

ECONOMIC RELEVANCE OF WAKF IN INDIAN FAMILY LAW- A COMPARATIVE ANALYSIS WITH INDIA'S NEIGHBOURS

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INTRODUCTION

Wakf is a pious endowment which is inalienable and perpetual¹, it is an influential institution that provides the Muslim community with social, economic and educational services². A wakf is established by waqif, a living man or woman, who owns the revenue producing property and makes it inalienable in perpetuity³. It is inalienable in nature and therefore, once the property is bestowed as wakf, it cannot be gifted or sold and is deferred from inheritance.

The definition of Wakf has evolved over the period, from Abu Hanifa to The Waqf Act, 1995. In the historically earliest view, given by Abu Hanifa, the ownership of the property is vested in the waqif and the usufruct is devoted for charitable purposes⁴. In the opinion of the disciples of Abu Hanifa, wakf is tying up the substance under the rule of property of God hence, the ownership rights of the waqif are extinguished and the benefits arising from the land are transferred for the benefit of mankind hence, the three elements recognized are (i) ownership vests with God perpetually and irrevocably, (ii) the proprietorship of the Waqif is annihilated and (iii) the usufruct of the property is used for the benefit of mankind⁵. The Sharia-ul-Islam defines Wakf as "A contract, the fruit or effect of which is to tie up the original of a thing and to leave its usufruct free", this definition elaborates two elements (i) immobilization of corpus of the property and (ii) the benefits from the property is used for the benefit of mankind⁶. Under the Mussalman Wakf Validating Act, 1913, Section 2(1) defines Wakf as "The permanent

¹ Fyzee AAA, Mahmood T, "Law of Wakfs," *Outlines of Muhammadan law* (5th edn, Oxford University Press 2008)

² Haitam Suleiman, 'The Islamic Trust waqf: A Stagnant or Reviving Legal Institution?' (2016) 4 EJIMEL <http://www.ejimel.uzh.ch> accessed 14 April 2018

³ *ibid*

⁴ Diwan P and Diwan P, *Muslim Law in Modern India* (10th edn, Allahabad Law Agency 2011)

⁵ *ibid*

⁶ Fyzee (n 1) 227

dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable”, the characteristics identified herein are, first, there should be a religious motive, second, the dedication of the property is permanent and finally, the profit or the income from the property should be used for the benefit of mankind⁷. Further, a pious act in Islam means the offering or gift that is made with the purpose to obtain the approval of the Almighty⁸. In the Waqf Act, 1995, the definition of Wakf was amended to add “movable or immovable” property, this addition to the definition did not make any sprawling change to the existing understanding or the meaning of Wakf.

Wakf supports economic sector by providing services to all aspects of the society without relying on the governmental funds, in other words it has become the primary vehicle for financing the Islam society⁹. It works as welfare institution by providing services such as food, housing, health, education and religion and by redistributing wealth as a result of state-individual cooperation¹⁰, and to some extent contributes to alleviation of poverty¹¹.

In this paper, I shall be evaluating the relevance of Wakf in Indian family law through the economic perspective and compare the institution with that of India’s neighbors, Pakistan and Bangladesh. Through the paper, I seek to answer ‘What is the relevance of Law of Wakf in alleviating poverty in India, and how is it similar or different to that in Pakistan and Bangladesh?’

OBJECTS OF WAKF

Any purpose that is considered to be ‘religious, pious or charitable’¹² is valid object of Wakf. The beneficiaries of the endowment can be made for (i) the rich and the poor (ii) the rich and thereafter to the poor and (iii) the poor alone, however, it cannot be for the purposes prohibited by Islam¹³. Although the beneficiary’s wealth is not considered, poverty is recognized as an

⁷ *Ibid*

⁸ *Ibid* 236.

⁹ Suleiman (n 2)

¹⁰ ‘Paper 7: Waqf (Endowment) & Islamic Philanthropy’ (2005) UN-HABITAT
www.assaiif.org/content/download/33115/174120/file/ISLAM accessed 18 April 2018

¹¹ Fyzee (n 1) 226

¹² Mussalman Wakf Validating Act 1913, Section 2(1)

¹³ Diwan (n 4) 303

important quality of the beneficiary, the relief and benefit to the poor is therefore the ultimate purpose of this institution¹⁴. A wakf can be by the execution of a deed known as the wakfnama, the use of the income from the property is guided by the same, but in absence of such a deed, the benefit arising from the endowment can be utilized for (a) object specified in the wakf, (b) expenses necessary for carrying out the specified object (c) maintenance of the Wakf property and (d) benefit of poor¹⁵. Any of the following could be made Wakf; land, cattle, tangible chattels used with the land, that might include agricultural implements and copies of used Quran¹⁶.

ECONOMIC RELEVANCE OF WAKF

The essential element of the wakf is recognized to be the benefit of the poor or public charity, the following are recognized as charitable purposes in Islamic Law; advancement of education, health, Governmental or municipal purposes, relief of poverty, advancement of religion or any other purpose that is deemed to be beneficial to the community¹⁷. Islamic wakf is viewed as a recipe for reducing poverty without increasing the Gross National Product since it is one of the dominant economic actor after the Government¹⁸. It is seen to have a great socio-economic influence in the economy of a country, as it led to rise of a third sector, separate from the public sector and private sector, which is profit based, and it is this institution that has recognized the significance of non-profit sector in social and economic development that is insulated from self-interest and the power of Government, as the motive of wakf is benefit of mankind¹⁹.

In the existing socio-economic arrangement, Wakf can be looked at as an additional support to alleviate poverty²⁰. It is one of the instruments in Islam that has a purpose to eradicate poverty

¹⁴ Fyzee (n 1) 239

¹⁵ *Ibid* 234

¹⁶ William F. Fratcher, 'The Islamic Wakf', (1971) 36 (2) Mo. L. Rev
<https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=2104&context=mlr> accessed 14 April 2018

¹⁷ *Ibid* 160

¹⁸ Muhammad Tariq Khan 'Contribution of Islamic Waqf in Poverty Reduction' (2013)
<<http://pide.org.pk/psde/pdf/AGM30/papers/Contribution%20of%20Islamic%20Waqf%20in%20Poverty%20Reduction.pdf>> accessed 14 April 24, 2018

¹⁹ Suleiman (n 2) 31

²⁰ Khan (n 18) 4

and improve the socio-economy of the Muslim community²¹. However, poverty is difficult to define, it has numerous manifestations, including various factors such as lack of income, productive resources, access to education and other basic services and leads to increased mortality, homelessness, among other effects²². There was no consensus on the definition of poverty until the year 1995, when the definition by World Summit for Social Development was adopted²³. Absolute poverty is hence defined as,

“a condition characterized by severe deprivation of basic human need, including food, safe drinking water, sanitation facilities, health, shelter, education and information. It depends not only on Income but also on access to social services”.²⁴

LAW OF WAKF

India

There are about one lakh wakfs in India, valued more than a hundred crore of rupees and can prove to be a strong instrument of public welfare²⁵. It can be categorized as Public wakfs and private wakfs. A public wakf is the one for public, religious and charitable purposes and private wakf is one for the waqif's own family and descendants, also called waqf-ulal-aulad, this is essentially a family settlement by way of wakf²⁶. Earlier, only the property dedicated to god or to religious or charitable duty was held to be valid which soon changed²⁷. The family endowment can be easily divided into two parts, pre and post The Wakf Act, 1913.

²¹ Masoud Ahmad, 'Role of Waqf in sustainable Economic development and poverty alleviation: Bangladesh perspective' (2015) 42 Journal of Law, Policy and Globalisation <www.iiste.org/Journals/index.php/JLPG/article/download/26789/27440> accessed 18 April 2018

²² "Report of the world summit for social development" (1995) rep <<http://www.un.org/documents/ga/conf166/aconf166-9.htm>> accessed April 21, 2018

²³ Khan (n 18) 4

²⁴ Ibid (n 21)

²⁵ Khalid Rashid 'Administration of Waqfs in India: Some suggestions' <http://14.139.60.114:8080/jspui/bitstream/123456789/736/38/Administrations%20of%20Waqfs%20in%20India_Some%20Suggestions.pdf> accessed 22 April 2018

²⁶ Ahmad A and Khan IA, *Mohammedan Law* (23rd edn Central Law Agency 2009)

²⁷ Ibid

Law before Wakf Act 1913

Private wakfs or waqf-ulal-aulad was held to be void by the Privy Council. In the famous case of *Abul Fata Mahomed Ishak v Russomoy Dhur Chowdhry*²⁸, where Wakf was made in favour of the children and descendants, generation to generation until the total extinction of the family. The income of wakf, then, will be applied for the benefit of the widow, orphans, beggars and the poor. It was held that, if the gift to the charity is not illusory, that is if it is substantial, then the wakf is valid, but in cases where it is illusory and was used for 'aggrandizement of a family', the wakf is void.

Law after Wakf Act 1913

The above mentioned decision created dissatisfaction among the Muslims of the country, thereby passed the Wakf Validating Act of 1913, which provided for wakf for the benefit of the descendants on the condition that the ultimate benefit is reserved for charity or for the benefit of mankind²⁹. This Act is seen to restore the law of Shariat in India and overrule the law laid down by the Privy council before 1913³⁰.

As per section 3(a) of Mussalman Wakf Validating Act, 1913 provides that wakf for maintenance and support of family, children and descendants is valid on the only condition that the ultimate benefit shall be for the purpose recognized by the Act as religious, pious or charitable and a wakf cannot be held invalid merely on the ground that the benefit for poor or for the purposes identified by the Act is postponed until after the extinction of family of the waqif. This reservation may be express or implied. However, the definition of family has been evolving ever since the Act has been enacted.

In Bombay, the word family includes all person residing in the house of the settlor and is dependent on him for the maintenance³¹. The meaning of the term family was extended and includes descendants from common ancestor and having a common lineage to any person living in the household³². Therefore, the term is inclusive of daughter-in-law and adopted son who

²⁸ *Abul Fata Mahomed Ishak v Russomoy Dhur Chowdhry* (1894) 22 I.A 76 (PC)

²⁹ *Khan* (n 24) 310

³⁰ *Fyzee* (n 1) 242

³¹ *Ibid* 143

³² *Ibid*

has been a dependent relation to the settlor³³. The proviso to section 3 provides that the ultimate benefit of the wakf shall be for the poor³⁴.

On one hand the enactment of the Act in 1913 was viewed as a victory for Muslims by validating Wakf in favour of the settlor's family, on the other its social impact was devastating, it blocked initiative from the Muslim upper class to the industry and created a class of people who were devoid of economic initiative, hence, it was argued that the law should be restored to the same as pre 1913³⁵.

In my opinion, the law as existing is favorable and in the light of the benefits of the Wakf, it shall be treated as an instrument to support the Government in alleviating poverty. As pointed out earlier, public wakfs contribute to providing access to education, health and other services such as acting as a social welfare institution, thereby reducing the burden of the family and directing the resources to more productive activities. Wakfs, thereby, reduce the burden of the state, as one of the state's function of maintenance of the citizens is supported by this institution. Family endowments, with a widened definition of family, though may delay the benefits of wakf from reaching the grass root level, it prevents leaving the family members destitute. However, the wakf is valid only if it is beneficial to the mankind at large and thereby eliminating family members from the benefit of family is unfair and unjust.

COMPARITIVE ANALYSIS

Pakistan

Non- state philanthropy has funded and assisted public services and other benefits to the poor and has sought to combine economic development and social services with charitable activities³⁶. The three types of wakfs were religious, philanthropic and family wakf, religious

³³ Khan (n 24) 312

³⁴ Mussalman Wakf Validating Act 1913, Section 3

³⁵ Danial Latif, 'Law of Family waqfs: Need for a reconsideration' <http://14.139.60.114:8080/jspui/bitstream/123456789/736/37/Law%20of%20Family%20Waqfs_Need%20for%20a%20Reconsiderations.pdf> accessed 15 April 2018.

³⁶ Andrew White, 'The Role of the Islamic Waqf in Strengthening South Asian Civil Society: Pakistan as Case Study' (2006) 4 (7) Int'l J. Civ. Soc'y L <<http://heinonline.org/HOL/Page?handle=hein.journals/ijcsl4&collection=journals&id=61&startid=&endid=90>> accessed 24 April 2018

wakfs was to provide revenue for operation of mosque, philanthropic wakf was for the benefit of the poor as well as to provide basic social services and finally family wakf was to prevent the descendants of the family from being impoverished³⁷. Wakf was seen as a threat to the State's absolute power and the Government sought to nationalize, seize or close it³⁸.

Regulation of the wakfs was initiated by Muhammad Ali Jinnah, as per him removing family endowments will break up Muslim families and hence, he pushed through a private member's bill relating to wakf by 1911³⁹. Later in the Mussalman Wakf Validating Act, 1913 was enacted, that restored private ownership of wakf. Then in the year 1960 after passing the West Pakistan Waqf Properties Rules, the endowments were to pass to the state's hand in contravention with the Act enacted in 1913 and to prevent such kind of criticism section 3 of the Act was excluded⁴⁰. This enabled the state to interfere in the economic wellbeing of a Muslim and the State nationalized the profitable endowments to further its interests⁴¹.

Wakfs is an effective way to strengthen the state's political legitimacy and remedy the problem in providing public services⁴². The Act passed in 1923 does not mandate the registration of family wakf, however, it should be registered when the property reverts to religious, pious or charitable purposes⁴³.

Wakf has the best chance of survival in a country like Pakistan where the civil society conflicts with the State and within its own ranks⁴⁴, this proves that the economic contribution of wakf has been unaffected. The Government hence seeks to regulate and control the profitable wakf institutions as the state acknowledges the fact that the it is an indispensable part that has the potential to provide wide range of basic services, thereby sharing the economic burden of the state and contributing to welfare of the economy.

³⁷ *Ibid*

³⁸ *Ibid* 14

³⁹ Jamal Malik 'Waqf in Pakistan: Change in Traditional Institutions' (1990) Jstor
<<http://www.jstor.org/stable/1571046>> accessed 13 April 2018

⁴⁰ *Ibid* 13

⁴¹ *Ibid* 35

⁴² White (n 35) 21

⁴³ *Ibid*

⁴⁴ *Ibid* 27

Bangladesh

Bangladesh is a predominantly Muslim country. About 8000 educational institutions and more than 1, 23,000 mosques are based on wakf⁴⁵. Wakfs are also known to provide employment, for example a shopping complex in Dhaka is a wakf, and it also finances a publication house, an auditorium and a mosque⁴⁶. It carries on the functions of benevolence to contribute to all areas of social welfare, it can provide for fund raising to improve the socio-economic welfare of a society⁴⁷.

After independence, the government of Bangladesh retained and adapted The Waqf Ordinance 1962 that is in existence till date. However, in the year 2013 a law has been enacted with respect to wakf, called as 'The Waqfs (Transfer and development of Property) Special provisions Act, 2013'. Wakf estates are governed by Ministry of religious affairs. The Wakf administration is highly centralized, the manpower is in adequate, there is lack of social awareness of the institution, all these have limited the contribution of the Wakfs in alleviating poverty in the country⁴⁸ and being treated merely as a charitable institution.

Therefore, though the institution of wakf being present it does not play the role of alleviating poverty or as a socio-development institution of the Government, this has led to the institution being sidelined merely for the purposes of charity.

CONCLUSION

India, Pakistan and Bangladesh, all three countries have a significance presence of institution of wakf. The laws in all three countries are varying, with the common acknowledgement that these institutions can play a significant role in alleviation of poverty. In Indian Family law, Family endowments are allowed and in my opinion is not a hindrance to eliminate poverty, as the wakf shall be valid only if the ultimate benefit is made for the purpose recognized by the Law. India, though has not expressly stated, it can be understood through the laws and

⁴⁵ Ahmad (n 21)

⁴⁶ *Ibid*

⁴⁷ *Ibid* 129

⁴⁸ Hasan, Rashedul & Siraj, Siti. 'Complexities of Waqf Development in Bangladesh.' (2016). Journal of Emerging Economies and Islamic Research. 4. 17-26.

regulation that the state has recognized it to be instrumental to the welfare of the country. It has also recognized that benefit of mankind is inclusive of benefit to the waqif's family, whereas in Pakistan, that has been rejected as the state has nationalized profitable wakfs and exercise their control over the same. However, it is also true that Pakistan acknowledges the importance of wakfs in poverty alleviation and adopts a law that could make the wakf reach the grass root level- the poor, without any interference from family members. Bangladesh, has utterly rejected the concept that wakfs support the welfare state and treats them as a mere charitable institution.

In light of this, it can be safely concluded that wakf is an essential instrument to eliminate poverty, though the laws of the country decide the mode in which the institution can be used for the benefit of the mankind. Its role as a socio-development institution, that can positively contribute to alleviate poverty and provide various services such as health, education and public services, should be recognized and accepted by the Government for the benefit of humankind. The institution has stood the test of time and hence, it can be transformed into an institution that is not merely a religious charitable institution. The secularism in India does not exclude religion from the scope of governance or law making therefore such an institutionalization of the wakf is possible and beneficial for the society at large.