THE INDIA FORUM
A JOURNAL-MAGAZINE ON CONTEMPORARY ISSUES

November 22, 2024

Wakf Reforms, or a Bid to Control Waqf Properties?

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All faiths in India have institutions for charity, all are governed by unique laws, so too the Waqf. While waqfs need reform, the 2024 Amendment Bill, unlike past laws, seeks not to improve governance, but to facilitate government control -- a case of discrimination in the present political milieu.

What is a *waqf*? How can a secular country like India have any legal place for alien, Arabised terminology? Are Muslims in India being given 'special treatment'? Why are waqf institutions allowed to capture land lawlessly?

These are some of the questions heard in discussions around the waqf, not only in the mainstream media but now even in many homes. The context of course is the introduction of the Waqf (Amendment) Bill 2024 in Parliament. This article attempts to address some issues surrounding the waqf in light of the proposed amendment.

In the bouquet of different Islamic charities such as *zaka'at* and *sadqa*, waqf is a unique method of charity with roots in Islamic religious beliefs. To create a waqf, a person dedicates his self-acquired or inherited movable or immovable property in the name of Allah, and the benefits from such properties are used for objectives in consonance with the Islamic understanding of charity. It is a common misunderstanding to only relate mosques and Madarsas to waqf properties. Many universities, orphanages, schools, and hospitals throughout the world function either on waqf lands or from the corpus of waqf money. These dedications are permanent: once the property is dedicated to waqf, the donor cannot take it back, akin to other charitable and religious dedications across faiths. From public and private to quasi-public and private, waqf properties have different natures.

Waqf in India

In our country, which places religions and faiths at its heart, religious trusts, charitable endowments, properties dedicated to deities, and other such concepts of dedication are bound to exist as they do in any society where ideas of charity are present. Like the waqf, followers of different faiths follow similar charitable systems. Those of the Hindu faith follow a system in which immovable and movable properties are donated to the public at large. In many instances, immovable properties are dedicated to religious deities. These dedications to deities, similar to waqf, are permanent, and cannot be later taken away.

The concept of waqf has existed in India for centuries. In the practice of the Islamic faith, throughout India, Muslims (in some cases, even non-Muslims) have not only dedicated a substantial number of immovable properties to waqf but have also created a financial corpus as waqf. Resultantly, a legal framework to regulate and protect waqf properties exists in India and has been periodically developed.

The principles of waqf laws are similar to various other religious and charitable endowment legislations. Some regulate specific religious communities, and others with general application. They exist both at the central and state level. Laws like the Charitable Endowments Act 1890, Bihar Hindu Religious Trust Act, 1950, Madras Hindu Religious and Charitable Endowments Act 1951, Andhra/Telangana Hindu Religious and Charitable Endowments Act 1987, operate at the state level. Under many of these acts, there are specific requirements that the board members shall be Hindus or professes the Hindu religion. The Shree Sai Baba Santhanam Trust Act, 2004, makes a provision that the officer attached to the organisation shall be a devotee of Sai Baba and shall make a declaration to that effect. Under these acts, many of the board members are inducted through elections, according to the clauses in the respective legislations.

Statutory Regulations

During the times of the Delhi Sultans and the Mughals, a system of waqf supervision existed. In the 1800s, the British introduced waqf laws following agitations against the control of the Hindu and Muslim endowments by a 'Christian Government'. The first codified laws on the management of endowments – the Regulation XIX of 1810 of the Bengal Code and the Regulation VII of 1817 of the Madras Code – were withdrawn and the Religious Endowments Act of 1863 was enacted to control and manage religious endowments through managers or managing committees. The Charitable Endowments Act of 1890 was enacted to administer public endowments of a

non-religious character, followed by the Charitable and Religious Trusts Act 1920.

The Privy Council judgement in the case of *Abul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry (1894)* upholding a judgement of the Calcutta High Court that invalidated *Waqf Alal-Aulad*[1] stirred a controversy that led to the passing of the Muslim Waqf Validating Act 1913. This was followed by the Mussalman Wakf Validating Act of 1930. Meanwhile, the Mussalman Wakf Act 1923 was enacted, introducing an obligation upon the Mutawalli (the manager or caretaker of a waqf) to disclose the existence of waqf, whether created through an instrument or brought into existence otherwise.

In 1937, one of the most prominent legislations on Muslim personal law, the Muslim Personal Law (Shariat) Application Act 1937, was enacted. Section 2 of this act applies Muslim Personal Law or Shariat to Muslims in various area, including wakfs. Since this was only a declaratory provision, a set of regulatory laws in compliance with Muslim Personal Law was necessary. Accordingly, provincial and state legislations were enacted in Bihar and Orissa, Bengal, Bombay, United Provinces, and Delhi. For instance, the Delhi Muslim Wakf Act 1943 was passed by the central legislature for Delhi, interestingly not placing the Muslim faith as the prerequisite for a person to create a valid waqf. Though the provisions for registration of waqf properties with one or the other body were introduced earlier, until 1954 there was no legislation or concept of 'notification' in the Gazette.

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After Independence, the Central Wakf Act was enacted in 1954 to provide for better administration and supervision of wakfs. The 1954 act defined wakf as a permanent dedication by a person professing Islam of any movable or immovable property for any purpose recognised by Muslim law as pious, religious, or charitable, including wakf by user, grants (including *mashrutul khidmat*) and a *wakf alal-aulad* to the extent to which the property is dedicated. Wakf was defined as any person making such a dedication. This dedication can be done by executing a document to this effect or by user.

After being repeatedly amended in 1959, 1962, 1964, 1969, and 1984 for want of better administration of waqf properties, the 1954 act was repealed, and a new legislation, the Waqf Act 1995, was introduced after "holding wide-ranging discussions with the leaders of the Muslim Community."[2]Unlike the 1954 act, where wakf was defined as a permanent dedication by *a person professing Islam*, the 1995 act expanded the definition by defining waqf as the permanent dedication *by any person*. In 2013, the 1995 act was further amended. In the present legal regime, along with registration, the publication of a list of *auqaf* (plural of waqf) in the official Gazette of the state has also been provided.

The Waqf (Amendment) Bill 2024

The questioning of the 2024 amendment bill is not about introducing change or a fear of change, as some have argued. The difficulties are in the contents of the proposed amendments itself, which are read with prejudice and the inherently divisive politics behind the bill. The proposed amendments, unlike the previous ones to the waqf laws, instead of making a bona fide step to better the waqf law (an option that is always available to all legislations), aim to dilute the entire institution of waqf through a politically controlled legal and administrative process.

It cannot be denied that the institution of waqf in India is facing challenges. Encroachment is a serious concern. In 2019, in response to a question raised in Parliament, the minister of minority affairs stated that approximately 17,000 waqf properties had been encroached on.[3] In 2014, in an attempt to find a plausible remedy to many such issues, the Waqf Properties (Eviction of Unauthorised Occupants) Bill 2014 was introduced by the then minister for minority affairs. In 2024, this bill was withdrawn by the current government. Amongst the other issues are the lack of functioning of waqf tribunals and the surveys of waqf properties pending under the Waqf Act 1995. Despite the passing of directions by the Supreme Court on both these issues, the state has ignored them.

> The 2024 Waqf Bill makes the District Collector, a government employee, the de facto custodian of waqf properties. The Bill further grants the Collector the authority to convert "waqf properties" into "government properties".

In the last decade, attacks on the Indian Muslim identity, many of them institutionalised, have not remained hidden. No law can be separated from the politics behind that law. From comparing waqf to '*jihad*' (an Arabic word that in its most general meaning means 'struggle' but is often used to fan Islamophobic propaganda) to Hindutva organisations repeatedly targeting waqf, the proposed legislation diluting the waqf does not come out of the blue.

The 2024 bill not only substantively reduces Muslim representation in both the Central Waqf Council and the Waqf Boards, it arbitrarily mandates non-Muslim representation in both the Central Waqf Council and the Waqf Boards. Why is this a problem? The answer to this question has its roots in the constitutional promise on equal protection of the law and the guarantee under Article 26. Article 26 of the Constitution guarantees the fundamental freedom to every religious denomination to manage its *own* affairs in matters of religion. As such, there are laws in UP, Kerala, Karnataka, Tamil Nadu, etc. mandating the representation of a person professing the Hindu faith for managing Hindu Temples and their properties. Under the Bihar Endowment Act, there are provisions for three boards – the Hindu Endowment Board, Shwetambar Jain Endowment Board, and Digambar Jain Endowment Boards – and the members of these boards are mandated to be Hindus. The Gurudwara Parbhandak Committee members must also be from the Sikh community. The Wakf amendment bill arbitrarily reduces Muslim representation and also mandates non-Muslim representation in the administration of the waqf.

The 2024 Waqf bill makes the District collector, a government employee, the de facto custodian of waqf properties. The bill further grants the collector the authority to convert waqf properties into "government properties" by issuing directives and updating information in the revenue records. Reports from the collector's subordinates will be sufficient to create a dispute in relation to the nature of waqf properties and accordingly those properties shall not be registered unless a competent court decides the dispute. The bill arbitrarily omits Section 40 of the existing Waqf Act that provides powers to Waqf Boards with respect to regulating and administering waqf properties. These powers will be with the collector, as will the existing powers of the Survey Commissioner to survey waqf properties.

The bill thoughtlessly erodes provisions which has the overriding effect on inconsistent laws in other statutes, removes of the application of the Waqf Act to evacuee property, and dilutes the punishment for alienation of Waqf properties. It eliminates the provision in the existing act that the Limitation Act (adverse possession) shall not apply to any suit for possession of immovable waqf property. Unlike the existing act, which allows "any person" to dedicate any movable or immovable property for any purpose recognised by Muslim law as pious, religious or charitable, the new bill places restrictions on these provisions as it proposes that not only a Muslim but only a Muslim who has practised the Islamic faith for at least five years can only dedicate a waqf.

The bill completely omits the concept of 'waqf by user', which sipulates that a property's nature as waqf can be established by long-term use for religious and charitable purposes on a property. Many mosques, *dargahs*, and *qabristans* are waqf by user. This doctrine of wakf by user is an established concept in our legal system, as recently reiterated by the five-judge bench in the Ayodhya title dispute. Even otherwise, the doctrine must be statutorily recognised on the ground of parity, as 'temple by user', 'math by user' and 'Hindu religious endowments by user' are recognised. These can be found out in the state legislations of Orissa, Tamil Nadu, and Telengana etc. Why should the doctrine of waqf by user alone be done away with?

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The bill reduces the waqf tribunal membership from three to two members, and the provision of post of a member who knows Muslim law and jurisprudence has been omitted. It creates room for governmental interference in the waqf asset management system and the auditing of waqf through the CAG's office. The bill replaces the 'election' of state waqf board members with 'nomination' by the state governments.

While the bill boasts of "ensuring the representation of Muslim women" (two in number) in the Central Waqf Council and the state waqf boards, Sections 9 and 14 of the existing Waqf Act (as amended in 2013) already provide for the mandatory representation of *at least* two women in the council and the boards. The present bill, ironically, limits Muslim women's representation to "two," which was earlier "at least two." This is a classic example of the application of the mind of those who have drafted the bill: Prejudice against Muslims at large and definite notions on the part of the government are the other issues.

There are other concerns, such as the intervention in the inheritance rights of *Waqf alal Aulad* and registration only through a portal and database. Updating the proposed portal may look simple and ensure transparency, but it will lead to very serious legal consequences. For example, if for some reason or the other attributable to the government officials or Mutawallis, the waqf is not

updated on the portal, then will that particular waqf continue to retain its waqf legal status or lose its status because this was not updated?

Waqf and the Constitution

Article 25 of the Constitution of India guarantees individuals the right to freedom of conscience and to profess, practice and propagate religion freely. At the same time, the Constitution ensures denominational rights under Article 26 of the Constitution. In addition to the clear protection the institution of waqf enjoys under both these articles, Article 29(1) of the Constitution of India provides absolute protection to the culture of any section of the citizens residing in India.[4] In the Constituent Assembly Debates on 8 December 1948, K.T. Shah spoke of culture in the following terms: "Speaking of culture, I think that is not a single item, either of area, language or script. It is a vast ocean, including the entirety of the heritage of the past of any community in the material as well as spiritual domain. Whether we think of the arts, the learning, the sciences, the religion or philosophy, Culture includes them all, and much else."

The treatment of the institution of waqf, through the present bill, is a clear case of discrimination against the Indian Muslim community and thus violates both Articles 14 and 15 of the Constitution. In other words, the institution of waqf may not only enjoy protection under the generically quoted provisions such as Articles 25 and 26 of the Constitution of India, but the canvas of protection is wider than what is popularly understood.

> The basic objective, as must be now clear is to weaken the institutional mechanism which gives a sense of empowerment to the Indian Muslim community.

There is no doubt that the government and the supporting organisations of the present government have disguised the agenda against waqf by plainly stating that the bill is to "overcome the shortcomings and to enhance the efficiency of the administration and management of waqf properties."[5] As a matter of fact, the present establishment does not want to see the existing institution of waqf where its stakeholders have a say. The assignment to undo this institution, has been passed on to another governmental institution – the office of the District Collector where the stakeholders of waqf hardly will have any say.

The basic objective, as must be now clear, is to weaken the institutional mechanism which gives a sense of empowerment to the Indian Muslim community. The present political regime has already taken a stand against all the special rights or group rights in relation to Muslims (and also against Christians on certain issues), which are part of the basic features of the Constitution. These special rights and group rights flow from Article 26 (denominational rights), Article 29 (cultural rights), and Article 30 (right to establish and administer educational institutions). Many of such rights are also meant for the majority community. Still, it is apparent that the stand of the government is only to target such rights when it comes to protecting the rights of the Muslim minority.

The constitutional facets of these rights are intended to ensure non-discrimination against minorities. Taking waqf as one such issue for law-making is a way of targeting one of the oldest institutions of Muslims in our country, as the present bill proposes to arbitrarily hand over Islamic denominational properties to public officials without accountability. We have witnessed how the collector's office behaved in demolishing people's homes in several north Indian states, leading to the Supreme Court making serious observations about such incidents and laying down strict guidelines to follow in case any house is found to be unauthorised. This way of demolishing houses cannot be without inherent prejudice and an inbuilt institutional bias against certain classes of people. It is the same office of the collector, that mostly follows political masters, which in the 2024 Waqf Amendment Bill is to become the custodian of waqf-denominational properties. This should concern us all.

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Footnotes:

1 A method of creating waqf of properties wherein children and the generations to come are the beneficiaries from the income and a defined portion of income is dedicated to charity.

2 Excerpt from the 'Introduction' to the Waqf Act, 1995.

3 See https://www.deccanherald.com/india/around-17000-waqf-properties-encroached-in-country-778438.html and https://timesofindia.indiatimes.com/city/hyderabad/only-20-of-waqf-land-in-telangana-state-free-of-litigation/articleshow/112330215.cms

4 The Supreme Court confirmed that the right under Article 29(1) is absolute and is not subject to any restrictions whatsoever in Jagdev Singh Sidhanti v. Pratap Singh Daulta, AIR 1965 SC 183.

5 Statement of Objects and Reasons, https://prsindia.org/files/bills_acts/bills_parliament/2024/Waqf_(Amendment)_Bill_2024.pdf