wakf is declared, it has the following effects:

- The declaration is irrevocable⁵
- The property is inalienable by any other person, as it is considered as property of God
- The declaration is perpetual⁶
- The property is to be used only for religious, pious or charitable purpose, as recognised by Islamic law⁷
- The waqif loses all rights of ownership and possession over the property⁸
- The courts have the power to inspect the management and functioning of the property

ALLEGED DISCRIMINATORY NATURE OF WAKF ACT

There have been several petitions filed in Indian Courts, challenging the validity of the Wakf Act on various grounds. Notably, a petition filed by Advocate Ashwini Kumar Upadhyay in the Delhi High Court in the form of a PIL alleged that Sections 4, 5, 6, 7, 8, 9 and 14 of the Wakf Act, 1995 are unconstitutional and discriminatory in nature. It is pertinent to note that the very same petitioner filed a Civil Writ Petition⁹ before the Hon’ble Supreme Court, but subsequently withdrew the same, due to refusal by the Hon’ble Court regarding hearing of the same¹⁰. The petitioner then sought relief from the Delhi High Court.

⁴ Karnataka Board of Wakfs v. Mohd. Nazeer Ahmad, AIR 1982 KANT 309.

⁵ Asoobai vs. Noorbai, (1906) 8 Bom LR 18.

⁶ Mst Peeran vs Hafiz Mohammad, AIR1966 ALL 201.

⁷ Kassimiah charities v. Secy., Madras State Waqf Board, AIR 1964 MAD 18.

⁸ Bibi Saddiqa Fatima v. Saiyed Mohammad Mahmood Hasan, 1978 AIR 1362.

⁹ WP(C)1080/2021.

¹⁰ Kakkar, S., *Supreme Court refuses to entertain plea challenging WAKF Act*, LIVE LAW, (2022, April 13), <https://www.livelaw.in/top-stories/supreme-court-refuses-to-entertain-plea-challenging-wakf-act-196545#:~:text=The%20Supreme%20Court%20on%20Wednesday,of%20the%20Wakf%20Act%2C%201995.>

The petitioner submitted before the Hon'ble Court that the Wakf Act is unfair and discriminatory due to dearth of such similar enactments pertaining to other religions like Jains, Buddhists, Christians, etc. The petitioner argued that the Wakf Act does not protect other religious minorities, aside from Muslims, and is hence violative of Art. 14 and 15 of the Indian Constitution. The petitioner sought to steer the law-makers towards a 'Uniform Code for Trust-Trustees and Charities-Charitable Institutions,' as enumerated under Item 10 and 28 of List-III, in the Seventh Schedule of the Constitution. The petitioner submitted that- in the interest of Art. 25 and 26 of the Indian Constitution- the provisions as under Art. 14 and 15 must not be ignored. Any law that contravenes the basic principles enshrined in Art. 14 and 15, and is manifestly arbitrary in nature, is liable to be declared unconstitutional¹¹. The Wakf Act provides for Wakf Tribunals¹² that are required to hear disputes relating the Wakf properties. In this regard, it was alleged by the petitioner Ashwini Kumar Upadhyay that such disputes relating to such properties must be heard not by special tribunals, but by the Civil Court, as per the CPC, 1908¹³.

The petitioner Vikash Kumar challenged the validity of the Wakf Act, claiming that it violates Articles 14, 15, 25, 27 and 300-A of the Indian Constitution. Further, the petitioner challenged the scope of the Parliament in establishing Tribunals for hearing disputes that would otherwise come under the purview of the Civil Court, and hence encroaching upon territory which exceeds the power given to them as under Art. 323A of the Indian constitution¹⁴. The petitioner claimed that equal protection of law was being denied to the other religious minorities, as the Wakf Act gave special status to Muslims who donate their properties for religious purposes. There are several Acts like The Religious Endowment Act 1863, The Indian Trustees Act 1866, The Indian Trusts Act 1882, The Charitable Endowments Act 1890, etc. which negate the need for a special law for Muslims alone. It was argued that there is no constitutional basis for the Wakf Act, and that the powers given to the Wakf Boards are unfairly vast, in this regard- when compared to powers of regulatory bodies for other religions.

The petitioner prayed before the Hon'ble Court, asking for the declaration that:

1. The Centre can only enact Uniform Law for Trust and Trustees, Charities and

¹¹ Shayara Bano v. UOI, (2017) 9 SCC 1.

¹² Wakf Act, S. 83, No. 43, Acts of Parliament, 1995 (India).

¹³ The Civil Procedure Code, S. 9, No. 5, Acts of Parliament, 1908 (India).

¹⁴ INDIA CONST. art. 323A.

Charitable Institutions, and Religious Endowments and Institutions and cannot make separate laws for Wakf properties.

2. S. 4, 5, 6, 7, 8, and 9 of the Wakf Act are manifestly arbitrary, unconstitutional, and hence void.
3. Disputes relating to Wakf and Wakf properties are to be heard by Civil Courts, and not by Tribunals.
4. The Centre or Law Commission is to draft a 'Uniform Code for Trust-Trustees and Charities-Charitable Institutions' in spirit of the Articles 14-15 and publish it for public debate/feedback.

CRITICAL ANALYSIS OF CONSTITUTIONALITY OF SELECT PROVISIONS OF THE WAKF ACT, 1995

S. 3(r)(i) states that “waqf shall not cease to be a waqf by reason only of the user having ceased irrespective of the period of such cesser.” This gives the concerned authorities a great deal of power to capture property in the name of Wakf, simply due to the fact that it could have been characterized as having been put to such use in the past. Hence, the waqif may have no say in such act by the authorities, hence violating his/her constitutional right to property.¹⁵ Whiles, it has been ruled by the Hon'ble Supreme Court that not every public trust is required to be considered as wakf property under Islamic law.¹⁶ Further, there are provisions to challenge the list of wakf properties in subsequent sections of the Act.¹⁷ Hence, there is a pertinent question of law in this regard, left unanswered to this day.

S. 4 of the Wakf Act deals with appointment of Survey Commissioner and Additional/ Assistant Survey Commissioners for conducting Preliminary Survey of Wakf. This provision bestows the Commissioners so appointed under the Act with- according to a petition challenging this act- unfair, “arbitrary and un-checked” powers to manage and take over property as deemed “necessary” by them, in the name of Wakf. There is no provision for hearing, or notice given to the public, before inclusion of property as wakf as under S. 4(3)-

¹⁵ INDIA CONST. art. 300A.

¹⁶ Maharashtra State Board of Wakfs v. Shaikh Yusuf Bhai Chawla & Ors AIR 2012 SC 2362.

¹⁷ Wakf Act, S. 7, No. 43, Acts of Parliament, 1995 (India).

and hence this provision is possibly violative of the maxim- *audi alteram partem*- and is in contravention to the principles of natural justice.¹⁸ In *Salem Muslim Burial Ground Protection Committee v. State Of Tamil Nadu And Ors.*¹⁹, the Court held that mere publication of notification will not immediately declare the property as Wakf, and such declaration can only be valid upon completion of elaborate and necessary statutory processes

S.5 deals with publication of list of Wakf, based on examination by the Wakf Board and is dependent on the procedures carried out as per S. 4 of the Act. As the procedure stated in S. 5 is based on S.4, this in turn, indicates that S. 5 is also a possible violation of Art. 14 due to “arbitrary and un-checked” powers of the Survey Commissioner. Further, such powers being given to Islamic Officers is, as alleged by the petitioner, a direct violation of the fundamental right against discrimination on the basis of religion.²⁰ Such powers have not been given to any equivalent persons under any other personal law system in India.

S.6 and S.7 deal with Tribunals that are constituted to hear disputes regarding Wakf and Wakf properties. The petitioner submitted that these provisions are unfairly in favour of Muslim communities, while other minorities have to approach common Civil Courts for all sorts of property, charity and trust-related disputes, as per S. 9 of the Civil procedure Code, 1908. Further, Art. 25 and 26 of the Indian Constitution confer the Right to Religious Freedom upon citizens- and when read along with Art. 14 and 15, it is clear that the Centre must ensure equal protection of laws to all, and the same may be denied to certain religious groups by virtue of these provisions- due to exclusivity of Tribunals based on religion. As per S. 7 of the Act, “any person aggrieved by the publication of list” under S. 5 may approach the Tribunal for relief; this provision is vague due to the term “any person”- including non-Muslims, who will hence be required to approach a Tribunal even without being well-versed in Islamic personal law and practices. It may also be argued in this context that a Tribunal specialising in Islamic personal law would be best suited as a forum to hear disputes regarding Wakf properties. Further, this may also be seen as a way to reduce pendency of cases in Civil Courts, and aid speedy disposal of cases relating to Wakf properties, which may otherwise take several years to resolve. Hence, this leaves an unanswered question in the air.

¹⁸ Harbans Lal v. Commissioner, AIR 1994 SC 39.

¹⁹ Salem Muslim Burial Ground Protection Committee v. State Of Tamil Nadu And Ors., AIR 2023 SC 2769.

²⁰ INDIA CONST. art. 15.

S.8 states that: “The total cost of making a survey including the cost of publication of the list or lists of auqaf under this Chapter shall be borne by the State Government.” This implies that the money used for the list, and its publication- comes from the pockets of tax-payers in the state. This can be viewed as a direct violation of Art. 14 and 15 due to the government favouring one religion in terms of its spending. Further, Art. 27 requires the state to ensure that the proceeds of taxes are not appropriated towards expenditure accruing to any particular religion- and in the case of the S. 8 of the Wakf Act, it appears as if there is an indirect violation of Art.

27. The purpose behind Art. 27 is to uphold the basic constitutional principle of secularism, and hence this is a possible violation of this principle.²¹ On the other hand, it has been held in *Prafull Goradia v. Union of India*²² that if only a small proportion of the collected tax is used to provide for some religious purpose, it would not amount to a violation of Art. 27. It is only considered as a violation when a substantial part of the tax collected is used for purposes directly in contravention to secular ideologies. Hence, this issue must be addressed by the Hon’ble Court to give a final stance on the matter.

S.9 gives the Central Government, the authority to establish a Central Waqf Council for the purpose of advising the Centre, States, and Boards on matters concerning the working of Boards and administration of Waqf. The provision also entails the structure and functioning of such Council. There is no such council that has been put in place to address the matters of Hindu Trusts, Religious Sects like Mutts, etc. in order to speedily settle disputes and act as an advisory body, with reference to any other religious minority or religious group. S. 9 has hence been challenged by various petitioners due to apparent violation of Art. 14, 15 and 27- while also disregarding the principle of secularism.

S. 14 specifies the structure of the Wakf Boards- and states that all members are to be Muslim. Further, under S. 40, such Boards have the power to question the property of any trust/society in the name of Wakf property. These provisions have been challenged due to the lack of safeguard provided to individuals whose property has been questioned- and there is no requirement for judicial pronouncements regarding such questions. Instead, the Board has been given the power to independently decide if such property is a Wakf or not. This points towards discrimination on religious basis. It was claimed that this power given to the Boards is ultra-

²¹ The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1954 AIR 282.

²² *Prafull Goradia v. Union of India*, (2011) 2 SCC 568.

vires to Art. 14, 15, 25, 26 and 300A of the Constitution.²³

SUGGESTIONS & CONCLUSION

The purpose of the Wakf Act, 1995 is to improve administration, management, and use of Wakf properties under Muslim personal law. It lays down various procedural aspects of registering, consolidating, and managing Wakf properties, and provides for a Central Wakf Council, as well as Wakf Boards- that function to realise the objectives of the Act. However, the Act has been challenged for its constitutionality on various separate instances, none of which has provided a clear, final decision from the Courts' side- due to pendency, and/or withdrawal of petitions. The pending issues relating to the Act are regarding the allegations of 'manifest arbitrariness' in certain provisions, and also the proclamation that the powers of the authorities stated under the Act are ultra vires to the constitution. There is a need for thorough examination of the constitutional validity of this Act by the Courts or by a Law Commission, in order to ensure that Constitutional ideals are not undermined simply by the enforceability of certain provisions of the Wakf Act. Due to the Doctrine of Severability as per Art. 13- there is no need to strike down the entire Act, which has been framed with clear intentions in mind. However, it would be prudent to reconsider certain provisions that have been included in this Act, and perhaps throw more light on the concept of Wakf by removing disparities and clarifying the dire questions of law regarding this enactment, which remain unanswered to this day.

²³ Wakf Act, S. 40(4), No. 43, Acts of Parliament, 1995 (India).

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