Waqf Institution in Libya

During Italian rule over Libya, some reforms were introduced in the administration of the wakf (decree of 1939), but the institution itself remained intact. No substantial changes occurred during the British rule and under King Idris al-Sanusi. Prior to the military coup, the bulk of khayri endowments belonged to the Sanusi order and served its lodges (zawiyas). Colonel Gaddafi outlawed the order and confiscated its awkaf. The 1971 law provides for the establishment of a general Board of Awkaf to administer awkaf is favour of charitable purposes or those whose beneficiaries are not known. The Board supervises the awkaf in favour of the zawiyas and tomb and the administration of family ones. The 1972 law, drafted along the pattern of the Egyptian 1946 law, introduced moderate reforms regarding the wakf. The 1973 law abolished the wakf ahli. The founder may revoke his wakf and resume the ownership himself provided he has retained the right to do so, failing which the wakf reverts to the beneficiaries. Amwal al-badal following expropriations for public purposes or sale due to dilapidation are to revert to the beneficiaries. Wakf properties nationalised by virtue of 1971 law with s view to being distributed within the framework of the agrarian reform, are to be revived in favour of the original purposes, failing which they are to revert to the Wakf Authority.61

Waqf Institution in Persia

The extent of wakf in Persia and its value at different periods and in different places are not available and the effect spread of wakf on the economy of the country has yet to be worked out. Moreover, what was typical of one district at one point in time cannot be taken as typical of others at all times. Government offices not doubt contain records of

61. Ibid
awkaf but these are not generally available. Shrines also presumably have records of awkaf constituted in their favour. Many surviving wakfiyyas are held in private hands and some have been published. Some also survive in the form of inscriptions in mosques and other charitable buildings; historical works, especially local histories, biographical works and collections of state documents also contain information on awkaf. Much of what follows is based on state documents and wakfiyyas and does not necessarily reflect practice as opposed to theory. The available information on awkaf for some districts, notably for some districts, notably Yazd, Kum, Kirman and, for the Safawid period, Isfahan, is richer than elsewhere. 62

The stipulation that property to be made into wakf must be in the full legal possession of the founder was in theory observed, and sometimes it is specifically mentioned in the documents that the property had been legally bought by the founder. It is, however, doubtful whether all the awkaf constituted by rulers were in fact made out of crown property [Khalisā] or had been legally bought and not usurped; similarly, some of the property of powerful individuals made into awkaf may, at some stage, have been usurped.63

In practice, there does not appear to have been any restriction on the type of land made into wakf. As well as landed estates, water rights, water mills, real estate, bazzars, shops and houses were also constituted into awkaf, and, more rarely, rights of usufruct.64 Jean Aubin noted that Oldjeytu authorised Inal Khatun in a decree (nishan) dated to the equivalent of July 31, 1305 to constitute over half of the village of Kalkhuran, which Ghazan Khan had given her for her upkeep (ikhradjat), into wakf for Shaykh Safi and his descendants. Ten years

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62. Ibid
63. id
later, Oldjeytu constituted the remainder of the village into wakf for the Shaykh, who later nevertheless managed to sell it to the descendants of the sahib diwan Shams al-Din Djuwayni, to whom it had originally belonged. “Books, carpets and other objects were frequently made into wakf for mosques and madrasas”. The great majority of charitable institutions were constituted for the benefit of mosques, madrasas and khanakahs, and their revenue devoted to purposes such as the support of the ‘ulama’, feasts and the feeding of the poor on religious festivals, the holding of religious assemblies, roza-khwanis and so on. Many were also made for the upkeep of charitable buildings such as hospitals, caravansarais, water storage tanks and drinking fountains.

The first call on the funds of a wakf was the development and upkeep of the property itself and, then unless exemption had been granted by a special farman, the payment of government taxes, after which came the payment of the wages of the servants of the foundation for which the wakf had been constituted and the mutawalli, who was usually entitled to one-tenth of the revenue, though in some cases it was stipulated in the wakf-nama that he should be paid more or less than this. Landed property held as wakf was often leased; some wakfiyyas laid down that the term of the lease should not exceed three years.

With the fragmentation of the caliphate and the rise of semi-independent dynasties, the conquered territories, whether belonging to Muslims or non-Muslims, fell to the conquerors and their military auxiliaries. The extent to which existing awkaf continued to function varied and is not well documented. Many were probably usurped; and others decayed over time and fell out of operation.

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66. Ibid
68. Ibid
For the Tahirid, Buyid, Saffarid, Samanid and Ghaznawid periods, information on *awqaf* is sparse, and such *awqaf* as were constituted were probably of a modest nature. Under the Samanids there was a separate *diwan for awqaf*. Narshakhi mentions a number of *awqaf* made by Amir Ismal’i b. Ahmad, all apparently of a modest nature. Much *wakfi* land was seemingly held by the ‘ulama’ as *mutawallis*. Under the Saldjuks (Saldjukids), there was probably an increase in *wakfi* land and in the control exercised over it by the state. The spread of *madrasas*, apart from anything else, and the foundation of mosques and other charitable buildings, is likely to have contributed to an increase of *awqaf*. Mafarrukhi states that Nizam al-Mulk constituted innumerable estates into *wakf* for a *madrasa* which he had built in the Dar Dasht quarter of Isfahan and that its annual revenue was over 10,000 dinars.

Husayn b. Muhammad b. Abi ‘l-Rida Awi states that when he was writing (ca. 729 / 1328-9), the *madrasa* was still in existence but its *awqaf* had been misappropriated. It is probable that Nizam al-Mulk’s foundations were made partly with government funds.

General supervision over *awqaf* was exercised by the *wazir*, the head of the *diwan-i a ‘la*, but immediate supervision was probably usually exercised by the *kadi al-mamalik*. The *mutawalli* of an important *wakf* or group of *awqaf* was probably often appointed by the state and, even if named in the *wakfiyya*, was given a document of appointment. If

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74. Lambton, op. cit., p. 43.
not a *kadi*, he was usually a member of the religious classes. The extent of the control exercised by the *diwan-i awkaf al-mamalik* over *awkaf*, especially with regard to provincial *awkaf*, is not entirely clear. Practice varied. In general, it seems that the provincial *kadi al-kudat* was appointed by the *kadi al-mamalik* and had charge or provincial *awkaf* but the general supervision of provincial *awkaf*, like the most other aspects of the administration, was delegated to the provincial governor or *mukta*.

Under the Khwarazmshahs, the situation with regard to *awkaf* was probably broadly similar to that which had prevailed under the Sladjuks. A diploma (Manshur) for the Kadi al-Kudat Khalaf al-Makki renewed his charge of *awkaf* properties, which had been in the possession of his trusted agents (mutamidan) and of the tawliyat of the *awkaf* of the mosques and madrasas, which had been in the care of former kadis. And at his request the accountant of the diwan, who had been in charge of the wakfi accounts, was recalled and all affairs connected with the administration of the *awkaf* their development and their protection from the hands of those who would encroach upon them, were entrusted to him.

Terken Khatun, who ruled Kirman after the death of her husband Kutb al-Din Muhammad in 665/1257 until her death in 681/1282, made numerous villages and estates into *awkaf* for mosques, shrines, hospitals and lesser charitable purposes. These are recorded in the *Tarikh-i Shahi-yi Kara Khita‘iyani*, the anonymous author of which states that records of the *awkaf* of Kirman had been kept in the provincial *diwans*. Piety may have been her primary motive, but it may be that she needed the public

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support, which such foundations have, she is stated to have claimed her dowry (sadak) on her husband’s death and with the 10,000 dinars to which it amounted to have bought land, which she made into awkaf for the madrasa and tomb complex which she built in Bardasir.\(^{80}\)

It seems likely that many, if not all, of her awkaf were made out of her personal property. She had a private diwan (diwan-i khass) separate from the state or public diwan and owned considerable resources.\(^{81}\) Her sons, Sultan Hadjdjadj and Soyurghatmish also made many charitable foundations out of their inherited estates and private property.\(^{82}\) Terken, Khatun designated herself as mutawalli of some of the foundations she constituted, including the numerous properties she made into wakf for the Friday mosque outside Bardasir.\(^{83}\)

In some of her smaller foundations, especially those made for slaves and slave-girls, her children were designated mutawalli. This was also the case of the mill (in Bahramdjird) which she had bought and repaired and made into wakf for the shrine in the village of Ardashir in Djuwayn.\(^{84}\) The office of mutawalli of the awkaf of the Friday mosque which she built at the New Gate of Bardasir in 673/1274-5 was entrusted to “the ruler who was on the throne of Kirman and (thereafter) to his/her children”.\(^{85}\) Some of Terken Khatun’s awkaf were of administrative affairs and public welfare.

During the Mongol invasions, much wakfi land, which lay in the path of the invading hordes, must have suffered devastation, but so far as it escaped its status appears to have been little changed. From an

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80. Ibid., p. 100.
81. Ibid., p. 232.
83. Terken Khatun, Tarikh-i Shahi-yi Kara Khitaiyan, p. 244-5.
84. Ibid., pp. 225-6.
85. Ibid., pp. 235-6.
early date there was a department of *awkaf* in the *Ilkhanate*. When Hülegü charged Nasir al-Din Tüsi with the establishment of an observatory at Marāgha, the building of which was begun in 657/1259, he appointed him over the *awkaf* of the empire. Nasir al-Din also held this office under Abaka and finally died when on a tour of inspection of *awkaf* in Iṣfahān. He appointed in each locality an official responsible for the administration of *awkaf*, allowing him to keep one-tenth of the *wakfi* revenue for his salary.

The *diwan*'s share of the revenue was to be sent to Maragha for the observatory.86 Teguder Ahmad, who succeeded Abaka in 680/1282, appointed Kamal al-Din ‘Abd al-Rahman al-Rafii mutawalli of the *awkaf* of the empire, and ordered the proceeds of all *awkaf* to be expanded as laid down by their founders with the cognisance of Kamal al-Din and the great imams and ulama. The proceeds of the *awkaf* for the Haramayn were to be collected annually and sent to Baghdad at the time of pilgrimage.87 Under Ghazan Khan (694-703/1295-1304) there was probably an attempt to tighten control over the administration of *awkaf*.

This may have been an accurate statement as regards the central government, but there was much usurpation of property in general, including *awkaf*, by Mongol officials and others. Hamd Allah Mustawfi states that Shiraz there were over 500 charitable foundations, which had innumerable *awkaf*, but the revenues of few of them reached their property purposes.88 He also alleges that the Mongols have usurped the Pishkil Darra district of Kazwin, which was *wakf* for the Friday mosque.

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of Kazwin. Wassaf asserts that most of the awkaf of the empire and the buildings, which they served, were in a state of ruin. Their revenue misappropriated, but he sates that Kurdudjin, the daughter of Tash Mongke. Abish Khatun, to whom the last Ilkhan Abu Said had given the taxes of Fars on a permanent contract (bar sabil-l mukata a-yi abadi) three years after his accession, paid particular attention to the buildings of his forebears, increased their awkaf and devoted their revenues to their proper purposes.

Ghazan Khan and Oldjeytu founded many awkaf. Their motives were various some of Ghazan’s benefactions were clearly prompted by charity. And some by a desire to secure the possession of property to his descendants, as when he laid down that his indju lands should be constituted into wakf for the sons of his chief wife Bulughan Khatun, or, if she had no sons, for the sons of his other wives and their male descendants. Al-Kashani mentions that Ghazan have orders for a dar al-siyada to be built in every province in Persia and for estates and villages to be made into wakf for them, so that the annual income of each would be 10,000 dinars. Rashid al-Din confirms that Ghazan made such buildings in Isfahan, Shiraz, Baghdad and various other towns. However, most of Ghazan Khan’s awkaf, and also Oldjeytu’s, were for the benefit of foundations in their respective capitals, Tabriz and Sultaniyya.

Among private individuals who constituted their property into awkaf, the example of Sayyid Rukn al-Din Muhammad and his son Shams al-Din Muhammad of Yazd is notable. Sayyid Rukn al-Din

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89. Ibid., p. 67.
91. Lambton, op. cit., 315 ff.
92. Rashid al-Din, Tarikh-i-mubarak-i-ghazani, p. 331.
disposed of a great deal of property—shares in *kanats*, land and real estate in Yazd—and he also apparently had considerable capital available with which he purchased new property with a view to making it into *awkaf*. His foundations and those of his son and their *awkaf* are set out in the *Djama' al-khayrat*, dated 748/1347-8.95

An interesting feature of Shams al-Din Muhammad’s *awkaf* is the inclusion of pensions (*idrarat*) which he held on various funds among the property ‘which he made into *wakf*’.96 Rukn al-Din Muhammad, Shams al-Din’s father, has also had a pension drawn on the revenue of Yazd, part of which he had inherited from his forefathers and part from the *sayyids* and *imams* of Yazd. After his death, it passed to Shams al Din.197 On the other hand, that *idrarat*, which consisted of money or villages, were the property of their holders, who could dispose of them like landed estates, sell them, give them away, or constitute them into *wakf*.98

Many of the *awkaf* constituted during the Ilkhanate disappeared over time. On Rashid al-Din’s fall, the revenue of the *awkaf* which he had made for the Rab’-i Rashidi was withheld from expenditure on its proper purposes and his estates taken for the *diwan*.99 The Ghiyathiyya *awkaf* or some of them, made by his son Ghiyath al-Din Muhammad, appear to have still been in existence in 1073/1662.100 There is also mention of Ghazani *awkaf* in the 10th/16th century.101

96. Shams al-Din Muhammad’s *Djaml al-khayrat*, pp. 174, 203, 213, 214; 216.
The Timurids in Bukhara, Harat and elsewhere, and the Safawids in Isfahan, followed the practice of Ghazan and Oldjeytu in founding magnificent buildings in their capitals and constituting valuable * awkaf* for them. Perhaps partly as a result of the increasing number of royal foundations, the * sadarat* was expanded and separated from the wazirate and the office of * sadr* regularised. Maria E. Subtelny has drawn attention to the proliferation of * awkaf* in Khurasan under the Tamurids, especially Husayn Mirza Baykara.

Under the Safawids, there was probably an increase in family * awkaf*, made in the hope of ensuring the enjoyment of their revenues by the founder and his family and of preventing, or at least lessening, the interfere of the government in the administration of the property so constituted. A typical example is the Wakfnama of Ghiyath al-Din Ali al-Ghiyathi dated Ramadan 951/November-December 1544. The founder relinquished ownership of the endowed properties and took them over again as *mutawalli*.

The Safawid shahs made extensive * awkaf* for various shrines and appointed *mutawallis* for them. Shah Ismail I allegedly took possession of estates in Maymand, which had been made into * wakf* for the Shah Ciragh mosque in Shiraz, and vested the office of *mutawalli* in his children. Misappropriation of * awkaf* was not uncommon. The *wazir* Kadi Djahan is alleged to have converted certain * wakf* villages into his private property. After he had retired to Kazwin, this came to the ears of Shah Tahmasp, who ordered him to be deprived of their possession.

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105. Ibid., p. 471.
and the equivalent of the revenue due from them to be recovered. However, because of Kadi Djahan's age and weakness, the Shah forgave him and granted him a sum of money as a soyurghal.¹⁰⁷

Shah Sultan Husayn, the last of the Safawids, constituted property into wakf for the Madrasa-i Sultani (Madrasa-i Madar Shah, now known as the Madrasa-i Cahar Bagh) in Isfahan in 1122/1711-12 and designated himself as mutawalli and thereafter the reigning shah.¹⁰⁸ He made the taxes and dues of the property so constituted into a permanent soyurghal for the administration of the madrasa.¹⁰⁹

When the Afghans took Isfahan on the fall of the safawids, they usurped much wakfi property and made into khalisa; and many records were destroyed.¹¹⁰ Under Nadir Shah, many wakfi properties were resumed in Isfahan. If not elsewhere, and included in the Nadiri registers.¹¹¹ Adil Shah revoked Nadirs regulations and ordered the awkaf to be returned to their mutawallis. However, a good deal of confusion prevailed and it is not clear to what extent this took place.¹¹² Karim Khan, according to Sipinta, made an abortive attempt to rectify affairs (343). Further decay and confusion occurred in the feminine years of 1871-2.¹¹³

The Kadjar period was not notable for the constitution of awkaf. One of the most important was that made for the Sipahsalar Madrasa in Tehran. Amin al-Dawla Hadjdji Muhammad Husayn Khan Sadr-I Isfahan, who designated himself first as mutawalli and thereafter the

¹⁰⁹. Ibid., p. 131.
¹¹⁰. Shaykh Djahir Ansari, Tarikh-i-Isfahan wa Ray, Isfahan, AHS 1322/1943, p. 35.
¹¹². Ibid.
ruling shah, began the building in 1819.\textsuperscript{114} He died after two years later before the building was completed. His brother Yahya Khan Mushir al-Dawla continued the work but also died before it was completed. It was finally finished by the shah's \textit{mutawallis}.\textsuperscript{115}

In 1854 a Ministry of Pensions and \textit{Awkaf} was founded. In 1863 it was announced in the official gazette, \textit{Ruznama-i dawlat-i aliya-yi Iran}, that those in charge of all \textit{awkaf} both in districts near the capital and in the provinces were to send their accounts, duly attested by a \textit{mudjahid}, to the Ministry of Pensions and \textit{Awkaf}. Anyone who failed to do so would be deprived of office (no. 535, 17 Radjab 1279/1863). After the grant of the Constitution the duties of the department of \textit{awkaf}, which came under the Ministry of Education, were set out in Article 6 of the Law of 28 Shaban 1328/1910 and in the Supplementary Law of 19 Djumada II 1329/1911.\textsuperscript{116} The legal position was in due course laid down in the Civil Code.\textsuperscript{117}

\textbf{Wakf Institution in the Ottoman Empire: Understanding and Interpretation}

The Understanding and interpretation of the role of \textit{wakf} in the Ottoman Empire has radically changed since the opening of the vast Ottoman archival holdings in Turkey and the successor states, to which should be added the considerable number of Ottoman documents held in European libraries and archives. The increased accessibility, especially from the 1970s onwards, for the International scholarly community to study portions of the Ottoman imperial and provincial archives and the \textit{wakf} documents within them—in addition to the ongoing publication of archival catalogues in Turkish, Arabic, the Slavic

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languages, English etc. represents no less than a revolution in research on Ottoman \textit{wakf}.\textsuperscript{118} Furthermore, Ottoman \textit{wakf} foundation deeds themselves (\textit{wakfiyye} and \textit{kitab al-wakf}) and associated documents are gradually being published under the auspices of the General Directorate of Wakfs in Ankara (i.e. the foundation document of the Ottoman Sultan, Mehemmed the Conqueror, published in 1938 and the deeds published in the \textit{Vakıflar Dergisi}). By Wakf Ministers in the former Ottoman provinces (such as the Lala Mustafa Pasha \textit{wakfiyya} published by the Syrian Wakf Ministry in Damascus) and by other organisations.\textsuperscript{119}

An overall picture of Ottoman foundations, which comes closer to reality, is made possible by understanding \textit{wakf} as a dynamic and very diversified institution, which partially developed on the ground in reaction to altering circumstances but which responded at least to a certain extent, to predefined structures. Both the changing as well as the continuous practices of \textit{wakf} was reflected in the juridico-administrative Ottoman tribunal and bureaucratic records (which, though seemingly of formulaic language, expressed nonetheless changing circumstances), but also within the corresponding legal normative framework articulated in \textit{fikh} (Husnu) and \textit{kanun}.\textsuperscript{120} In other words, the primary sources have indisputably shown that, far from being static or in ‘mortmain’, foundation properties were not, in fact, inalienable and often changed hands not only through the legal mechanism of \textit{istibdal}, \textit{Irsad} and other legalised means, but also simply as an integral part of


\textsuperscript{119} Ibid.

\textsuperscript{120} A. Cetin, Osmanlı Basbakanlık Arsivi Kilavuzu, Istanbul, 1979, pp. 221-7.
the economy, in line with market demands.\textsuperscript{121} The economics and politics of Ottoman \textit{wakf} were based upon a flexible but stable system that had, long since produced an institution capable of interacting and responding to individual, family, community and state needs.

\textit{Wakf} was omnipresent in all levels of Ottoman society, urban and rural, both in the form of individually functioning units and as separate parts of a basic single institutional system. Studying the institution \textit{in situ} from the vantage point of the data found in endowment deeds. In the \textit{hududjal al-wakf} and in documents inscribed in \textit{wakf} and other registers (i.e. the \textit{tahrir}, the \textit{daftar mufassal}, etc.) reveals the extreme multiplicity of functions that were initiated, established and activated by \textit{wakf} networks in the Ottoman world, over which the imperial authority attempted to exercise supervision with varying degrees of success over the centuries.\textsuperscript{122}

Ottoman endowments included the \textit{khayrl}, \textit{dhurri/ahli} and \textit{mushtaraka wakfs} (identifiable according to the wakfs immediate line of beneficiaries). The politically influential pilgrimage foundations—including the dashisha and Haramayn foundations the irsad (Cuno) wakfs, as well as a plethora of foundations the irsad (cuno) wakfs, as well as a plethora of foundations which simultaneously incorporated elements from several of the above categories.\textsuperscript{123} Boundaries between the types of \textit{wakf} were not impermeable and differences between them should often be sought in term of nuances.

The Ottoman world was profoundly shaped by the foundations, each of which was administered as a separate unit by one or several

\textsuperscript{121} Deguilhem, \textit{The loan of mursdon waqf prosperities}, 1988.
\textsuperscript{123} Ibid.
mutawalli, supervised by a nazir (a) who, depending upon the size of the endowment, may have had an accountant (muhasib) and other personnel under this his or her authority. During the expansionist periods of the empire, especially in the 9th/15th and 10th/16th centuries, wakf was an important political instrument for the Islamisation of newly conquered localities and frontier areas. To this end, the endowments funded convent-type structures (ribat) situated in areas near or bordering on the dar ul-harb, notably in the European Ottoman provinces where Sufis and other Muslims lived, worked the land, engaged in commerce and eventually colonised regions as a concrete means of increasing the expanse of lands belonging to the realm.

Wakf networks in Ottoman lands were the essential infrastructural link in the transmission of knowledge, since the construction and patronage of places for ritual observances and institutionalised learning, i.e. the mosques and religious schools mentioned above, were almost exclusively subsided by wakf, this was equally true from many libraries, both public (associated with mosques, Sufi lodges or schools) and private. By way of a famous example, Mehemed the Conqueror, immediately upon annexing Konya to his empire. in the middle of the 9th/15th century, recorded, in the wakf registers, the magnificent 7th/13th-century manuscript collection dear, which had formerly belonged to the Sufi Sadr al-Din al-Kunawi, son-in-law of Ibn Arabi.124 As dispensers of justice toward the community, the Ottoman sultans and members of their extended households as well as the average Muslims, overtook poor relief, via the agency of wakf, as one of their responsibilities.

The year 1914, does not in any way reflect a chronological rupture in the history of Ottoman *wakf*, the hostilities of World War I did not specifically affect the endowments in the empire. A much more significant date was 1924 when, along with the abolition of the caliphate and the Ministry, of Sheri'at, *wakf* administration and its properties were incorporated within the secular state apparatus of Mustafa Kemal's Turkish Republic.

**Wakf Institution in Central Asia**

Since in Islamic times the region governed from such Transoxanian cities as Bukhara and Samarkand often included the southern banks of the upper Oxus river course, it is convenient to consider here also what is now northern Afghanistan.

**Pre-Mongol Period**

One of the earliest, if not the earliest, known *wakf* foundations was established by the Samanid Isma'il b. Ahmad (d, 295/907) at Bukhara. The date of the original deed was 254/868, but it was redrafted in 676/1277 and the surviving version written during the reign of the Manghit Amir Haydar (1215-42/1800-26). According to this last, the foundation supported both 'the family mausoleum and the descendants of Isma'il. The Karakhanid or Ilek-Khanid Tamghac Bughra Khan founded *wakfs*, for a hospital (*bimaristan*) in Radjab 458/May-June 1066 and for a college (*madrasa*) at some unknown date in Samarkand. In the course of listing the properties abutting the Karakhanid endowments, other wakf-supported institutions are mentioned: the *Madjid-I Dawud*; the Congregational Mosque; the tomb (*mashhad*) of 'al-Tarkhan' and his daughter al-Khattun'; and a student scholarship fund.125

A second known Karakhanid wakf is that of Arslan Khan Muhammad b. Sulayman (495-523/1102-1129) for a 'madrasa for jurists' in Bukhara. The documentation on it includes a reference to it in the version of Narshakhi that has survived and a lawsuit of unknown date seeking restitution of grain and money embezzled from the wakf income.\(^{126}\)

A family endowment (wakf-i awlad) from 698/1299 by 'Abd. al-Rahim b. Muhammad b. 'Abd Allah Istidjabi (Isfidjabi) for his son Kutb al-Din Yusuf and then his male descendants in Bukhara and for the upkeep of the mosque and shrine of a local saint, Khwadjja Khamana, is the first known wakf from Transoxania in the Mongol Period.\(^{127}\)

The wakfiyya exists in its Arabic original with an accompanying contemporary Persian translation. The endowment included the village of khamana in the district (luman) of Samdjan, including its own canal (nahr-i khass). One unusual feature of this wakf was the assignment of the income of specific amounts of land (rather than a percentage of the endowment income or fixed amounts of money) to pay the salaries of the mosque officials and for the specific requirements of the wakf.

**Post-Mongol Era**

The 726/1326 wakf founded by Shaykh Yahya in memory of his grandfather, the Sufi shaykh Sayf al-Din Bakharzi, established a pattern of large wakf complexes associated with the shrine of a religious figure, a pattern which is a characteristic feature of the urban landscape of the region. Major architectural complexes, usually with a shrine at a focal point, underwritten by extensive wakf endowments that were in turn

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administered by family dynasties, are a recurrent, feature of the socio-economic history of the cities of Central Asia.

The Bakharzi wakf is also an example of how wakf was used as a source of development capital in Bukhara as it was in Isfahan in order to revive local economies. The foundation document, a scroll of nearly 1,000 lines, detailed a vast agricultural expanse, including an area outside the Karshi Gate of Bukhara estimated at more than 100km. These lands, which were intended to support a mosque and Khanakah complex as well as the tomb of Sayf al-Din Bakharziu, were situated amidst extensive ruins.

At the same time, on its own lands the document speaks of newly planted vineyards, orchards and vegetables gardens. When Ibn Battuta recalled his stay at the khanakah in 1333, only seven years after the foundation was established, he mentions vast agricultural wakfs belonging to it and just ability to feed 'all comers.' Like many of the large foundations of the time; the Bakharzi foundation was very long lived. The surviving documents pertaining to the foundation include a grant in 1745 of two parcels of irrigated land totalling four, hectares, and a record of the restoration (tamir wa marammat) of the wakfiyya itself by the khatib of fathabad, the location of the tomb, al-Hadjdj Mir Maksud Dahbidi.

Timurid Wakfs

The advent of the Timurid era in Central Asia brought an efflorescence of large wakf foundations. Those published or described include:

130. Rihla, tr. by Gibb, III, pp.27-8, tr. Ill, p.554.
1. A wakf of 785/1383 involving much irrigated land in the Samarkand region.\textsuperscript{131}

2. Timur's wakf for the shrine of Shaykh Ahmad-I Yasawi. The document, purporting to be Timur's original wakfiyya for the shrine in Turkistan, has been called a 'crude foggery' but it is more likely that Timur did endow shrine when it was built, or at least encouraged others to do so.\textsuperscript{132} In 1866, Mir Sahib Begcurin described the wakf of the shrine compel (which at the time included a mosque, a madrasa, and a staff of eight, not including the madrassa teachers) as comprising two inns and a caravanserai, this last, donated in 1820, with 80 shops producing 100 tillas of income used for upkeep of the shrine.\textsuperscript{133}

3. The endowments for the library, madrasa, khanakah, and mosque of Khwadja Muhammad Parsa (d. 822/1420), one of Baha al-Din Nakhsband's chief disciples.\textsuperscript{134}

4. The wakfs for Ulugh Beg's madrassa and Khanakah in Samarkand and his madrasa in Bukhara (1417-20).\textsuperscript{135} Although modern scholars have not yet yield studied in any .detail the endowments for the two great madrasas founded by Timur's grandson, there is a considerable around of archival material on-. them in. the Uzbek state Archives, including a series of 17th century endowments of books for the madrasa library.

\textsuperscript{132} Ibid., p. 309.
\textsuperscript{133} Opisanie meceti Azreta, in Voennii sbornik, VIII, 1866, pp.209-17.
\textsuperscript{134} Maria Eva Subtelny, \textit{The making of Bukhara-yi Sharif: Scholars, books, and libraries in medieval Bukhara}, n.d.
\textsuperscript{135} Hafiz Abru, \textit{Zubda}, Tehran 1372/1993, pp.743-4.
5. The 868/1464 wakf of Habibi Bigum, daughter of the Tkurid amir djalal Suhrab for the mausoleum called Ishrat-Khana in Samarkand, the tomb of Khawand Sultan Bigi.136

6. Sultan Husayn Baykara's endowment with commercial properties and a large canal at the rediscovered alleged tomb-site of Ali b. Abi Talib east of Balkh in 885/1480-1.137

7. The wakf foundation of Khwadja Ubayd Allah Ahrar in Samarkand for the complex called Muhawwata-i Mawali in the city district of Khwadja Kafshi (Kafshir), present day Ulugh Beg. It held properties throughout Central Asia right up to the Soviet period, and was established principally as a family trust.

The pattern of large wakfs jointly supporting public institutions and the private interests of future generations of the founder's family continued through the 16th and 17th centuries. In Bukhara, one of the more notable wakf founding families was the Djuybaris. From their origins as keepers, of the Car (Cahar) Bakr shrine in the western Bukhārām sūturbs and beneficiaries of its endowments. The family emerged as one of the wealthiest and most influential families in Central Asia, and preserved in both wealth and influence for several centuries, in large part through the purchase of real estate, conversion of those purchase into wakf and designating as beneficiaries not only the 'madrasa' mosque complexes that they built but also succeeding generations of the family. There are many unpublished endowment deed of the family in the Uzbek State Archives, which taken together

establish the long-term economic influence of the family in Central Asia.138

In the 11th/17th century, besides additions made to the large endowments of the preceding centuries (e.g. Nadr Diwan-Begi Arlat’s dramatic-expansion and endowment of Khwadjia Ahrar’s tomb area on the southern side of Samarkand with a large madrasa, and several large wakfs of books for the Ulugh Beg madrasa in Bukhara), there were new projects in Samarkand (the Shir Dar and Tillakar madrasas on the Rigistan built -by another leading amir, Yalangtush Bi Alcin). In Bukhara (Nadr Diwan Begi’s madrasa and Khanakah and Abd al-Aziz Khan II’s two madrasas), and in Balkh (the two madrasas of father and son, Nadhr Muhammad and Subhan Kuli all of which generated major new endowments.139

Throughout the century, the issue of wakf also touches on the relations between the Tukay-Timurids in Bukhara and the Timurid rulers of India. A tradition about the endowment of the Gur-I Amir Complex in Samarkand had persisted through the centuries. Muhammad Sultan (d. 805/1403), grandson of Timur, was believed to have founded a wakf for his madrassa, as one of the buildings of the complex; the terms of which local residents believed they knew as late as 1101/1690. Because of the importance of the tombs they’re to such Timurid epigoni as the Mughals ruling in India, efforts, Ultimately unsuccessful, were made by the latter late in 1102/1690-1 to re-capitalizethe wakf with cash sent from Kabul and to revive the terms of what was believed to be the original endowment.

139. A.D. Davidov, "Imeniya medrese Subkhankuli-khana v Balkhe (po vakufnoi gramole XVII v.)", Kratkiye Sooshceniya Instituta Vostokovedeniya XXXVII, 1960, pp. 82-128.
Chapter-IV

Central Wakf Act, 1995 and Its Evaluation
Chapter-IV

CENTRAL WAKF ACT, 1995 AND ITS EVALUATION

An Overview

A half-hearted attempt to improve the administration of Wakf properties has been made by the Central Government by enacting the Central Wakf Act, 1995. The important authorities connected with Wakf administration under the Central Wakf Act 1995 are (i) The Central Government, (ii) The State Government, (iii) Central Wakf Council, (iv) Wakf Boards, (v) Chief Executive Officer, (vi) Mutawallis and (vii) Tribunal. These authorities are involved in active participation in the administration of Wakfs. An effort has been made here to make an evaluation of the Act and its authorities.

Prior to enactment of Wakf Act, 1995, the following enactments dealt with the administration and supervision of Wakfs.

(i) Wakf Act, 1954;
(ii) U.P. Wakf Act, 1950;
(iii) Bengal Wakf Act, 1934;
(iv) Bihar Wakf Act, 1937;
(v) Bombay Public Trusts Act, 1950;
(vi) Dargah Khwaja Saheb Act, 1955; and
(vii) Section 92 of the Code of Civil Procedure.

The Wakf Act, 1954, was in force in all States except Bihar, West Bengal and U.P., which had their own corresponding enactments. The Bombay Public Trusts Act, 1950, which, applies equally to endowments of every community is in force in Maharashtra (excluding its Marathwada area) and Gujarat (excluding the Kutch area). Section 112 of the Wakf Act of 1955 has repealed not only the Wakf Act,
1954 but also the State enactments having law corresponding to the 1995 Act. The Dargah Khwaja Saheb Act, 1955 provides for supervision and administration of the endowments of the Durgah of Ajmer.¹

**Wakf Fund by Common Wakf Boards and Rules**

Under the Act, the Central Government is competent to constitute a common Wakf Board for more than one state under certain specified conditions, the Wakf fund of such common Wakf Board, if constituted shall be under the control of such common Wakf Board subject to any rules made by the Central Government.²

**Power to Regulate Secular Activities of Wakf**

The Wakf Act, 1995 empowers the Central Government to regulate secular activities of any Wakf and for this purpose it can lay down general principles and policies of wakf administration in so far as they relate to the secular activities of the Wakfs. The Central Government is also empowered to coordinate the functions of the Central Wakf Council and the Wakf Board relating to secular activities. For this purpose, the Central Government can call for any such periodic or the reports from any Board and may issue suitable directives. The Board has to comply with such directions of the Central Government. For the purpose of this Section, secular activities include social, economic, educational, and other welfare activities.³

**Constitution of Common Wakf Boards**

In the field of Wakf administration, a peculiarity emerged related to the situation, which was created at the time of partition of the country and in the wake of mass migration of Muslims from the Border

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² Wakf Act 1995, Section 77, Sub-Section(3).
³ Ibid. Section 96, Sub-Section (1a-c) and (2)
States of Punjab, Rajasthan, Bihar and Bengal, etc. The population of Muslims had undergone a drastic change with the division of certain States. The Muslim population in the States of Punjab, Haryana and Himachal Pradesh were left behind several thousands of Wakfs properties fetching huge income without proper number of Mutawallis to look after their management. This situation was regarded as Chinese puzzle with solution difficult to find. Again, the division of Assam into States of Assam, Meghalaya, Arunachal Pradesh, Mizoram and Nagaland resulted to the problem of Wakf administration because in certain emerging States the Muslim population reduced to such an extent that it was almost undesirable and infeasible to constitute a Wakf Board. Either the Wakf properties were negligible in number or the number of Mutawallis were not sufficient. Therefore, the only way to tackle this situation was to constitute a common Wakf Board for two or more such States as may be considered feasible by the Central Government. The Constitution of inter-State Wakf Board is not objectionable constitutionally also in view of the fact that 'Wakf' is appearing as item No. 44 of the List I read with item 28 of List III of the Seventh Schedule.

The proposal to constitute inter-State Wakf Board was not objected to by the State Government of Orissa, Punjab, Haryana, Gujarat, Rajasthan, Madhya Pradesh, Bihar, Delhi and Maharashtra.4

It is against this background that the Central Government was empowered to constitute a common Wakf Board because of smallness of the Muslim population in two or more states or the slender resources of Wakfs in such State and the disproportion between the number of Wakfs/Wakf income and the Muslim population in such states.

The composition of such common Wakf Board shall be same as is mentioned under Sub-Section 7 of Section 14 of the Act relating to Wakf Board in the Union territories. Such common Wakf Board would be constituted after consultation with each of the concerned State and shall include, at least one representative of each of the concerned state, but all powers vested in the State Government under any deed of Wakf or any provision of Law for the time being in force relating to Wakfs shall stand transferred to and vested the Central Government and, thereupon, references in such deed of Wakfs or law to the State Governments, shall be construed as references to the Central Government. Therefore, other provisions of the Wakf Act would apply accordingly.\(^{5}\)

**Power to Remove Difficulties**

The Central Government is empowered to remove the difficulty, if any, arising in giving effect to the provisions of this Act and for this purpose the Central Government can issue any order, inconsistent with the provisions of this Act to remove the difficulty. However, no such order shall be made after the expiry of the period of two years from the date of commencement of this Act. Every such order of the Central Government is required to be laid down, as soon as may be after it is made, before each House of Parliament.\(^{6}\)

**State Government: Its Role:**

**Appointment of Survey Commissioner, etc.**

The State Government may be notification in the official Gazette, appoint for the State a Survey Commissioner of Wakfs for making a survey of Wakfs existing in the State at the date of commencement of this Act in order to prepare and submit a report to the State

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5. Supra note 2, Section 106, Sub-Section (1-4)
6. Ibid., Section 113.
Government in this regard. Depending upon the exigency of the work, the State Government may appoint as many Additional or Assistant Survey Commissioners, as may be necessary for the work of survey. However, all the additional or Assistant Survey Commissioners would work under the general supervision of the Survey Commissioner of Wakfs.7

The Survey Commissioner of the Wakf has to submit his report to the State Government furnishing the detailed information regarding the number of Wakfs, showing the Shia Wakf and Sunni Wakfs separately; the nature and object of each Wakf; the Gross-income, Land, Revenue, cesses, rates, taxes payable by each Wakf, expenses and other remuneration of the Mutawalli of each Wakf, etc.8

The survey commissioner vested with certain powers of a Civil Court under Code of Civil Procedure for making enquiry. For this purpose, he shall have the powers to summon and examine any witness, require the discovery and production of any document, requisition any public record from any Court or office; issue commission for the examination of witness or accounts.9

If during the course of enquiry, any dispute arises to whether a particular Wakf is a Shia Wakf or Sunni Wakf and if there are clear indications in the Wakf deed as to its nature, such dispute shall be settled based on such Wakf deed.10

The State Government may direct second or subsequent survey of Wakfs, which would be governed by the same procedure.11 However,
restriction is imposed on such second or subsequent survey\textsuperscript{12} that until the expiry of a period of twenty years from the date on which the report relating to immediately previous survey was received such second or subsequent survey should not be made.\textsuperscript{13}

**Constitution and Appointment of Members of Wakf Board**

In the Act 1995, the composition of Wakf Board is drastically changed. It consists of both elected and nominated members who are to be appointed by the State Government by notification in the official Gazette.\textsuperscript{14}

**Removal of Chairperson of Wakf Board**

The State Government may, by notification in the Official Gazette is empowered to remove the chairperson of the Board of any member thereof, if he or she becomes subject to any disqualifications specified in Section 16 of the Wakf Act, 1995 or refuses to act or is incapable of acting or acts in a manner which the State Government considers to be prejudicial to the interest of the Wakfs. However, before taking such action it is necessary for the State Government to hear any explanation that the chairperson or the member may offer. However, such decision should not be based on frivolous or weak grounds and there should be a cogent nexus between the alleged ground and the proposed action of removal. Failure to attend three consecutive meetings without sufficient cause is also a ground for removal. Lastly, if the chairperson is removed from his office, under this Section 20 of the Act, then he ceases to be a member of the Board\textsuperscript{15} also and for this reason, he is included in the definition of 'member' under Section 3(h) of the Act.

\textsuperscript{12} Ibid., Section 4, Sub-Section 6
\textsuperscript{13} Ibid.
\textsuperscript{14} Ibid., Section 14
\textsuperscript{15} Ibid., Section 20, Sub-Section (la-c) and (2)
Filling of Vacancies:

When the seat of a member becomes vacant by his removal, resignation, and death or otherwise, the State Government shall appoint a new member in his place and such member shall hold office so long as the member whose place he fills would have been entitled to hold office, if such vacancy had not occurred.\textsuperscript{16}

Assumption of Direct Management of certain Wakf

The Wakf Act, 1995 confers power on the Wakf Board to assume direct management of certain Wakf in case where no suitable person available to be appointed as Mutawalli thereof or where the Board is satisfied that filling up of such vacancy of the Mutawalli is prejudicial to the interest of the Wakf. However, before so deciding the Board has to record in writing the reasons for such decision. Further, the Board has to notify in the official Gazette its decision to assume direct management. The period of such direct management shall not exceed five years in aggregate as may be specified in the notification.\textsuperscript{17}

The State Government is empowered in this regard to call for the records of any case, either on its own motion or on application from any person interested in the Wakf. The State Government may examine such records satisfy itself as to the legality, correctness or propriety of the notification issued by Wakf Board for assuming direct management. The decision of the State Government thereon shall be final and be published the same manner, in the Official Gazette as is laid down in Sub-Section (1) of Section 65.\textsuperscript{18}

The Wakf Board is required to send a detailed report after the close of every financial year to the State Government and such report

\textsuperscript{16} Ibid., Section 21.
\textsuperscript{17} Ibid., Section 65, Sub-Section (1)
\textsuperscript{18} Ibid., Sub-Section 2
shall contain information about the income of the Wakf and also the reasons as to why it has not been possible to handover the management back to the Mutawalli or any Committee of management during the year under report. The State Government has to examine such report of the Board and pass such order as it may think fit and the Board is obliged to comply with such orders of the Board.

**Appointment and Removal of Mutawalli**

The Wakf Act, 1995 confers power on the State Government to appoint or remove Mutawalli of such Wakf in respect of which the Wakf Board does not have such power because of the order or decree of the Court or due to any scheme of management or any direction contained in the Wakf deed. Therefore, it is laid down that, whenever a Wakf deed, scheme of management of decree or order of a Court provides that the Court or any authority “other than the Wakf Board” may appoint or remove a Mutawalli, or settle or modify scheme of management or otherwise exercise superintendence over Wakf, notwithstanding any such order or direction, such powers shall be exercisable by the State Government.

However, the Standing Committee on Labour and Welfare (1994-95) observed that this provision “gives unlimited powers to the State Government and the Wakf Board are denied any power. The members were of the view that the Wakf Board should also have a say in the appointment and removal of the Mutawalli”. Therefore, in view of the recommendation of the Standing Committee the following Proviso has been added to Section 66, which runs as follows, “provided that where a Board has been established, the State Government shall consult the Board before exercising such powers”.

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20. Supra note 2, Section 77.
Rules to be made for spending Wakf Fund

The Wakf Act, 1995 also requires that all such money received towards the Wakf shall be deposited and accounted for under a separate sub-head. Under sub-Section, 4 of Section 77 various expenses have been described which could be met out of the Wakf fund. However, the State Government shall under the control of the Board subject to any rules make such Wakf fund.

Constitutional of Tribunal

The State Government is empowered to constitute as many Tribunals as it thinks necessary for the determination of any dispute, question or other matter relating to a Wakf or Wakf property under this Wakf Act, 1995. Every such Tribunal shall consist of only one person who shall be a member of the State Judicial Service holding a rank not below the rank of a district, Sessions or Civil judge, Class I. The appointment of such Tribunal may be made either by name or by designation and the local limits and jurisdiction of each of such Tribunal shall be specified.

If an application relating to Wakf, which falls within the Territorial limits of the jurisdiction of two or more Tribunals, in that case such application may be made to such Tribunal within whose jurisdiction that applicant actually resides or carries on business of works for grains and other Tribunal having similar jurisdiction shall not entertain such application. However, the State Government is of opinion that it is expedient in the interest of the Wakf, Wakf property or any other person interested in the Wakf, and then it may transfer such application to any other Tribunal having jurisdictions.

21. Ibid., Section 7, Sub-Section (3)
22. Ibid., Section 83, Sub-Section (1 and 4)
23. Ibid., Sub-Section (2 and 3)
Suppression of Wakf Board

This is a very critical Section, which empowers the State Government to supersede the Wakf Board, take over the entire administration from the Wakf Board, and pass it on to any persons as it thinks proper. Since the action of the State Government under the Section, in effect, is resulting in removing the statutorily constituted Board before the completion of its statutory period of five years, such drastic action can be taken on the following ground, namely:

a) that the Wakf Board is unable to perform, or
b) has persistently made default in the performance of the duty imposed on it by or under this Act, or
c) has exceeded or abused its powers, or
d) has wilfully and without sufficient cause failed to comply with any directions issued by the Central Government under Section 96, or by the State Government under Section 97, or
e) if the State Government is satisfied on consideration of any annual report that the Board’s continuance is likely to be injurious to the interest of the Wakfs in the State.

Thus on the above grounds the State Government may supersede the Wakf Board by notification in the Official Gazette for a period not exceeding six months. However, before the issue of such notification, the State Government shall give a reasonable time to the Board to show cause as to why it should not be superseded and explanation or objection submitted by the Board shall be taken into consideration.

On suppression of the Board by the Government, the person appointed by the Government in this behalf shall now discharge all the functions of the Wakf Board and all properties vested in the Board shall during the period of such suppression vest in the State Government. The State Government is also empowered to extend the period of

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24. Ibid., Section 99.
suppression or reconstitute a new Board in accordance with the manner provided in Section 14 of the Act.

It is pertinent here to refer to an important judgement of the Supreme Court of India interpreting the scope of the State Government’s power to supersede Wakf Board under Section 64 of the Wakf Act, 1954. Since the same Section is incorporated and remembered as Section 97 in the Wakf Act, 1995. The judgement by the Supreme Court in *Bihar State Sunni Wakf Board v. State of Bihar*\(^{25}\) becomes relevant. Thus, “it has been alleged in the Writ Petition that soon after the change of the Government, fabrication of charges and the grounds for suppression of the Board and removal of the chairman started on extraneous and political consideration … on the basis of these facts, it was contended that on some pretext or the other, baseless allegations were made and undue interference was caused by the respondent Government in day to day affairs of the Board. In about a period of fifteen years, the Board has been superseded twelve times on one plea or the other and it has not been given adequate and proper opportunity to efficiently manage, and administer the functioning of more than 2000 Wakfs in the State of Bihar.” Then the Supreme Court examined and interprets the scope of this provision to supersede Wakf Board and said thus; “on plain reading of the said provision, it would be obvious that the opinion of the State Government to supersede the Board is not a subjective opinion. It has to be based on objective findings and for the reasons to be recorded in writing. The persistent default is the performance of the duty imposed on it cannot be gathered by a solitary, irregularity or illegality”.

Similarly in another case the Kerala High Court examined the true scope of this provision and the expression used therein such as

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"persistent default" and excess or abuse of powers”. Thus, the Kerala High Court in one case\textsuperscript{26} held that “one or two isolated cases of failure to act will not amount to persistent default within the meaning of the Section. Even a single act of disobedience of the direction may, added to certain continuing circumstances depending upon the gravity of matter, indicate persistence on the part of the defaulter”.

**Reorganisation of Wakf Board\textsuperscript{27}**

Section 102 of the Wakf Act, 1995 corresponds to Section 66-A of the old Wakf Act, 1954. Section 66-A was incorporated in the Central Wakf Act, 1954 pursuant to the State Registration Act of 1956. As the prevailing notion in regard to the reorganisation of States at that time was that the Sate Reorganisation Act of 1956 was the last in the matter of reorganisation of State and no Further,, State reorganisation was envisaged, perhaps this line of thoughts governed the phraseology of Section 66A. Whereas, in fact, this Act was the beginning of a series of reorganisation of State which process is being continued and, therefore, it would not be correct to tag the application of Section 66-A (now Section 102) to the States Reorganisation Act of 1956. This lacuna was not corrected even after several Acts were passed later concerning reorganisation of States.

Instead of confining action following reorganisation of the States, in respect of Wakf Boards to Section 66-A of the Central Wakf Act, 1954 by suitably amending the said Section, action was taken for the continued application of the Central Wakf Act, to the Kutch area under Section 75 of the Bombay Reorganisation Act of 1960 instead of the Inter-State Corporation Act of 1957. Similar action was taken when the erstwhile Punjab State was reorganised. The State Wakf Board in Punjab

\textsuperscript{26} Kerala Wakf Board and another v. State of Kerala, AIR, 1984, p. 57.
\textsuperscript{27} Supra note 2, Section 102.
was treated as an Inter-State Corporation, whereas all such actions, consequent upon the reorganisation of any State should be taken as provided for under Section 66-A and 66-B which are self-contained and fully meet the special requirements of trifurcation or bifurcation of the Wakf Board, as the case may be.

In actual practice, it is noticed that when there is specific provision adequate enough to meet any such contingency under the Wakf Act itself, it would not be advisable to take shelter under another enactment, which does not fully meet all the requirements of the division of assets and liabilities and the distribution of the State etc., of the Boards affected by such reorganisation of the Wakf Boards. Therefore, to meet any future contingency of reorganisation of States, the word "under the State Reorganisation Act, 1956" have been deleted from Section 102 of the Wakf Act, 1995, and this Section 102 would be sufficient to meet all employment of the employees and other matter incidental thereto.

Establishment of Wakf Board for Part of State

Where on account of the territorial change brought about by any law providing for the reorganisation of any State, this act as from the date on which that law comes into force applicable only to any part or parts of a state but has not been brought into force in the remaining part thereof, then notwithstanding anything contained in this act, it shall be lawful for the Government of the state to establish one or more Boards for such part or part in which this Act is in force and in such a case any reference in this Act to the Word "State" in relation of a Board shall be construed as a reference to a part of the State for which the Board is established.28

28. Ibid. Section 103, Sub-Section (1)
Where any such Board has been established and it appears to the Government of the State that a Board should be established for the whole of the State. The State Government may, by order notified in the Official Gazette, dissolve the Board and establish a new Board for the whole of the State. The asset, rights and liabilities of the Board for the part of the State shall vest in the new Board, as the case may be. Under Section 109 of the Act, the State Government is empowered to make rules for carrying out the purposes of the Act.

**Laying of Rules before the Legislature**

The Wakf Board in order to exercise powers vested with it under various Sections of the Act, is empowered to make regulations with the previous sanction of the State Government. Various matters in respect of which the Wakf Board is empowered to make regulations with the previous sanctions of the State Government. Various matters in respect of which the Wakf Board is empowered to make regulations are required to be framed are also enlisted. The general parameters as laid down in respect of the rules are also applicable to such regulations in order to be valid the regulations have to be reasonable.

Every rule framed by the State Government under Section 109 and every regulation framed by the Wakf Board under Section 110 has to be laid before the State Legislature and have published in the Official Gazette.

**Central Wakf Council**

**Constitution of Central Wakf Council and Its Purpose**

The Central Wakf Council owes its origin to the Kazmi Bill of 1952, which proposed the Central Board of Muslim Wakf, to be an

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29. Ibid., Sub-Section (2)
30. Ibid., Section 111.
elected body and the Central Public Trust Council to be a wholly
nominated one, neither was meant only to advise the Central
Government. Thus, Central Wakf Council originated from the Central
Public Trust Council as recommended by the Kazmi Bill 1952. The
provision for the Central Wakf Council was incorporated in the year
1964 by amending the Wakf Act, 1954, for advising the Central
Government concerning the working of the Boards and the due
administration of Wakfs. A new Chapter II-A inserted which contained
Sections 8-A to 8-D. According to Section 8(a), the Central Wakf Council
consisted of the Union Minister in-charge of Wakfs as its Chairman
along with other twenty members appointed by the Central
Government. The qualifications of the members were not prescribed.
The Wakf Bill, 1993 retained the same pattern of composition,
However, the Standing Committee on Labour and Welfare (1994-95)
recommended a more comprehensive composition representatives
from different categories based on knowledge, experience and expertise
relating to Wakf matters. The Wakf Act, 1995 based on this
recommendation, incorporated Section 9. Now, the Central Wakf
Council consists of the Union Minister in-charge of Wakf matters as its
Chairman and other twenty members are appointed by the Central
Government who include three persons to represent Muslim
Organisations of All-India character, four persons of national eminence
of whom two shall be administrative and financial experts, the
members of Parliament of whom two should be from the House of
people and one from the Council of States, three Chairpersons of Wakf
Board by rotation, two persons who have been judges of the Supreme
Court or a High Court, one advocate of national eminence, one person
to represent Mutawallis of Wakf having a gross annual income of not

31. Supra note 19, p. 3
less than five lakhs of rupees, and three persons who are eminent scholars in Muslim Law.

**Finance of the Council and Audit of Accounts**

The Central Wakf Council is financed by the contributions from the Wakf Boards which is equivalent to one percent of the aggregate of the net annual income of the Wakfs in respect of which contribution is payable under Sub-Section (1) of Section 72 of the Wakf Act, 1995. If any Wakf Board has remitted or condoned under Sub-Section (2) of Section 72, whole of the contribution for any Wakf registered with it, then such remission shall not be taken into account for the purpose of calculation of one percent contribution by the Wakf Board to the Central Wakf Council, it is not necessary that Wakf Board should actually received the contribution for the Wakfs registered with it as some may be defaulter. Therefore one percent is to be calculated on the basis of the contribution ‘payable’ to the Wakf Board under Section 72(1) and not necessarily paid by the Wakfs.

In addition to one percent contribution from the Wakf Boards, all other money received by the Council as donations, benefaction and grants from a fund which is called Central Wakf Fund. The Central Government is empowered to make rules for the purposes of prescribing the manner in which the accounts shall be audited, procedure for discharging of their functions, filing of vacancies among the members of the Council.

**Evaluation of the Role of the Central Wakf Council**

The Joint Select Committee on the Kazmi Bill, 1952 expressed its opinion that “The constitution of a non-official body at the Central level for the purpose of coordinating Wakf administration is to be considered only as an alternative to the empowering of the Central Government
with powers of coordination through general directives. When once the responsibility for coordination is vested with the Central Government, the establishment of a non-official body becomes, superfluous. Such a body cannot obviously, under such circumstances, be clothed with specific powers and functions without at the same time impinging upon the powers of the Central Government. No wonder that the Tamil Nadu Wakf Board has described the present Central Wakf Council as a fifth-wheel to the coach. The Mysore Wakf Board has considered the Council as superfluous body with no specific functions and duties assigned under the Act. The U.P. Sunni Central Board of Wakfs too has However, significantly cautioned that if the powers of the Council are enlarged, a conflict of jurisdiction is likely to arisen between the council, the Central Government, and the State Government.32

The Wakf Inquiry Committee, too, expressed its opinion on similar lines and even questioned the payment of one percent contribution by the Wakf Board to the Council. Thus, the committee said, “under no circumstances Wakfs in this country which are liable to pay contribution under Section 46 of the Central Wakf Act, 1954 (now Section 72 of the Wakf Act, 1995), be made liable to pay 1% of their net income for the maintenance of the Central Wakf Council as it exists at present.33

Examined from the point of view of services rendered by the Central Wakf Council to the concerned Wakfs in consideration of the payment of contribution by the latter, it was argued that a vast dispensary exists in the actual amount to be paid by the Wakfs with large income and others with little income although the percentage remained the same. Then there is no difference in the matter of services

32. Supra note 4, pp. 3 & 14.
33. Ibid.
rendered by the Central Wakf Council to those big and small Wakfs. Such situation was even challenged as being violative of Article 14 of the Constitution. Wherein the Division Bench of the Kerala High Court justifying the levying of uniform license fee i.e., one percent to all and the latitude and flexibility permitted to the legislature. Thus, the Kerala High Court observed. “The inequalities alleged because of some Wakfs having to pay more out of their net income (meaning profits and gains) proportionately than others, it appears to us rise from circumstances which are fortuitous. Alleged inequalities arising from the nature of enjoyment of properties or even the nature of the properties owned by a Wakf cannot be made a ground for supporting the contention that an important such as a fee at a uniform rate on the gross income of the Wakfs taking into account the services rendered to each Wakf to violative of article 14 of the Constitution as we are not able to discern any clear hostile discrimination or the singling out of any class of Wakfs for special or peculiar treatment. The discrimination, if any, as stated already, seems to arise out of fortuitous circumstances”. Thus, the High Court rejected the allegation of discrimination in the matter of uniform contribution of one percent by all the Wakfs.

Further, the nexus between the fee levied and the services rendered by Wakf Board and similar institutions has also been emphasized in the decision of the Supreme Court.

Positive Contribution of the Council

However, the positive role-played by the Central Wakf Council during recent years in the matter of granting loans to various Wakfs and Wakf Board for the execution of the several developmental projects

on the Wakf lands and Wakf properties cannot be ignored. The annual reports of the functioning of the Central Wakf Council for the last few years are quite indicative of the enormous and invaluable contribution of the Central Wakf Council to the development of the Wakf properties in the country.

Wakf Boards

Section 13 is an enabling Section, which confers powers on the State Government to establish the Wakf Board. The State Government may appoint a Board of Wakf with effect from such date as by notification in the Official Gazette. The State Government is also competent to constitute separate Wakf Board each for Sunni Wakfs and Shiah Wakfs, provided that the number of the Shiah Wakfs in any state is more than fifteen percent of all the Wakfs in the State or the income of the properties of all the Wakfs in the State is more than fifteen percent of the total income of properties of all the Wakfs in the State. The State Government in the Official Gazette can also specify the name of such Boards.

By virtue of its establishment under the Act, the Wakf Board becomes a body corporate having perpetual succession and a common seal with powers to acquire and hold property and to transfer any such property subject to such conditions and restrictions as may be prescribed and shall by the said name sue and be sued.

Constitutional validity of the Wakf Board

The basic question relating to the validity of the powers of the Wakf Board to Control and supervise Wakf administration, regulate the powers of Mutawallis in so far as it relates to manage the Wakf properties under various Sections of the Act was challenged as
unconstitutional. It was contended that such wide powers of the Wakf Board are violative of the fundamental rights of the Mutawallis or any person to manage their own affairs in matter of religion guaranteed under Article 26 (b) of the Constitution of India which states thus; “Subject to public order, morality and health, every religious denomination or any Section thereof shall have the right to manage its own affairs in matter of religion.” But, the Court rejected the argument and said that “In view of the general scheme and purpose of the Act, it is futile to contend that the question regarding Wakf, in so far as it relates to the properties comprised therein and the right of Mutawalli or any person to manage the same property fall under Article 26(b) of the Constitution. It falls under Article 26(d) of the Constitution and as such is subject to the law made by the Parliament. The Legislative competence of the Parliament therefore to make the aforesaid, cannot be questioned. There is nothing in the impugned Sections which derive the religious denomination, namely Muslims, of their right of administration or administering properties owned and acquired by it”.

**Wakf Boards: Powers and Duties**

**Publication of Wakf List**

The report forwarded to the Board under Sub-Section (1) of Section 5 is examined by the Wakf Board and published in the Official Gazette in the form of a list of Wakfs mentioning the Sunni or Shiah Wakfs. If no suit is instituted in the Wakf Tribunal regarding any property mentioned in the list of Wakfs, within a period of one year, no such suit can be filled in the Tribunal and lists of Wakfs becomes final.

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37. Art. 26 of the Constitution “to administer such property in accordance with law”.
38. Supra note 2, Section 5, Sub-Section (2)
Composition of Wakf Board

Before discussing the composition of Wakf Board, it appears pertinent to examine the crucial question which has long been debated in India as to whether the Wakf administration should be entrusted to one-man administration in the form of charity Commission as obtained in Maharashtra and Gujarat or should it be given to a Wakf Board consisting of a chairman and several other members and clothe it with all powers of supervisory and administrative, as is done under the Wakf Act, or again should it be a dyarchial system with separation of powers between a Wakf Commissioner (or a Chief Executive Officer as he is called under the Wakf Act, 1995) with all administrative powers and the Wakf Board with supervisory powers, as obtained in West Bengal.

It may be noted that during the Muslim Rule in India, only the officer known as Sadrus-Sadur was in-charge of the supervision of Wakfs both at Central and Pro vincial level.

In the erstwhile state of Hyderabad the Wakf administration was looked after by a full-fledged Government Department, known as Mahkuma-e-Umoor-e-Mazhabi i.e., Ecclesiastical Department. The department was essentially secular in character as both Muslim Wakfs and this department managed Hindu Endowments.

The Hindu Endowment Commission Report

The one-man Administration was supported by the Hindu Religious Endowments Commission Report,39 which can be referred to herewith thus, "Complaints have no doubt also been levelled against One-Man-administration, the general criticism being that he is apt to carry out the orders or wishes of the Minister-in-charge, on the other

hand. The Commissioners of Madras and Gujarat have asserted emphatically before us that there has been no case of interference by Government—Opinion on the relative merits of the two systems will no doubt vary. We have considered very carefully the pros and cons of the two systems. We do not wish to minimize the possibility of a single officer being over-awed or influenced by a powerful Minister who requires to act in accordance with his wishes. At the same time, we cannot also overlook the same possibility occurring in the case of a President and Members of a Board. After a careful balancing of the considerations, pros and cons, we have arrived at a conclusion that the Executive administration of temples by a single officer will be much more expeditious and efficient than administration by a body of persons or Boards of Commissioners”.

**Recommendations of the Wakf Inquiry Committee**

The Wakf Inquiry Committee appointed by the Central Government in 1976 has also considered this question and examined the suggestion given by the Amendments Committee of the Central Wakf Council, thus:

“While with its right hand the Committee has given vast and crucial important powers to the Executive Officers, such as the removal, suspension and dismissal of Mutawallis and committees of Management, framing of schemes and much more of reporting to the State Government on his own, whenever the Board takes a decision not in conformity with any of the provisions of the Act, with its left hand, the Committee has in effect nullified the exercise of all these powers by the Executive Officer by stipulating that the Executive Officer shall be under the administrative control of the Board. It does not need much emphasis to hammer home the point, than any officer who is under the
administrative control of the Board will not have the necessary prestige of all these important statutory duties. Hence, it is necessary that in the sphere of statutory duties and responsibilities entrusted to him under the Act, the officer should be kept outside the control of the Board and made accountable to the State Government. The key for achieving this goal is the proper and through separation of functions of general superintendence from those relating to administration, inspection, auditing, etc”.

Thus, the Wakf Inquiry Committee recommended for the appointment of, what is called, Wakf Commissioner and a non-official Board with essential separation of powers between them on the basis of the key words ‘superintendence’ and ‘Administration’. Thus, the Committee was optimistic that “Wakf Board can still continue to discharge an effective and useful role in the overall superintendence of Wakf particularly laying down policies, acting as watch-dog and recommending to the State Government for providing necessary facilities for the taking up of Wakf administration. Further, more, the presence of non-official members of the Board will act as check against any possibility of the State Ministers overacting the Wakf Commissioner and forcing the latter to act according to their will and pleasure”.

The present scheme under the Wakf Act, 1995, appears to have incorporated the recommendations of both the Wakf Inquiry Committee, 1976 (Vide, Section 32) and the Amendments Committee of the Central Wakf Council (Vide Section 25 and 26). However, more, the separation of powers between those relating to ‘Superintendence’ and ‘Administration’ has not been clearly carried out by the Act of 1995 to the desirable extent.
The Composition of the Wakf Board

The Wakf Board consists of:

Chairperson - Whenever the Wakf Board is constituted or reconstituted, the members of the Wakf Board from among themselves who are present at a meeting convened for this purpose elect one chairperson.

Appointment of Members by Election - Under Section 14(1)(b), one and not more than two members as the State Government may think fit, shall be elected from each of the following electoral colleges:

(i) Muslim members of Parliament from the State, or as the case may be, the Union Territory of Delhi;
(ii) Muslim members of the State Legislature;
(iii) Muslim members of the Bar Council of the State; and
(iv) Mutawallis of the Wakfs having an annual income of not less than rupees one lakh.

The number of members elected under the clause may vary from four to eight.

The System of Election - Election of the member specified in Clause (b) of Sub-Section (1) of Section 14 shall be held in accordance with the system of proportional representation by means of a single transferable vote, in such manner as may be prescribed by the State Government. However,, if the number of Muslim Members of Parliament, the State Legislature or the State Bar Council, as the case may be, is only one, then such Muslim Member shall be declared elected on the Board, provided further, where there is no such Muslim member from any of the above categories, then Ex-Muslim Members of these categories shall constitute the electoral college. Inclusion of ex-Muslim Member of Parliament or Member of Legislative Assembly is made as per the

40. Supra note 2, Section 14, Sub-Section (8)
recommendations of the Standing Committee 1994-95. However, where
the State Government is satisfied, for reason to be recorded, that it is not
reasonably practicable to constitute and Electoral College from any of
the above mentioned categories, then the State Government may
nominate such persons as the members of the Board as it deems fit.\footnote{41}
Further, it is provided that the number of elected members of the Board
except as provided under sub-Section 3, shall at all times be more than
the number of nominated members.\footnote{42} This sub-Section 4 has been
added as per the recommendations of the Standing Committee on
Labour and Welfare 1994-95.\footnote{43}

Appointment of Members by Nomination

In addition to the elected members, the Wakf Board also consist
of members who shall be appointed by the State Government by
nomination. Therefore, under sub-Section (1) of Section 14, the members
are nominated from the following categories:

\textit{Clause-(c) One and not more than two members to be nominated representing
eminent Muslim organization.}

\textit{(d) One and not more than two members to be nominated from
recognized scholars in Islamic Theology.}

\textit{(e) An officer of the State Government not below the rank of a deputy
Secretary.}

Thus, all the number of members to be nominated by the State
Government may vary from 3 to 5 and, therefore, the total number of
the members of the Wakf Board, both from the elected an nominated
categories put together may vary from 7 to 13. However, in the case of
Union Territory other than Delhi, the Board shall consist of not less than

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\begin{itemize}
  \item \footnote{41}{Ibid., Sub-Section (3)}
  \item \footnote{42}{Ibid., Sub-Section (4)}
  \item \footnote{43}{Supra note 19, p. 5}
\end{itemize}
three and not more than five members to be appointed by the Central Government from among the categories mentioned in sub-Section (1).

Where there are Shia Wakfs but no separate Shia Wakf exists, then at least one of the members from the categories listed in sub-Section (1) shall be a Shia Muslim. Similarly, there shall be at least one Mutawalli as the member of the Board.

It is pertinent to mention here that as far as the appointment of members through election is concerned, the inherent danger in this system for the religious institutions cannot be ignored. It is a matter of common observation that even for the election of the managing committee of certain mosque, from among the members of the congregation, various religious groups are converted into hostile compartments and unhealthy, sometimes, unfortunate confrontation during the time of prayers tarnished the sanctity of the sacred place. Therefore, when the elections are conducted for a more important position of a member in the state of Wakf Board there is every possibility that the contestants of each of the Electoral College would make it a prestigious issue to win the elections by spending lot of money. Once they are elected by incurring huge expenditure then the temptations to get the expenditure reimbursed during the tenure of their membership cannot be ruled out. Apart from this, the Wakf Board too, have to incur lot of expenditure on account of the conduct of election as was observed in the case of election of a single mutwalli in the West Bengal Wakf Board which had to spend twenty or thirty thousands of rupees in the early 1970s and therefore, the West Bengal Wakf Act was amended in the year 1973 to replace the system of election of mutwalli by providing for nomination by the State Government.

44. Supra note 2, Section 14, Sub-Section (5)
The amendment Committee appointed by the Central Wakf Council had also suggested the inclusion of the members of the Registered Medical Association, the Institute of Engineering, Teachers Association and the Senate or Court of the Universities of the State, apart from the members of the Bar Council in the Wakf Board.

**Term of Office**

The term of office of the member of rather Wakf Board is fixed as five years. The purpose of fixing a long term of five years is to provide sufficient opportunity to the Wakf Board to plan and implement various policies and developmental schemes for improving the efficiency of its functioning and bringing about an overall improvement in the supervision and protection of Wakf properties. All this requires time. Therefore, it is always desirable not to disturb the Wakf Board by frequent constitution and reconstitution. Even Supreme Court of India expressed its opinion in similar terms in the case, which came before it from the Bihar Wakf Board. The Punjab High Court has held that the computation of five years shall start from the date of nomination by the Government.

**Disqualification of Members**

The Act specifies certain grounds that render a member disqualified for being appointed or for continuing as a member of the Board. Thus a person is disqualified for the membership of the Board if he is not a Muslim or has not attained the age of twenty-one-year, or he is of unsound mind or an un-discharged insolvent, or he has been convicted of an offence involving moral turpitude.

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45. Ibid., Section 15.
48. Supra note 2, Section 16, Clauses (a-d).
However, in the Wakf Act, 1995, it is added that if such conviction has been reversed or he has been granted full pardon in respect of such offence, then he is not disqualified. This addition does not appear to be well founded for the grant of full pardon by itself is indicative of his guilt and when in particular the offence relates to moral turpitude it should render him disqualified to hold a prestigious office of trust and honour in a body, which controls religious institutions also.

However, it is essential that the disqualification is seriously proved against the member and it should not be labelled on frivolous or faint grounds. Nor should it be imposed by stretch of imagination or bias. There should be necessary nexus between the guilt and the proposed action of removal. It was pointed out in a case49 by Andhra Pradesh High Court that mere discourteous behaviour of a member towards the Chairman is not sufficient to hold the view that the continuance of the member would be prejudicial to the interest of Wakfs. Further, before removing the member on such grounds, he should be furnished with the record against him and an opportunity of explanation should be given.

Establishing Committees for supervision of Wakfs

The Board may, whenever it considers necessary, establish either generally or for a particular purpose or for any specified area or areas committees for the supervision of Wakfs.50 The Board shall determine the constitution, functions and duties and the term of office of such committees from time to time. Provided that it shall not be necessary for the members of such committees to be members of the Board.51

50. Supra note 2, Section 18, Sub-Section (1)
51. Ibid., Section 18, Sub-Section (2)
Appointment of Officers of Wakf Board

The board shall have the assistance of such number of officers and other employees as may be necessary for the efficient performance of its functions under Wakf Act, 1995, details thereof shall be determined by the Board in Consultation with the State Government.52

Delegation of Powers to Secretary etc

The Board may by a general or special order in writing, delegate to the chairperson, any other member, the Secretary or any other officer or servant of the Board or any area committee, subject to such conditions and limitations as may be specified in the said order, such of its powers and duties under this Act, as it may deem necessary.53

Powers and Functions of Wakf Board

The Wakf Act, 1995 confers powers on the Wakf Board to administer, control, supervise the Wakf, and to regulate the powers of Mutawalli as far as it relates to manage the Wakf properties.54 The Madhya Pradesh High Court in a case55 examined the basic and crucial question as to whether Wakf Board has any right to interfere with the right of Mutawalli, or for that matter, any person to manage their own affairs in matters of religion as guaranteed to him under clause (b) of Article 26 of the Constitution. Hence, the validity of such powers of the Board was challenged as unconstitutional being violative of Article 26 (b) But the court upheld the constitution validity of such powers of the Wakf Board on the ground that such right of Mutawalli is governed not by clause (b) of Article 26, but by clause (d) of Article 26 which states

52. Ibid., Section 24, Sub-Section (1)
53. Ibid., Section 27.
54. Ibid., Section 32, Sub-Section (1)
55. Supra note 36
that such Mutawalli or persons shall have right to administer such property in accordance with law.

The powers of Wakf Board are conferred subject to the condition that the Board shall act in conformity with the directions of the Wakf, the purpose of the Wakf. Further, the Standing Committee recommended that the powers of the Wakf Board shall also be made subject to such usage and custom as are sanctioned by the “School of Muslim Law to which Wakf belongs”. The Wakf Act, 1954 as amended in 1964 contained the words “such usage or custom of the Wakf sanctioned by Muslim Law”. The members of the Standing Committee opined that Wakfs belonging to various categories of Muslim Schools of thought needs to be protected in accordance with the relevant usage and custom. Thus, the recommendation is incorporated in the proviso to Sub-Section (1) of Section 32, of the Wakf Act, 1995 adding the word “School of Muslim Law”. The Wakf Inquiry committee 1976 has also recommended that such inclusion of School of Muslim Law would enlarge the ambit of application of not only Sunni Law but also customs and usages of the sects such as Chishtia, Quadaria, Bhoru and Mehdavis.56

Schemes of Management for Wakf

The Wakf Board is also empowered to settle schemes of management for a Wakf.57 However, a proviso is added to this clause, which states that no such settlement shall be made without giving the parties affected an opportunity of having heard. The Mysore High Court58 has laid down that it is imperative on the part of the Wakf Board to have heard “Parties affected” before settling any scheme of

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56. Supra note 4, p. 57.
57. Supra note 2, Section 32, Sub-Section (2).
management of mosque. The fact that these petitioners were duly elected trustees was well within the knowledge of the Wakf Board. It was, therefore, their duty to have heard them in accordance with the Act. Further, under Section 69 of the Act, the Wakf Board may frame such scheme for the administration of a Wakf either on its own motion or on the application of not less than five persons interested in the concerned Wakf and such scheme shall be subject to other conditions as are stipulated under Section 69 of the Act. However, any person aggrieved by such settlement of scheme of management of a Wakf may institute a suit in a Tribunal for setting aside such settlement or directive.59

**Incorporation of Doctrine of Cypress in the Wakf Act**

Usually ambiguity, indefiniteness and impossibility of achieving object are vitiating elements in any legal transaction. However, in the case of Charitable gift it is desirable that such gift shall not fail on account of ambiguity or indefiniteness or impossibility and the same may be utilized on purpose similar to the original object. Therefore, bringing about an amendment in the year 1964 incorporated the doctrine of Cypress in the Wakf Act. Thus, the Wakf Act, 1995, too retained the provision under Section 32 (2) (e) (iii), which says that in any case where any object if Wakf has ceased to exist or has become incapable of achievement, then so much of the income of the Wakfs as was previously applied to that object shall be applied to any other object. This rule has sanction by the Muslim law also. Tayabji quoted with the authority of Fatawai Kazi Khan60 and Raddul Mukhtar 61 that when a purpose of a Wakf fails because the object has ceased to exist or has become incapable of achievement then it is lawful to apply the

59. Supra note 2, Section 32, Sub-Section (3)
61. Ibid., p. 174
income of the Wakf property to other object nearest in its nature to the
original purpose i.e., Jins-I-Q a’r b”. For example if a Wakf is created
for the maintenance of a particular orphanage and if that orphanage
ceases to exist then maintenance of deserted children. However, in view
of the very low literary level among Muslims, it is added in the Wakf
Act, 1995 that where any object of Wakf has ceased to exist or has
become incapable of achievement then such of the income which was
previously applied can be used “for the benefit of the poor or for the
purpose of promotion of knowledge and learning in the Muslim
community.”

It is further laid down that for the purpose of this clause the
powers of the Wakf Board shall be exercised in the case of Sunni Wakf,
by the Sunni members of the Board only and similarly in the case of
Shia Wakf, by the Shia members of the Board only. For this purpose,
the Wakf Board can also co-opt such other Muslims, being Sunnis or
Shias, as the Board thinks fit, to be temporary members of Wakf Board
for exercising its powers under this clause. The Wakf Act, 1995 contains
provision,62 which confers detailed powers on the Board in relation to
Wakfs, which have ceased to exist.

**Power to Sanction Transfer of Immovable Property of Wakf**

The Wakf Act, 1995 imposed stricter condition on the transfer of
any immovable Wakf property by way of gift, sale, mortgage or
exchange63 or for lending the property on lease64 without prior sanction
of the Board. Clause (j) of Sub-Section (2) of Section 32 provides the
procedure for granting such sanction by the Board and it requires that
“no such sanction shall be given unless at least two-thirds of the

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62. *Supra* note 2, Section 31, Sub-Section (3)
63. Ibid., Section 51
64. Ibid., Section 56
members of the Board vote in favour of such transaction". Obviously, obtaining the consent two thirds of the members of the Wakf Board is not always easy. However, the Wakf Inquiry Committee, 1976, has suggested for consent by two thirds of the members of the Board "present" and vote in favour of such transactions. However, in Wakf Act, 1995, the word "present" is not to be found.

**Developmental project on Wakf land and its Origin**

The question of developing Urban Wakf land through commercial utilization for the benefit of the Wakf, which offer attractive potential, has long been debated in India. The Central Wakf Council has constituted a Committee for the development of Wakf properties and the Central Government have sanctioned financial grant to the Central Wakf Council in order to enable that body to grant loans to suitable Wakf institutions through the State Wakf Boards for the implementation of economically and commercially viable development schemes. However, unfortunately whenever any developmental scheme were proposed for implementation the concerned Mutawallis posed resistance to such schemes and raised legal and other objections related to Shariat. The Central Wakf Council, the Amendment Committee, The Central and State Governments and the one-man commission all have emphatically suggested to give powers to the Wakf Board for ensuring implementation of such developmental schemes and projects. The Wakf Inquiry Committee\(^65\) recommended, thus, ‘we agree with the suggestion that the State Wakf Board should have powers to take over underdeveloped urban properties for development where the cooperation of Mutawallis is not forthcoming and to hand over after developing them and realizing the amount actually spend on development’.

\(^{65}\) Supra note 4, pp. 58-59
The Wakf Inquiry Committee had reproduced the proposed draft of Section 22-F prepared by the one-man Commission and the same was incorporated in the Wakf (Amendment) Act, 1984 as Section 15-A. This Section gave a very detailed scheme, which was incorporated in 14 sub-Sections of Section 15-A. However, this Act of 1984 was never brought into force. Therefore, now the Wakf Act, 1995 again incorporated the scheme for development of Wakf Land and conferred one the State Wakf Board effective powers to take over temporary possession of such Wakf properties, implement the scheme and hand them over to the concerned Mutawalli after development. However, under the Act, the scheme is simplified and incorporated.66

Statutory Provisions Relating to Development of Wakf Land

The statutory provisions under Sub-Section 4 to 6 of Section 32 relating to development of Wakf Land conferred potential powers on the State Wakf Board and thus stated that where the Board is satisfied that any Wakf land offers a feasible potential for development as a shopping centre, market, housing flats and the like, it may serve upon the Mutawalli a notice in the prescribed manner inviting his decision, objections or suggestions. If, the Wakf Board, on receipt of the reply from the Mutawalli, is satisfied that either the Mutawalli is not willing or is not capable of executing the development scheme, then the Wakf Board, with the prior approval of the Government, may take over the Wakf property, clear it of any building or structure there on which in the opinion of the Wakf Board is necessary for execution of the Wakfs. Either the necessary finance can be obtained from the Wakf Fund of the Wakf Board, or it may be raised on the scrutiny of the concerned Wakf properties. During the period of execution of the development scheme, the Wakf Board is empowered to take over the entire Wakf properties in

66. Supra note 2, Section 32, Sub-Section (4-6)
its control and manage the same till the completion of the development project.

However, it is incumbent on the Wakf Board to pay to the concerned Mutawalli an average annual net income calculated on the basis of the annual net income of the preceding three years of the concerned Wakf, during the entire period of execution of developmental scheme. After completion of the developmental scheme the Wakf Board has to handover the entire Wakf property, along with the newly developed property, back to the Mutawallis. The Wakf Board is entitled to recover the entire expenditure incurred on the developmental project along with the interest thereon, from the income of the concerned Wakf property including the newly developed property, before handing over the Wakf property to the concerned Mutawalli.

**Recovery of Lost Properties**

Clause (b) of sub-Section (2) of Section 32 requires Wakf Board to take measures for the recovery of the lost properties of any Wakf. However, the basic question was well debated as to whether Wakf Board has jurisdiction to make measure for the recovery of the lost properties of any Wakf. It was usually argued that the very purpose of continuing a Wakf Board is to supervise and control the Wakf properties for the purpose of protection of the existing Wakf properties. Therefore, it follows that the scope of functions of Wakf Board should be confined only to the existing Wakf properties, which has become extinct. Following the same view the clause (h) was deleted from the Wakf (Amendment) Act, 1984 which has not enforced. However, under the Wakf Act, 1995 this power is retained. Therefore, now the Wakf Board is empowered to take measure for the recovery of the lost
properties of Wakf and endeavour to restore the benefits to the beneficiaries to the possible extent.

Powers of the Board in respect of Ceased Wakfs

Section 39 of the Wakf Act, 1995 incorporates the Doctrine of Cypress, as already discussed under sub-clause (iii) of clause (e) of Sub-Section (2) of Section 32 of the Act, which deals with the functions of the Wakf Board. The difference between Section 32 and Section 39 is that under Section 32 the Wakf Board has been conferred with the power of utilization of the income of the Wakf which has ceased to exist on any other object nearly similar to the original object or for the benefit of the poor or for the promotion of knowledge and learning in the Muslim community, whereas Section 39 describes the procedure to be followed for such utilization and also provides for an action through the Tribunal for the recovery of such Wakf Property from any unauthorized possession.

Thus, under Section 39, the Wakf Board, if is satisfied that the objects or any part thereof, of a Wakf have ceased to exist, shall cause an inquiry to be conducted by the Chief Executive Officer in the prescribed manner. After receiving his report, the Board shall pass an order specifying the property and funds of such Wakf and directing the way in which it may be utilised for renovation of any Wakf property or where there is no need for such renovation, utilisation on the purposes similar or nearby similar to the original object in accordance with Doctrine of Cypress as specified under sub-clause (iii) of Clause (e) of Sub-Section (2) of Section 32 of the Act.

Similarly if the Board has reason to believe that any building or other place, which was being used for religious purpose or institution or for charity, has ceased to be used for that purpose, it may make an
application to Tribunal for an order directing the recovery of possession of such building or other place. The Tribunal after making such inquiry as it thinks fit may pass an order for the recovery of such property and its utilisation thereof in accordance with the Doctrine of Cypress.67

**Decision if a Property is Wakf Property**

This was a very crucial question which came up before the Rajasthan High Court68 as to whether the Survey Commissioner as appointed under the Section 4 of the Wakf Act while making survey of the Wakf properties is empowered to decide the question whether a property is Wakf property or not? The High Court of Rajasthan held that the Jurisdiction of the Survey Commissioner is confined only to the Wakfs, which exist in the State and whether such Wakf is a Shia Wakf or a Sunni Wakf. However,69 he cannot decide the Basic question or dispute if one arises, as to whether a particular property is Wakf property or not. However, this view of the Rajasthan High Court was reversed by the Supreme in appeal from the same case69 and it was held, thus, “It will be clear that the word’s for the purpose of making a survey of Wakf properties is a key to the construction of the Section. The ordinary meaning of the word “Survey” as given in the Random house Dictionary of English Language is ‘to take a general or comprehensive view of or appraise a situation”. If the commissioner of Wakfs has the power to make a survey, it is but implicit that in the exercise of such power he should enquire whether a Wakf exists. The making of such an enquiry is a necessary concomitant of the power to survey. The High Court was clearly in error”. Now, if there is any dispute with regard to properties to whether it is a Wakf property or not, or whether it is a Shia Wakf or a Sunni Wakf, the Wakf Board, the

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67. Ibid., Section 39, Sub-Section (4)
68. Radha Kishan v. Rajashtan Board of Muslim Wakf, AIR, 1967, Raj., p.1
69. Ibid., p. 289.
Mutawalli or any person interested therein may institute a suit in a 
Tribunal for the decision of the question.

However, the Wakf Board was given a power under Section 27 of 
the Wakf Act, 1954, to collect information regarding any property, 
which it has reason to believe to be Wakf property and if any question 
arises whether a particular property is Wakf property or not, or whether 
a Wakf is a Sunni Wakf or a Shia Wakf, and decide the question by itself 
after making such inquiry as it may deem fit. In 1984, an amendment 
was proposed to the old Section 27 of the Wakf Act, 1954, and it was 
provided that question whether a property is a Wakf or not, should be 
referred by the Board to the Tribunal whose decision thereon shall be 
final. However, the Standing Committee of the Labour and Welfare 
recommended that the power should be given to the Wakf Board itself 
to collect information and decide the question and any party aggrieved 
may go in appeal to the Tribunal against the decision of the Wakf Board 
and the decision of the Tribunal shall be final. Therefore, the old 
provision as contained under Section 27 of the Wakf Act, 1954 is 
retained under Section 40 of the Wakf Act, 1995, and it is, therefore, 
provided that the Wakf Board itself may decide the question, which 
shall be final, unless revoked or modified by the Tribunal.

Power to Cause Registration of Wakf and to Amend Register

Although every Mutawalli is required to apply for registration of 
Wakf under his administration, The Wakf Board, on its own accord 
may, direct a Mutawalli to apply for registration of a Wakf to supply 
any information regarding Wakf. Section 41 imposes a duty on the 
Mutawalli to comply the direction of the Board, which he is obliged to 
carry out under Section 50 (a) of the Act also. This Section also

70. Supra note 2, Section 36.
empowers the Wakf Board itself to cause the Wakf to be registered or may at any time amend the register of Wakf.

**To pass orders on Auditors Report**

The Wakf Board is empowered to examine the report submitted by the auditor or and to call for the explanation of any person in regard to any matter mentioned in the report and pass such orders as it may think fit under the circumstances including orders for the recovery of any amount certified by the auditor as recoverable under Sub-Section (2) of Section 47 of the Act.\(^{71}\)

The concerned Mutawallis or any other person aggrieved by such orders of the Wakf Board may go in appeal to the Tribunal within a period of thirty days from the date of receipt of such orders by him. However, so the Tribunal can entertain such application unless the amount certified by the auditors under Sub-Section (2) of Section 47 has no power to stay the operation of the order made by the Board in this regard. Nevertheless, the Tribunal after taking such evidence as it may think necessary, may confirm or modify the order of the Wakf Board or remit the amount so either certified in whole part or in part, since the amount certified by the auditor is already deposited in Tribunal. The Tribunal may also make such orders as to costs as it may think appropriate in the circumstances of the case. The orders of the Tribunal shall be final.

**Sanction for Alienation of Wakf Property**

The Statement of Reasons and objects relating to the Wakf Act, 1995, inter alia, has mentioned that the purpose of the Act is to make alienation of the Wakf property more difficult and, therefore, under Section 52, it lays down that notwithstanding anything contained in

\(^{71}\) Ibid., Section 48
the Wakf deed, any gift, sale, exchange or mortgage of any immovable
Wakf property shall be void unless effected with the prior permission of
the Wakf Board. However, no mosque, Dargarh or Khanqah can be sold,
mortgaged or exchanged except in accordance with any law for the time
being in force. This requirement is added on the recommendations of
the Standing Committee on Labour and welfare. The Wakf Board may
accord sanctions only with at least two-thirds of the members of the
Board vote in favour of such transaction.\textsuperscript{72} It may be noted here that
obtaining consent of two-third members of the Board would be
practically very difficult.

Therefore, the Wakf Inquiry committee has suggested that the
consent of two-third members present at the Board meeting may be
obtained. However, in the provision under Section 32 of the Wakf Act,
1995, the word "present" is missing. The sanction of the Board is
Further, subject to condition that such transaction is necessary or
beneficial to the Wakf, and it is consistent with the objects of the Wakf
and Further, that the consideration thereof is reasonable and adequate.
However, the Wakf Board has to follow certain procedure before
granting sanction and it has to publish the details of the transaction in
the official gazette for inviting objections and suggestions from the
interested persons for the considerations by the Wakf Board. Further,
such sale should be affected by public auction and should be subject to
confirmation by the Wakf Board. However, the Wakf Tribunal, on
application from the aggrieved Mutawalli or other person may permit
such sale to be made otherwise than by public auction for reasons to be
recorded by it. The amount so received shall be utilised or invested by
the Mutawalli subject to the approval by the Wakf Board. Against the
decision of the Wakf Board, the Mutawalli or any other person can go in

\textsuperscript{72} Ibid., Section 32, Sub-Section 2(j)
appeal to the Tribunal within ninety days from the date of communication of such decision to him.

**Recommendations of the Wakf Inquiry Committee**

The reason as to why such restrictions are imposed on gift, sale, exchange or mortgage of immovable Wakf property is quite satisfactory in view of the malpractices committed by the Mutawalli in effecting such transaction. The Wakf Inquiry Committee too, has remarked, thus “during all our tours of the states all Sections of Muslim community have represented to us hundreds of instances of illegal alienation and transfer of Wakf property by the Mutawallis and with their connivance and equally large number of unauthorised occupation by squatters. Closed graveyards situated in urban areas have been the main targets of such clandestine transaction. We are therefore convinced that the malady has reached a stage where some drastic action is required. Unless and until immediate measures are taken, we fear that the situation may go out of control and it would be too late to save the remaining Wakf properties.” 73 Thus, Section 51 laid down such cumbersome procedure in order to ensure alienation of Wakf property only in the interest of the Wakf and its beneficiaries.

**Recovery of Wakf Property Illegally Transferred**

In case of any Transfer of Property in contravention to the provision of Section 51, the Wakf Board in empowered to recover such property, under the provisions of Section 52, and send a requisition to the concerned collector to obtain and deliver the possession of the Wakf property to it. The Collector after duly following the procedure, laid down under Section 52 of the Act shall obtain possession of the property in respect of which the order has been passed and deliver it to

73. Supra note 4, p. 26
the board. Any person aggrieved by the decision of the Collector may go in appeal to the Tribunal within a period of thirty days and the decision of the Tribunal thereon shall be final.

Similar restriction is also imposed on Mutawalli to purchase any property on behalf of Wakf without the permission of the Wakf Board as required under Section 53.

**Restriction to Grant Lease**

Under Section 56 of the Wakf Act, 1995, a total restriction is imposed on the power to grant lease or sub-lease of a Wakf property for a period exceeding three years and any such lease, if granted, shall be void and of no effect and anything contained in the Wakf deed or instrument of Wakf or in any other law for the time being in force relating to such period of lease exceeding three years is totally ignored and made inapplicable. Any lease for a period exceeding one year can be granted subject to the previous sanction of the Wakf Board. Therefore in effect, a lease for a period of less than one year does not require any sanction from the Wakf Board while it is so required for a period during one year to three years. A lease for a period exceeding three years cannot be granted even with the sanction of the Wakf Board, as the Board does not have any power to sanction such lease. However, the Wakf Board is empowered to sanction renewal of any lease or sub-lease including a lease for a period of three years, subject to such terms and conditions as it may direct.

Corresponding provision relating to restriction on lease of Wakf property was also incorporated under Section 36-F of the Wakf (Amendment) Act, 1994 which was not brought into force.

It may, further, be noted that in the matter of granting lease for a period exceeding three years, even the direction of the Wakf, if any, is
also ignored and it does not appear to be appropriate particularly when such lease for a period exceeding three years may be necessary for well reputed tenants like Banks, Public Corporations, Government offices or other Commercial concerns who would like to furnish or suitably modify such premises on their own expense and therefore would prefer a lease on a long term basis. If a total, ban is imposed on lease beyond three years that may be renewed only on fresh terms and conditions as directed by the Wakf Board such potential tenants would not be attracted to take any such Wakf property on lease and therefore such a restriction does not appear to be in the interest of the Wakf.

**Payment of Dues on Behalf of Defaulting Mutawallis**

The act empowers the Wakf Board to pay dues on behalf of the Mutawalli in case of default by such Mutawalli. The Board discharge such dues from the Wakf Fund and may recover the amount so paid from the Wakf property and may also recover damages not exceeding twelve and a half percent of the amount so paid.74

Wakf Board is Further, empowered under the Act to direct the creation of reserve fund for payment of revenue, taxes etc, or for repair or preservation of the Wakf property75 and extension of time by the Wakf Board within which any act is required to be done by the Mutawalli.76 Section 58 to 60 of the Wakf Act, 1995 exactly corresponds to Sections 38 to 40 of the Old Wakf Act, 1954.

**Power to Appoint Mutawalli in Certain Cases**

When there is a vacancy in the office of the Mutawallis of a Wakf and, there is no one to be appointed under the terms of the deed of the Wakf, or where the right of any person to act as Mutawalli is disputed.

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74. Supra note 2, Section 58, Sub-Section 1
75. Ibid., Section 19.
76. Ibid., Section 60.
The Board may appoint any person to act as Mutawalli for such period and on such conditions as it may think fit.\textsuperscript{77}

**Removal of Mutawalli**

Section 64 of the Wakf Act, 1995 deals with the removal of Mutawalli and corresponds to Section 43 of the old Wakf Act, 1954. However, under Section 64 certain new grounds have been added on the recommendations of the Wakf Inquiry Committee 1976, on the basis of which the Wakf Board could remove a Mutawalli.

**When a Mutawalli can be Removed**

a) Under clause (a) of Section 64, Mutawalli can be removed if he is convicted more than once under Section 61 of the Wakf Act, 1995.

b) If he is convicted of any offence of criminal breach of trust or any other offence involving moral turpitude. Under the Wakf Act, 1995 it is further, added that if such conviction has not been reversed or he has not been granted full pardon in respect of such offence, he would be liable to be removed. In other words, if his conviction is reversed he is granted full pardon the Mutawalli cannot be removed.

c) Unsoundness of mind or suffering of any other mental or physical defect or infirmity is also a ground of removal of Mutawalli as he would be practically unable to perform his duties for the maintenance and protection of Wakf property.

d) If he is un-discharged insolvent, an insolvent is one who is not able to pay his debts. Since insolvency may tempt or compel a Mutawalli to misappropriate the Wakf property, such person is disqualified to be appointed or to continue as Mutawalli.

e) If he is proved to be addicted to drinking liquor or other spirituous preparations or is addicted to be taking of any narcotic drugs. Islamic Law prohibits consumption of liquor and other spirituous preparation. However, under this clause mere consumption of liquor once or twice may not, probably, be sufficient to remove the Mutawalli as it is necessary to prove that he is "addicted" to such drinking liquor or taking

\textsuperscript{77} Ibid., Section 63.
other spirituous preparation or narcotic drugs and he is dependent on such things as a habit.

f) If he is employed as a paid legal practitioner on behalf of or against the Wakf, he is liable to be removed because of his inherent interest in the Wakf.

g) If he has failed to maintain or submit regular accounts for two consecutive years without any reasonable excuse under sub-Section (2) of Section 46, the Mutawalli is required to submit the statement of accounts before first May in respect of the year ending on 31st March each year.

h) If he is interested, directly or indirectly in any lease or contract or other work being done for the Wakf.

i) If he continuously neglects his duties or commits any misfeasance, malfeasance or misapplication of funds or breach of trust relating to Wakf property. In this clause also isolated case of neglect of duties would not liable Mutawalli to be removed unless he is neglecting his duties continuously.

j) If he wilfully and persistently disobeys the lawful order of the Central Government, State Government or the Wakf Board made under the provision of the act or under any rule or order made there under. While the Wakf Board as the key agency to implement the Wakf Act is empowered to issue orders and directions to the Mutawalli under various Sections of the Act, the Central Government and the State Government are also empowered to regulate secular activities of Wakfs and issue directions under Section 96 and 97 of the Act respectively.

k) If he misappropriates or fraudulently deals with the Wakf property.

It must be noted that the Wakf Board is empowered to remove Mutawalli on the grounds mentioned under Section 64 and such powers are limited only to such grounds as are enumerated under Section 64 and the Board should make out the case within the ambit and scope of the Section. The Madras High Court has held that78 the Wakf Board is vested with powers to remove a Mutawalli on certain limited grounds. If those grounds are not made out, the Board will, of course,

have no jurisdiction to remove a Mutawalli. However, it is for the Board, in the first instance, to consider, whether there are grounds made out for removal. The allegation of the respondent that the petitioner committed breach of trust and divested the Wakf properties to his private use, prima-facie will attract the Board’s jurisdiction to enquire into the whole allegation.

**Personal Rights not affected**

As per the provisions of sub-Section (2) of Section 64, the removal of the Mutawalli would not affect his personal rights either as a beneficiary or as a Sajjadanashin. Where a Sajjadanashin is also working as manager then he can be removed from managership under Section 64 and allowed to continue as Sajjadanashin unless it is proved that his continuance as Sajjadanashin is prejudicial to the interest of the Wakf.

Under sub-Section (3) of Section 64 it is mandatory for the Wakf Board to hold an inquiry into the allegations against the Mutawalli before taking any action against him. It is also a legal requirement that the inquiry must be held in a free and fair manner applying principles of natural justice. The Mutawalli shall have the right of being heard and to cross examine the witness against him. He should first be given charge sheet and an opportunity to offer his explanation. Before removing a Mutawalli, an enquiry has to be made and that hearing has to be neither fair hearing in other words such inquiry should be real and not illusory nor a colourable attempt at fulfilling a legal compulsion.

It was held by Karnataka High Court\(^79\) that Section 43 (Now Section 64 under the Wakf Act, 1995) which deals with the removal of a Mutawalli and which directs that a Mutawalli cannot be

removed without an inquiry and decision by the majority of the Board is mandatory. Therefore, the order of suspension passed against the petitioner in contravention to such provision is liable to be quashed.

**Majority Decision is Essential**

Under sub-Section (3) of Section 64, it is Further, laid down that the decision to remove a Mutawalli should be taken by a majority of not less than two-thirds of the members of the Board. It may be noted that under sub-Section (4) of Section 43 of the Wakf Act, 1954, such decision were required to be taken by a majority of not less than three-fourth of the members of the Board, which is now changed to two-third under the Wakf Act, 1995.

**Appeal to the Wakf Tribunal**

Any Mutawalli aggrieved by an order of the Wakf Board under this clauses (c) to (j) of sub-Section (b) of Section 64 may go in appeal to the Tribunal within one month from the date of the receipt of such order and the decision of Tribunal thereon shall be final.

**Suspension of Mutawalli**

Under the provisions of the old Wakf Act, 1954, a Mutawalli could have been removed under Section 43 after due enquiry, but there was no specific provision enabling the Wakf Board to suspend the Mutawalli. The Wakf Act, 1995 under sub-Section (5) of Section 64 has now provided that where any inquiry is proposed under sub-Section (3) against any Mutawalli and the Board is of the opinion that it is necessary so to do in the interest of the Wakf, by an order, may suspend such Mutawalli until the conclusion of the inquiry. Although the period of such suspension shall not exceed ten days but the same can be continued beyond ten days only after giving the Mutawalli a reasonable opportunity of being heard against the proposed action.
Appointment of Receiver

Where any appeal is preferred by the Mutawalli to the Tribunal under sub-Section (4) of Section 64, the Board may make an application to the Tribunal for the appointment of a receiver to manage the Wakf during pendency of the appeal. The Tribunal in case of such application has to appoint a suitable person as receiver to manage the Wakf and ensure that the customary or religious rights of the Mutawalli and of the Wakf are safeguarded.

Delivery of Possession may be ordered

Where a Mutawalli has been removed from his office, the Wakf Board may by order direct the Mutawalli to deliver possession of the Wakf property to the Board or any officer authorised in this regard or to any person or committee appointed to act as the Mutawalli of the Wakf property. Further, under Section 68 of the Act, the Mutawalli is under obligation to handover the complete charge of the Wakf property along with - book of Accounts and other relevant documents including cash, if any. In case he refuses or fails to do so then the Magistrate concerned may, after giving him a notice, order to comply with the orders and deliver the possession of the Wakf property. Failure of the Mutawalli to comply with the orders of the Magistrate could attract punishment of imprisonment for a term, which may extend to six months or with fine upto eight thousand rupees, or with both under sub-Section (3) of Section 68 of the Wakf Act, 1995.

Supervision and Supersession of Committee of Management by the Board

The purpose of Section 67 is to confer supervisory powers on the Wakf Board in relation to such Wakfs which are managed by a committee appointed by the Wakfs, under Section 3 (1) the definition of
Mutawalli also includes in its scope any committee or corporation appointed to manage the Wakf and therefore such committee would be under supervision of the Board. Under this Section, such committee is required to function under the direction, control and supervision of the Board and abide by such directions of the Board. In respect to any scheme made by the committee for the management of the Wakf, the Wakf Board is empowered to modify such scheme if the Board is satisfied that such scheme made by the committee is inconsistent with any provisions of the Act or of any rule made thereunder or with the directions of the Wakf and therefore the Wakf Board can modify such scheme to bring it in conformity with the directions of the Wakf or of the provision of this Act or any rule made thereunder. The Wakf Board is also empowered to supersede such committee if it is satisfied that such committee is not functioning properly; that it is being mismanaged or it is necessary to do so in the interest of the Wakf. But before doing so the Board has to give a notice setting forth the reasons for the proposed supersession and calling upon the committee to show cause within such time not being less than one month as may be specified in the notice, as to why action shall not be taken and every such order shall be published in the prescribed manner. One such publication the order of the Board shall be final and binding on the Mutawalli and all persons having any interest in the Wakf. However, any person aggrieved by the order of the Wakf Board, may, within sixty days from the date of the order, appeal to the Tribunal. However, the Tribunal does not have any power to suspend the operation of the order by the Board during pendency of such appeal.

The Wakf Board also has to remove any members of such committee instead of superseding the whole committee. The removal of the member of this committee is also governed by the same procedure
and the Board is required to give notice providing reasonable
opportunity to the member to show cause against the proposed action
and he also has the power of appeal to the Tribunal against the
proposed action and he also has the power of appeal to the Tribunal
whose action modifying, reversing or confirming such order of the
Board shall be final.

**Power of Board to Frame Scheme of Administration of Wakf**

Section 69 of the Act confers wide powers on Wakf Board to
frame any scheme for administration of any Wakf on the basis of its
own motion or on the application of not less than five persons
interested in the Wakf. The justification of framing of the scheme for
administration of Wakfs is the “necessary” or “desirability” of such
scheme for “proper administration of the Wakf”. However, it is
incumbent on part of the Board to settle such scheme of management
only after giving the party to be affected an opportunity of being heard
as is required under clause (d) of Section 32 of the Act.

Further, while framing such scheme, the Board has to consult the
concerned Mutawalli and such scheme may also provide the removal of
the Mutawalli provided that where any hereditary Mutawalli is likely to
be removed then the proposed scheme provide for appointment of such
hereditary Mutawallis as one of the members of the committee
appointed for the purpose of proper administration. Every such order
is required to be published in the prescribed manner and it shall be final
and binding on the Mutawalli and all other persons interested in the
Wakf on publication of such order. However, any person aggrieved by
the order may, within six days from the date of order, prefer an appeal
to the Tribunal. Again, the Tribunal may revise, modify or confirm the

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80. Supra note 2, Section 69, Sub-Section (2)
81. Ibid., Sub-Section (3)
order of the Board and such order of the Tribunal becomes final but the Tribunal has no power to stay the operation of the order made under this Section. The Board is also empowered to appoint any suitable person to perform all or any of consultation with the Mutawalli and the publication of such framing of the scheme have to be carried out in accordance with the rules that can be made under Section 109 of the Act.

Power to Conduct Inquiry and the Procedure Thereof

Under Section 70 of the Act, any person interested in a Wakf may make an application to the Wakf Board supported by an affidavit to institute an inquiry relating to the administration of the Wakf. If the Board is satisfied that the Wakf is being mismanaged, it shall take such action as it thinks fit. Further, under Section 71, the Board, either on its own motion or application received under Section 73, may hold an inquiry in such manner as may be provided or authorise any person to hold inquiry into any matter relating to a Wakf and take such action as it thinks fit. For this purpose, the Board or any authorised person shall have the same powers as are vested with a civil court under the code of Civil Procedure for the purpose of enforcing attendance of witnesses and compelling production of documents.

The Standing Committee on Labour and Welfare (1994-95) in its report recorded that the “Members were critical about the number of frivolous complaints being received by the Wakf Board. They were of the view that there should be some safeguard against such complaints for the smooth functioning of the Board. In order to have a check on frivolous complaints being lodged in various Wakf Boards, the Committee desire that the complainants should be asked to deposit

82. Supra note 19, p. 9
certain cost of inquiry with the Board along with their complaints. The committee are, therefore, of the view that suitable provisions to this effect should be made in the rules under the Act”. Since the recommendation of the Standing Committee is based on factual analysis, it deserves, to be incorporated in the rules to be made under this Section.

**Power to Borrow Money**

For giving effect to the provisions of this Act, the Board may with the previous sanction of the State Government, borrow such sum of money and on such terms and conditions as the State Government may determine.83

**Spending of Wakf Fund**

Section 77 of the Wakf Act, 1995 correspond, to Section 48 of the Wakf Act, 1954 but differs in certain respects. It specifies various components that constitute a fund to be called “Wakf Fund” and lays down that all moneys received or realised by the Board under this Act and all other moneys received by way of donations, beneficiations, or grants by the Board shall form a fund to be called “Wakf Fund”.

It may Further, be noted that under the Old Wakf Act, 1954. The expenditure towards the cost of audit of accounts of any Wakfs was to be paid out of the Wakf Fund under Sub-Section (3) of Section 33 of the Wakf Act, 1954 therefore such expenditure was allowed under clause (b) of Sub-Section (3) of Section 48 of the Old Wakf Act, 1954. However, under the provisions of the New Wakf Act, 1995 the cost of the audit of any Wakf is now to be met out of the funds of that Wakf and it is not to be paid out of Wakf fund of the Wakf Board. However, such expenditure of audit of accounts of any Wakfs is still in clause (b) of

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83. Supra note 2, Section 75, Sub-section (1)
Sub-Section (4) of Section 77 of the Wakf Act, 1995 to be met out of the Wakf fund under this Section. Such inclusion obviously appears to have crept inadvertently.

**Budget and Audit of Accounts of the Wakf Board**

The provisions contained under Sections 78 to 82 of the Act deals with the preparation of budget of the Board, submission and audit of accounts of the Board, Government orders on such report of the auditor and the procedure for recovery of dues from the Wakf Board. Similar provisions relating to submission of budget etc., by the Wakf Board are incorporated under Section 44 to 49 of this Act. The only difference underlying these Sections is that the budget, its preparations, audit of accounts etc., of the Wakfs are required to be submitted by the Wakfs to the Wakf Board under Section 44 to 47 while the same relating to Wakf Board is to be submitted by the Wakf Board to the Government under Section 78 to 80. In both the cases, dues are recovered as arrears of land revenue under Sections 49 and 82 pertaining to the Wakfs and the Wakf Board respectively.

**No Suit against Wakf Board without Two Months Notice**

No suit can be instituted against the Wakf Board in respect of any act purporting to be done by it in pursuance of this act or any rules made there under, unless a written notice is delivered or left at the office of the Wakf Board two months in advance. Such notice should specify the name, description, place of residence, the cause of action and the relief sought for by the plaintiff, and the plaint shall also contain a statement that such notice has been so delivered or left. The Madras High Court had clarified that this Section is in general terms and it covers all suits questioning the validity of any action of the Board. The

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84. Ibid., Section 89.
Section imposes a statutory and unqualified obligation upon the courts to dismiss a suit for non-compliance with its provisions.

**Wakf Board to Apply to Tribunal for Directing the Mutawalli to Pay Money for Performance of Pious Religious or Charitable Act**

Section 94 of the Act lays down that where a Mutawalli is under obligation to perform any act recognised by Muslim law as pious, religious or charitable and the Mutawalli fails to do so, then the Wakf Board may apply to the Tribunal for an order directing the Mutawalli to pay to the Board or to any other person authorised by the Board such amount as may be necessary for the performance of such act. In respect of any other duties of the Mutawalli, wilfully fails to discharge his duties then the Board or any person interested in Wakf may apply to the Tribunal and the Tribunal may pass such order as it thinks fit.

**Members of the Wakf Board to be Public Servant**

The act provides protection to the officers of the Wakf Board, Survey Commissioner and every other person duly appointed to discharge any duties under this act or any rule or order made thereunder by declaring that they shall be deemed to be Public Servant within the meaning of Section 21 of the Indian Penal Code. Similarly every Mutawalli of a Wakf, every member of the Managing committee, every Executive Officer and every other person holding office in a Wakf is deemed to be a 'Public Servant'.

The Wakf Inquiry Committee, 1976 made important observation in this regard, thus "Section 111 of the Andhra Pradesh Hindu Religious Endowments Act of 1966 goes much further," (in this regard). Under the aforesaid Section of the Andhra Pradesh Act, any trustee or any

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86. Ibid., Section 94, Sub-section (1 & 2)
87. Ibid., Sub-section (2)
88. Ibid., Section 102, Sub-section (1 & 2)
member of the Board of trustee, the Executive Officer or any office holder or servant of a charitable or religious institution shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code. This provision incorporated in the Andhra Pradesh Act on the specific recommendations of the select committee which considered the Andhra Pradesh Bill, as the committee was anxious that the Prevention of Corruption Act should be made applicable to every trustee and all members of Trust or to officers employed by the trustees and also the Executive Officer appointed by the Endowment Commissioner. In the control of the deep-seated corruption rampant in the management of Wakfs, we consider that the Prevention of Corruption Act should be made applicable to Mutawallis as well. We feel that persons managing the property vested in God should be no less liable than public servants and trustees for acts of corruption. We therefore consider that over and above the provision of surcharge recommended by us earlier in our report Mutawallis and other office holders and employees of Wakf, should be deemed to be Public Servant within the meaning of Section 21 of the Indian Penal Code in order that Prevention of Corruption Act may be made applicable to them which would facilitate speedier investigation and penal action against them.”

Thus it may be seen that the sub-Section 2 of Section 101 of the Wakf Act 1995 is exactly based on the draft Section 66 of the Old Wakf (Amendment) Act, 1984.

**Power to Require Copies of Documents**

The Act empowers the Board or the Chief Executive Officer to require any person having the custody of any record, register, report or other documents relating to a Wakf or any immovable property, which is Wakf property, to furnish, subject to the payment of necessary costs,

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89. Supra note 4, p. 90
copies of, or extracts from any such records, register, report or document and every person to whom such a requisition is made, shall furnish, as soon as may be practicable, to the Board or Chief Executive Officer, copies or extracts from the required record, register, report or other document.\textsuperscript{90}

\textbf{Restoration of Evacuee's Wakf Property}

The problem of evacuee's Wakf property owes its origin to the circumstances created immediately after the Partition of the country in August, 1947 when hundreds of thousands of people migrated from India to Pakistan leaving behind them enormous properties both movable and immovable, some of them being Wakf properties. Mutawallis of such Wakf properties had also migrated and there was no proper record or information regarding such properties. Since the evacuees could not arrange for the protection of their properties behind them, many of such properties were taken over by the unauthorised occupants and this uncertain situation necessitated passing of the Administration of Evacuee Property Act, 1950 and Section 11 of this Act contained special provisions with respect to evacuee properties. According to this Section, where any evacuee property, which vested in the custodian, was the trust property for a public purpose of a religious or charitable nature, the Central Government could appoint a new trustee, by general or special order, in place of evacuee trustee. It further, if such evacuee property shall remain vested in custodian only till such time as the new trustees were so appointed. Due to this arrangement a substantial number of Wakf properties were restored which otherwise could have been lost. However, a great deal of difficulty was faced in respect of the properties for which no written instruments, documents or Wakfnamas were available to prove and

\textsuperscript{90} Supra note 2, Section 105
claim such properties as Wakf properties. In particular, graveyards in isolated places and other unprotected premises like mosques, the trespasser into their own dwellings converted madrasas etc.

It is against this background that the Old Wakf Act, 1954 was amended to incorporate a special provision relating to such evacuee Wakf property under Section 66-H of the Wakf (Amendment) Act, 1984. Although this amended act of 1984 was not brought into force. Section 66-G and Section 66-H were the only two Sections, which were enforced. Now the contents of Section 66-H are incorporated under Section 108 of the Wakf Act 1995. This Section, inter-alia, authorises the Wakf Board to assume direct management of such evacuee Wakf property and such Wakf property would be vested in the Wakf Board in the same manner and effect as in a trustee of such property for the purpose of Sub-Section (1) of Section 11 of the Administration of Evacuee Property Act, 1950.

Powers to Make Regulations

Section 110 empowers the Board with previous sanction of the State Government to make regulations generally for carrying out the purposes of the Act\(^\text{91}\) and particularly for any of the matters mentioned in clauses (a) to (1).\(^\text{92}\) All regulations made by the Board should be published in the Official Gazette and the regulations shall be effective from the date of such publication.\(^\text{93}\)

Chief Executive Officer—Power, Duties, Appointment, Term of Office and Other Conditions of service

Under Section 23 of the Wakf Act, 1995, the State Government appoints the Chief Executive Officer by notification in Official Gazette.

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91. Ibid., Section 110, Sub-section (1)
92. Ibid., Section 110, Sub-section (2)
93. Ibid., Section 110, Sub-section (3)
He is appointed by the State Government with the consultation of the Wakf Board. The Office of the Chief Executive Officer is the special feature of the Wakf Act, 1995 and it owes its origin to the recommendations of the Wakf Inquiry Committee, 1976. Infact, it was recommended by the Wakf Inquiry Committee to appoint, what is called, a Wakf commissioner and a non-official Wakf Board with the separation of powers between them and demarcate functions based on the keyword “superintendence” and Administration. The proposed “Wakf Commissioner” is designated as Chief Executive Officer under Wakf Act, 1995. The necessary qualifications of the Chief Executive Officer are not prescribed under the Act and the same may be prescribed under the rules to be prepared by the State Government. However, the Act lays down that the Chief Executive Officer shall be a Muslim and he shall be ex-officio Secretary of the Wakf Board and as such would work under the administrative control of the Board. The Wakf Inquiry Committee had emphatically recommended that the Chief Executive Officer (Wakf Commissioner) shall not be placed under the Administrative Control of the Board as it was apprehended that such subordination would effect the prestige of his keeping in view the vast administrative functions of Chief Executive Officer has to discharge for the protection of the Wakf properties and exercise his control over the Mutawallis for the same purpose.

**Powers and Duties**

As mentioned earlier, the Chief Executive Officer has to function subject to the provisions of the Wakf Act, 1995, and the direction of the Wakf Board. Thus, the Chief Executive Officer is placed under the administrative control of the Wakf Board. However, the Wakf Board, while giving such direction, has to act in conformity with the directions

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94. Ibid., Section 23, Sub-section (3)
by the Wakf as specified in the Wakf deed (Wakfnama), purpose of the
Wakf and such usage and customs of Wakfs as are sanctioned by the
School of Muslim Law to which the Wakf belongs. This provision is
added on the basis of the recommendation of the Standing Committee
of Labour and Welfare which expressed its opinion that interests of
Wakfs belonging to various categories of Muslim Schools of thought
need to be protected in accordance with the relevant usages and
customs of such schools. Hence, it is incorporated under Section 25 (2)

Subject to the above conditions the Chief Executive Officers' functions and duties include investigation of the nature and extent of
Wakf and Wakf properties, inspection of lands accounts, deeds, and
documents and take such steps as are necessary for the control,
maintenance and supervision of Wakfs. In addition to this, the Chief
Executive Officer, shall also exercise such other powers as may be
delegated to him under the Act.

While the Chief Executive Officer has to work under the direction
of the Wakf Board, he is empowered to refrain from implementing any
resolution of the Wakf Board if he considers that such resolution:

1) has not been passed in accordance with the law or,
2) is in excess of, or is an abuse of the powers conferred on the Board
   by or under the act or by any other law, or
3) if implemented is likely to cause financial loss to the Wakf Board or
to the concerned Wakfs generally or lead to a riot or breach of
   peace or cause danger to human life, health or safety or is not
   beneficial to the Board or to any Wakf or
4) is not beneficial to the Board or to any Wakf, or Wakfs in general
   on the above reasons, the Chief Executive Officer may place such
   resolutions of the Wakf Board for its reconsideration and if such

95. Ibid., Section 25, Sub-section (2)
96. Ibid. Section 25, Sub-section (3)
order or resolution is not confirmed by a majority of votes of the members present, then the Chief Executive Officer has to refer the matter to the State Government along with his objections to the order, or resolution and the decision of the State Government shall be final. However, it may be noted that in the Wakf (Amendment) Act 1984 similar provision existed under Section 231-D with a glowing difference that the Chief Executive Officer, on the grounds mentioned under clauses (a) to (d) of Section 21-D above could directly submit such order or resolution of the Board to the State Government along with his objections and the decision of the State Government shall be final. But in the Wakf Act 1995, the Chief Executive Officer is required to place such order or resolution before the Wakf Board for its reconsideration and if the Board reconfirmed such order or resolution with a 'majority' of votes of the members of the Board present in the meeting, then the Chief Executive Officer is obliged to implement such order or resolution of the Board. It is only in the case where the Board fails to reconfirm its order with the majority of votes that the Chief Executive officer has to place it before the State Government for its decision.

It may be noted that originally the proposed Wakf Bill contained the word “Unanimity” among the members of the Board at the stage of reconsideration. However, the Standing Committee felt that such provision gives overriding power to the Chief Executive Officer as the condition of “unanimity” makes the Board a pawn in the hands of the Chief Executive Officer. Thus, the Standing Committee recommended substitution of the word ‘Unanimity’ with the words “simple majority”.

Chief Executive Officer to Exercise Powers Through Collectors:

Under Section 28 of the Wakf Act, 1995, the Chief Executive Officer is required to exercise all or any of his powers conferred on him by this Act through the Commissioner of Division or the collector of the concerned district. As originally proposed by the Wakf Bill, this Section empowered the Chief Executive Officer “to delegate all or any of his powers to Commissioner of the Division or the Collector of the
concerned district. However, the Standing Committee noted that the Chief Executive Officer relatively is a junior officer and as such he can neither exercise his powers through his seniors i.e., Commissioners, collectors, nor delegate to them. Therefore, the Standing Committee\textsuperscript{98} recommended redrafting the whole Section making the exercise of the powers of Chief Executive Officer through rules and regulations and with the prior approval of the Board. Thus, the recommendation is incorporated under Section 28 of the Wakf Act, 1995.

**Powers of the Chief Executive Officer to Inspect Records, Register in Public Office**

This is an important feature of the Wakf Act 1995, which confers powers on the Chief Executive Officer or any other officer of the Board duly authorised by him to inspect in any public office any record, register or other document relating to a Wakf or movable or immovable properties which are Wakf properties or are claimed to be Wakf properties. Such inspection is subject, however, to such conditions and restrictions as may be prescribe and subject to payment of such fees as may be leviable under any law for the time being in force. Such conditions and restrictions may be prescribed by the State Government under clause (vi) of Sub-Section (2) of Section 109 of the Act. Similar provisions existed in the Wakf (Amendment) Act, 1984 and under Section22-b as per the recommendation of the Wakf Inquiry Committee, 1926 which is now incorporated under Section 29 of the Wakf Act, 1995. Similar provision was also found under Section 99 of the Tamil Nadu Hindu Endowment Act, 1959.

\textsuperscript{98} Supra note 19, p. 6
Powers of the Chief Executive Officer to Examine Mutawallis Negligence and Failure

Section 33 of the act empowers the Chief Executive Officer to inspect any movable or immovable Wakf property, with the prior approval of Board, in order to find out whether, by reason of any failure or negligence on the part of a Mutawalli in the performance of his executive or administrative duties, any loss or damage has been caused to any Wakf property. For this purpose the Chief Executive Officer or any other person authorised by him can inspect all funds, correspondence, places, accounts and other documents relating to such Wakf. To facilitate such inspection, all the concerned officers, employees, Mutawalli and every person connected with the administration of the Wakf are required to extend such facilities and assistance, as may be necessary.\(^\text{99}\)

If during such inspection it appears that the concerned Mutawalli or any other person or employee has misappropriated, misapplied or fraudulently retained any money or other Wakf property, or had incurred irregular or unauthorized expenditure, then the Chief Executive Officer may, after giving him a notice in the prescribed and after considering his explanations make an order requiring such person to make the payment of the amount so determined and to restore the said Wakf property within such time as may be specified in the notice.\(^\text{100}\) However, such Mutawalli or any other person aggrieved by the order of the Chief Executive Officer may within a period of 30 days from the date of receipt of such order, appeal to the Wakf Tribunal. However, the Tribunal shall entertain no such appeal unless the appellant first deposit with the Chief Executive Officer the amount

\(^\text{99}\) Supra note 2, Section 33, Sub-section (2)
\(^\text{100}\) Ibid., Sub-section (3)
determined by the Chief Executive Officer as payable by the Mutawalli or any other person, as the case may be provided. Further, that the Tribunal shall have no power to grant any stay of proceeding or operation of the order made by the Chief Executive Officer. However, the Tribunal is empowered, after taking such evidence as it may think fit, to confirm, reverse or modify the order made by the Chief Executive Officer and may make such order as to costs as it may think appropriate. Such order of the Tribunal shall be final.

Chief Executive Officer to Prepare Budget of Wakfs under Direct Management

Under Section 45, the preparation of Budget in respect of the Wakfs under the direct management of the Wakf Board is entrusted to the Chief Executive Officer who is also obliged to comply with the similar statutory requirements under the Act. However, he is authorised to charge administrative charges not exceeding ten percent of the gross income of the concerned Wakf under the direct management of the Wakf Board. Such charges are payable to the Wakf Board.

Enforcement of Orders through Magistrate

Section 55 provides for the procedure for the enforcement of the order made by the Chief Executive Officer under Section 54 and lays that where any person ordered under Sub-Section 3 of Section 54 to remove any encroachment omits or fails to remove such encroachment from the Wakf property then the Chief Executive Officer may apply to

101. Ibid., Section 33, Sub-section (4)
102. Supra note 100
103. Supra note 2, Section 130, Sub-section (5)
104. Ibid, Sub-section (6)
105. Supra note 2, Section 45, Sub-section (7)
the concerned sub-divisional Magistrate for evicting such encroachment.

On receiving such application from the Chief Executive Officer, the Magistrate has to make an order directing the encroacher to remove encroachment from the Wakf property and deliver the possession to the concerned Mutawalli. In case of default of compliance with the order of the Magistrate to handover possession of the Wakf property, the Magistrate shall evict the encroacher and for this purpose, he can take such police assistance as may be necessary.

Powers of the Chief Executive Officer to Direct Banks, Persons to Make Payment

This is a new and a crucial provision incorporated under Section 73 of the Wakf, 1995. By virtue of this Section, the Chief Executive Officer has been empowered to recover contribution leviable under Section 77 from such of the banks or other persons with whom any money belonging to a Wakf is deposited. Thus, in case of delay, refusal or non-payment of annual contribution payable by the Wakfs to the Wakf Board, the Chief Executive Officer, notwithstanding anything contained in any other law for the time being in force, or if he is satisfied that it is necessary so to do, may make order directing any bank in which, or any person with whom any money belonging to such Wakf is deposited, to pay the contribution leviable under Section 72, out of such money as may be standing to the credit of the Wakf in such bank or may be deposited with such person. On receipt of such order the bank or the other person, as the case may be, shall comply with such orders. However, the bank or such other person may make appeal within thirty days from the date of receipt of such order, to the Tribunal and the decision of the Tribunal shall be final thereon. In case the bank
or the other person so ordered by the Chief Executive Officer or in the case of appeal, by the Tribunal, fails without any reasonable excuse to comply with the order, shall be punishable with fine which may extent to eight thousand rupees, or with imprisonment for a term which may extend to six months or with both.

Thus, this an important executive power conferred by the new Act on the Chief Executive Officer, which would contribute to strengthen the finances of the Wakf Board in a more effective and prompt manner. This Section corresponds to Section 46-A of the Wakf (Amendment) Act, 1986 and similar provision is also found under Section 59 of the Bombay Public Trust Act, 1950.

**Mutawallis Duty to Apply for Registration of Wakfs**

Section 36 of the Wakf Act 1995, provides for the registration of a Wakf at the office of the Wakf Board and the manner in which an application for registration of Wakf is to be made. It requires that the application for registration shall be made by the concerned Mutawalli, provided that the wakif himself, or his descendants or a beneficiary of the Wakf or may make such application even by any Muslim belonging to the sect to which the Wakf belong.

**Preparation and Submission of Budget of Wakf**

As per the provisions of Section 44 of the Wakf Act, 1995, every Mutawalli is under the obligation to prepare a budget in the prescribed manner and forming respect of the financial year next ensuing, showing the estimated receipts and expenditure during that financial year. This proposed budget has to be submitted by every Mutawalli to the Wakf Board at least ninety days before the beginning of the financial year. This budget shall make provision for carrying out the objects of the Wakf, maintains and preservation of the Wakf property and the
discharge of all liabilities in commitments binding on the Wakf under the provisions of this Act or any other Law for the time being in force.106

The Wakf Board is obliged to examine, scrutinise and approve the budget submitted by the Mutawalli107 and while doing so it may give such directions as it may deem fit for making alternations omissions or additions in the budget, subject. However, to condition that such directions shall be consistent with the object of the Wakf and the provisions of the Act.108

Further, the Mutawalli may make any modification in the budget if it is necessary doing the course of the financial year in respect of receipts or distribution of the amounts to be expended in different heads of accounts. And he may submit to the Wakf Board a supplementary budget and in that case the Wakf Board shall have same powers to scrutinise and approve it.109

Submission of Accounts of Wakfs

Under Section 46 of the Wakf Act, 1995, every Mutawalli is required to submit a full and true statement of accounts in the prescribed form and manner and this statement shall contain such particulars as may be provided by the regulations by the Board of all moneys received and expended by the Mutawalli during the period of twelve months ending on 31st day of March each year. Such statements of accounts shall be submitted before the 1st day of May every year. However, the date on which the annual accounts are to be closed may be varied at the discretion of the Board.
Payment of Annual Contribution to Wakf Board

Section 72 of the Wakf Act, 1995 corresponds to Section 46 of the Old Wakf Act, 1954. However, under the new Act drastic changes are brought in and the expression "net annual income of such of its property" appearing in Sub-Section (1) of Section 46 of the Old Act has been deleted. In fact, the Wakf Inquiry Committee, 1976 has also taken a note of the implications of these words due to which "Nazars" and "offerings" made at the Dargah were excluded from the assessment for the purpose of contribution. The Wakf Inquiry Committee observed, thus "we further, consider that the following word occurring in Sub-Section (1) of Section 46 of the Central Wakf Act as it stands to evict, net income of such of its properties it stands to led law courts to interpret the above quoted phraseology to mean the contribution payable by a Wakf is limited to the income derived from its "properties" only, and not from other sources. Following the aforesaid line of interpretation, the Tamil Nadu High Court held in a few cases that "Nazars" and "offerings" made at the Dargah are excluded from the assessment for the purpose of contribution. Hence, in our opinion the words "Such of its properties" in Sub-Section (1) of Section 46 of the Central Wakf Act 29 of 1954 should be deleted". Therefore, following this recommendation, the Wakf Act, 1995 provided an explanation to Sub-Section (1) of Section 72 and thereby laid down that net annual income" include nazars and offerings which do not amount to contributions to the corpus of the Wakfs." Thus, nazars and offerings, which are not specifically earmarked by the donors towards corpus of the Wakf should be included in the expression of net annual income for the purpose of calculating 6% contribution of the Wakf income to the Wakf Board.

110. Supra note 4, pp. 49-50
Further, it was claimed by some of the Mutawalli that certain expenditure incurred by them on account of working expenses, particularly cost of cultivation and collection etc., should be allowed to be deducted from the net annual income for the purpose of calculating contribution payable to Wakf Board. Since there was considerable force in the suggestion on grounds of equity and natural justice, they have now been allowed under clause (a) to (f) of Sub-Section 72. However, the maximum dedication on account of these expenses was restricted to ten percent of the income derived from lands belonging to the Wakf.

Another important point raised in connection with the contribution payable to the Wakf Board related to the inequalities in the quantum of contribution and the nature of service rendered by the Wakf Board. In fact, this crucial argument was posed to challenge Section 46 of the old Wakf Act, 1954, case of Kerela Wakf Board v. Abdul Sattar Hajee Moosa Sait and others. While allowing the appeal of the Kerela Wakf Board, the Division Bench of the Kerela High Court has made the following important observation on the question of uniform levy of contribution and its effects inter se in between the various Wakfs. Thus, "The inequalities alleged because of some Wakfs having to pay more out of their net income (meaning profit and gains) proportionately than others it appears arising from the nature of enjoyment of properties or, even the nature of the properties owned by a Wakf cannot be made a ground for supporting the contention that an import such as a fee at a uniform rate on the gross income of Wakfs is violate of Article 14 of the Constitution, as we are not able to discern any clear hostile discrimination of the singling out if any Wakf or any class if Wakfs for special or peculiar treatment. This discrimination, if any, as stated already, seems to arise out of the fortuitous circumstances."

It may Further, be noticed that the existing Section 72 of the Wakf Act, 1995 is based on the recommendation of the Wakf Inquiry Committee 1976 and correspond to the draft Section proposed by the Committee in its Final Report.\textsuperscript{112}

The quantum of contribution payable by the Wakf to the Wakf Board is now increased from 6% to 7% as may be prescribed. Non-payment or failure, or refusal by the Mutawalli to pay annual contribution to the Wakf Board is a punishable office under the Act.

**Mutawalli not to Lend or Borrow Money without Sanction of the Wakf Board**

This is also a new Section, which imposes restriction on power of the Mutawalli to lend any money belonging to the Wakf or any Wakf property or borrow any money for the purpose of the Wakf except with the previous sanction of the Wakf Board. However, no such provision in the Wakf Deed for such borrowing or lending. However, in the case where the sanction of the Wakf Board is required, the Wakf Board is also empowered to specify any terms and conditions subject to which such lending or borrowing of money may be sanctioned. If any Mutawalli lends or borrows any money in contravention to this Section or without the previous sanction of the Board then the Chief Executive Officer is empowered to recover such amount so lent or borrowed from the concerned person or Mutawalli together with interest due thereon.

**Recommendation of the Standing Committee**

The Standing Committee of Labour and Welfare (1994-95) However, recommended, thus, "In this connection the Members were of the opinion that some Wakfs are set up for the purpose of giving Qarz-i-Hasanah (interest free loan) for various purposes and therefore the

\textsuperscript{112} Supra note 4, p. 51.
provision in its present form requiring prior approval of the Wakf Board is unwarranted. Thus in accordance with this recommendation such lending or borrowing of money, if permitted by express provision in the Wakf Deed is allowed under proviso to Sub-Section 1 of Section 76.

Tribunal's Powers and Duties

Disputes Regarding Wakfs

Despite regarding any property declared as Wakf property in the list of Wakfs published under Section 5(2) can be taken to the Wakf Tribunal by either the Wakf Board or the Mutawalli of the Wakf or any person interested therein. The dispute can relate to the question whether a particular property is a Wakf property or not, or whether it is a Shia Wakf or a Sunni Wakf.

The expression "any person interested therein" appearing in Section 6 above includes not only a "person interested in the Wakf" as defined under Sub-Section (K) of Section 3, but it also includes a person who, though not interested in the Wakf concerned, is interested in such property and to whom an opportunity has been given to represent his case by serving a notice on him during the course of the relevant inquiry under Section 4.

The Rajasthan High Court in 1967 held that the purpose of Section 6 is to confine the dispute between the Wakf Board, the Mutawalli and a person interested in a Wakf, and therefore, this Section has no application to any stranger to a Wakf. Consequently, the finality of the list of Wakf published under Section 5 (2) would be against such persons who are entitled to file a suit. In order to overcome the effects

113. Supra note 19, p. 10
115. AIR 1978, SC, p. 289
of these judgements and to render finality to the list of Wakfs against every person an explanation was added in Wakf (Amendment) Act, 1984, which was not brought into force. Therefore, in the Wakf Act, 1995 the explanation to Section 6 again included every person who, though not interested in the Wakf concerned, is interested in such property. This explanation would also cover within its ambit a non-Muslim who is permitted according to Muslim Law, to create a Wakf or to donate any property for the welfare of the Muslims. Thus, after this explanation, Section 6 now binds such person also who may not be interested in the Wakf, but is interested in such property.

The Karnataka High Court\(^{116}\) has held that limitation of one year for filing suit challenging inclusion of certain property in list of Wakfs does not apply to the government as the plaintiff government cannot said to be bound by the said limitation.

**Constitution of Tribunal**

The administration of Justice through Tribunal has become increasingly common in the modern judicial system in India and in almost all-important spheres of litigation; specialised Tribunals under various legislations are existing. The Income Tax Tribunal, Air Corporation Tribunal, Administrative Tribunal, Industrial Tribunal, Water Tribunal, etc., are few to mention. The very purpose of setting up such Tribunals is to provide expert machinery for the resolution of disputes relating to more specialised legislations, and secondly to avoid delay, which is a common feature of ordinary, law courts, which are subject to cumbersome procedure due to rigid adherence to the Civil Procedure Code and the Indian Evidence Act. Therefore, on similar grounds the Tribunals are set up for expeditious and expert disposal of

Wakf litigation. To start with, the Uttar Pradesh Muslim Wakf Act, 1960 empowered the State Government to constitute, as may Tribunals as may be considered necessary to cope up with the Wakf litigation. Thus, the U.P. State Government constituted Wakf Tribunals in all the Districts of the State headed by either the District or a Civil Judge of the concerned District, and the total number of such Wakf Tribunal in the State of U.P. along reached Fifty-five. Since the establishment of such a large number of Tribunals cost heavily on the State Ex-Chequer, the Wakf Inquiry Committee, 1976\textsuperscript{117} suggested as a via media, to constitute regional Wakf tribunal covering certain number of districts.

In the Central Wakf Act, 1954 also and amendment was brought in to provide for Tribunal under the Wakf (Amendment) Act, 1984 but it was not enforced. Now again in the Wakf Act, 1995 the entire scheme of resolution of Wakf litigation by Tribunal has been provided under Section 83 to 95.

It directs the State Government to constitute as many Tribunals as it thinks fit. Every such Tribunal shall consist of one judge not below the rank of District and Session Judge or Civil Judge, Class I.\textsuperscript{118}

Any Mutawalli or any person interested in a Wakf or other person aggrieved by an order made under the act or rules may apply to the Tribunal within the specified time for the determination of any dispute question or other matter relating to Wakf.

**Powers and Procedure of Tribunal**

The Tribunal constituted under the Act shall have the same powers as are vested with the Civil Court constituted under the code of Civil Procedure 1908 while trying suit or executing a decree or order.\textsuperscript{119}

\textsuperscript{117} Supra note 4, p. 32.
\textsuperscript{118} Supra note 2, Section 83, Sub-section (1 & 4)
\textsuperscript{119} Ibid, Sub-Section 5
It may be noted that the Wakf Inquiry Committee, 1976\textsuperscript{120} has recommended that the procedure to be followed by the Tribunal should be simple, less cumbersome and expeditious and in any case, it should not be hampered by the cumbersome procedure under the Code of Civil Procedure, 1908. Therefore, under Sub-Section (6) of Section 83, it is laid down that the Tribunal shall follow such procedure as may be prescribed and anything contained in the Code of Civil Procedure, 1908 shall not apply to Tribunal. In fact, the main purpose of constituting any Tribunal is to ensure expeditious disposal of cases and avoid usual delay by the cumbersome of the Civil Courts.

Therefore, the procedure before the Tribunal is made flexible and the principles of natural justice are strictly adhered to. In line with the current progressive judicial trend with regard to the necessity for greater flexibility, even in the matter of procedure adopted law courts, the Supreme Court has also adopted a liberal point of view on the subject. The Supreme Court has made the following important observation:\textsuperscript{121}

"Rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no material should be relied on against him without his being given an opportunity of explaining them. If these rules are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in the Evidence Act for taking evidence was not strictly followed".

\textsuperscript{120} Supra note 4
It is also pertinent to note that the decision of the Tribunal is made final and binding upon the parties and it shall have the force of a decree made by a Civil Court, and no appeal lies against any decision or order whether interim or otherwise given by the Tribunal. This provision is also made in accordance with the recommendations, of the Wakf Inquiry Committee, 1976 which said thus, "On the analogy if Section 76 of the Uttar Pradesh Wakf Act of 1960. The Amendments Committee has recommended that the award of a Tribunal shall be considered as final, conclusive and binding upon the parties concerned and the award shall have the force of a decree and that it shall not be questioned in any Court of Law. In view of the fact that in the case of the Uttar Pradesh Sunni Central Wakf Board v. Sirajul Haq, a doubt arose as to whether an appeal can lie against an interim order passed by the Tribunal during the pendency of the reference before it, it would be better if it is made clear that the final award and any interim order issued by a Wakf Tribunal shall be considered as final and conclusive."

However, it is further, laid down in the Wakf Act, 1995 that such finality shall be subject to the condition that the High Court may, on its own motion, or on the application made by the Wakf Board or any other aggrieved person, call for and examine the records relating to any dispute, question or other matter, which has been determined by the Tribunal, for the purpose of satisfying itself as to the correctness, legality or propriety of such determination and the High Court after such examinations may confirm, review or modify the order of the Tribunal and pass such order as it may think fit.

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122. Supra note 2, Section 83, Sub-section (7)
123. Ibid., Sub-section (9)
124. AIR, 1963, All, p. 537
125. Supra note 4, p.33.
126. Supra note 118
The original Draft dealing with the Wakf Tribunal to amend the Central Wakf Act, 1954 proposed under Section 55A of the old Act that no proceedings taken by the Wakf Board or Wakf Commissioner under this Act in respect of any Wakf shall be stayed or suspended merely by reason of the pendency of any such dispute, question, or matter before a Tribunal or any revision before the High Court. Therefore, the Wakf Act, 1995, provided for this principle and laid down that the Tribunal shall have no power to stay order or proceeding of the Wakf Board or chief executive officer under the Act and incorporated the same under Sub-Section (2) of Section 6, Sub-Section (2) of Section (7), the proviso to Sub-Section 4Section 67, and the proviso to Sub-Section 3 of Section 69 of the Act.

Under Section 84 of the Wakf Tribunal is required to hold its proceedings as expeditiously as possible and on the conclusion of the hearing of any dispute, question or other matter relating to Wakf, give its decision in writing and also furnish copy thereof to the parties.

Bar of Jurisdiction of Civil Courts

Since a full-fledged forum for the determination of disputes arising out of the Wakf Act, 1995 has been provided under Section 83 to 95, the jurisdiction of the Civil Courts to try any suit or legal proceedings in respect of any dispute relating to any Wakf, has been barred. The Wakf Tribunal shall determine now all such disputes etc. Thus, Section 85 incorporates the same and avoids any conflict of jurisdiction between the Tribunals and the civil court with regard to Wakf matters. Interpreting similar provision under Section 43 (4A) and 55-C of the MP Wakf Act, 1954, the Madhya Pradesh High Court has held that when appeal is provided against any decision to Tribunal and

127. Supra note 4.
128. Intazamia Committee Idgah, Moraina v. MP Wakf Board, AIR 1996, MP., p.47
decision of the Tribunal is made final then the jurisdiction of Civil Court stands ousted.\footnote{129}

**Unregistered Wakfs Barred**

Registration of Wakfs has been made compulsory under Section 36 of the Act, it also imposes an obligation on every Mutawalli to register the Wakf with the Wakf Board, and any failure on part of the Mutawalli to register the Wakf is made punishable under Section 61 of the Act. The purpose of all these provisions is to ensure that all Wakfs are duly registered under the Act so that the Act so that the uniformity in the administration of Wakf could be introduced and the Wakf Board could exercise proper supervision over such Wakfs. If any Wakf is not registered under the Act then it is but fair that it should not be allowed to seek any benefit or protection under the provision of the Act without rendering itself subject to the Control of the Wakf Board. Therefore, Section 87 of the Act bars the enforcement of any right on behalf of such unregistered Wakf by instituting any suit, appeal or other legal proceedings in the Courts after the commencement of the Wakf Act, 1995. Similarly any such proceeding suit etc., If already commenced or pending before the courts shall not be continued, heard, tried or directed by the Courts after the commencement of this Act, unless such Wakf has been registered in accordance with the provisions of this Act.

**Proceedings under Land Acquisition Act, 1894**

Section 91 of the Act protects the interest of the Wakf Board in respect of such Wakf properties, which are likely to be acquired by the Collector in course of the proceedings under the Land Acquisition Act, 1894. It, therefore, requires that whenever it appears to the Collector that any property under acquisition is a Wakf property, he shall serve a
notice on the Wakf Board before making any award and shall stay further, proceedings in order to enable the Wakf Board to appear and plead as a party to such proceedings at any time within three months from the date of the receipt of such notice.\textsuperscript{130}

Similarly, if the Wakf Board on its own comes to know about such proceedings relating to the Wakf property, it may at any time, but before the award is made, appear and plead as a party to the proceeding.\textsuperscript{131}

Any order made under Section 31 or Section 32 of the Land Acquisition Act, 1894 or under the corresponding proceedings of any other law relating to acquisition, without giving an opportunity to the Wakf Board of being heard shall be declared void.\textsuperscript{132} In addition to this provision, the Wakf Board has a right to appear and plead as a party to any suit or legal proceedings in respect to a Wakf or Wakf property.\textsuperscript{133}

**Power of Appellate Authority to entertain Appeal after expiry of specified period**

Section 95 of the Act authorises the appellate authority to entertain any appeal after the expiry of the period specified for making such appeal if it is satisfied that the appellant was prevented by sufficient causes from preferring the appeal within the permitted period. Thus, the appellate authority can extend the time limit for making such appeal on reasonable ground.

It is a well-established fact that the institution of Wakf is so intrinsically interwoven with the religious and socio-economic life of the Muslims but unfortunately, many of the existing Wakfs have shown a steep decadence caused by neglect, misuse and mismanagement

\textsuperscript{130} Supra note 2, Section 77, Sub-section (1)
\textsuperscript{131} Ibid., Sub-section (2)
\textsuperscript{132} Id., Sub-section (4)
\textsuperscript{133} Supra note 2, Section 92.
owing to the improper and non-serious application of the Wakf Act, 1995. The days are not far away when the Wakf properties will be only on papers. The Wakf Act, 1995 is an exhaustive peace of legislation, which is in force all over India except the state of Jammu and Kashmir and Dargah Khawaja Saheb, Ajmer, which has a separate legislation to manage its affairs. This Act aims to provide for better administration and supervision of wakfs, but its actual working revealed many flaws in it as also in the set up of the Wakf Boards, in particular the power of superintendence and control over the management of the individual wakfs. Although, the Wakf Act, 1954 was amended three times in 1959, in 1964 and in 1969, but did not materialised the desired results. On the recommendation of the Wakf Inquiry Committee, comprehensive amendments were carried out in 1984, but the same was strongly opposed. Therefore, it was decided to enact in new law i.e. Wakf Act, 1995.

The existing Wakf Act has disappointed on many fronts as the aims and goals have not been realised thereunder. The sorry state of affairs of wakfs calls for administration and organisational reforms. At present, the management of Wakf properties is seriously impaired both due to the high incidence of litigation and mismanagement. Often important wakf cases and thereby valuable properties are lost because of lack of financial and administrative resources. Therefore, strengthening and empowering Wakf Boards with administrative, financial and legal support is absolutely a need of the hour.
Chapter- V

Judicial Response
Chapter- V

JUDICIAL RESPONSE

An Overview

The law of wakf has emerged as one of the most important branches of Islamic Law. It is the only form of perpetuity known in Islam. Apart from their religious aspect, the wakfs are also instruments of socio-economic upliftment as the benefits from the wakfs flow to the needy persons for their socio-economic, cultural and educational development.

Wakf applies to any property movable or immovable, dedicated for purposes recognized by the Muslim Law as religious pious or charitable. This philanthropic foundation of the wakf is an important one and explain the institution’s role through the centuries as a means of disposing of property for what would be perceived in the common law as “charitable purposes”. To earmark a part of what one has earned or inherited and set it apart in perpetuity for charitable purposes is considered an act of piety, and as such vast and innumerable properties have been bequeathed since the foundation and growth of the institution of wakf.

Modern writers have generally identified wakf as a pious foundation or charitable trust. However, the practice of the Anglo-Indian courts seemed to be largely responsible for this limited view of the institution. From the date of its inception to the whole era of Muslim history and upto the contemporary socio-economic and legal backdrop, the doctrine of wakf has retained its significance as a socio-religious institution almost equivalent to the “non-governmental
organisation" involved in welfare activities. This role is very much evident from the fact that awkaf have not only been a way of supporting mosques, graveyards, Islamic schools. Madarsas, takias etc. but has also served as wills, family settlements and economic backbone of various educational institutions. Therefore they are endowments in the broader sense in that they could be used to benefit individuals as well as institution.¹

The legislative and judicial experiences of the wakf institution have not been totally irresponsible and unyielding. Infact Tahir Mahmood in his paper² has observed that even in the British period the legislature tried to shield the wakf institution from the massive legislature activities but the judiciary made all efforts to nullify the legislature endeavour. This policy can well nigh be ascertained from the notorious decision in Abul Fata’s³ case that invalidated family wakfs.

Since 1923 a number of Acts have been passed by the Central and State Legislatures regulating the administration of wakfs. The earliest of these is the Musalman Wakf Act of 1923, which was passed for making provision for the better management of wakf property and for ensuring the keeping and publication of proper accounts. The most important Act is the Wakf Act, 1954 which aimed at providing for the better administration and supervision of wakfs.⁴ It is a substantive piece of legislation. The Act, by constituting unofficial Boards vested with considerable authority and powers, by imposing a precise obligation on the Mutawalli and making their violation a personal offence, by associating the State Governments in the supervisory responsibility and

³. (1894) 22 IA 76
by conferring policy making authority on the Central Government, has laid down a sound administrative structure to ensure proper administration of wakfs in the country.

However, the actual working of the Act revealed a number of flaws which were attempted to be removed by the Amending Acts of 1959, 1964, 1969 and then comprehensively in 1984. But much could not be accomplished. Finally in 1995 the wakf Act of 1995 was passed and incorporating the features of the Act of 1954 and the Amending Act of 1984.

The role of judiciary in this regard is more crucial and calls for an in-depth analysis of the judicial treatment of the institution of wakf in India. This judicial behaviour has shown a remarkable transition in the post independent era as distinguished from the reluctant and degenerating attitude of the Anglo-Indian Courts. What emerges from this statement is the fact that the English judges with their limited knowledge of Islamic law and irreproachable hostility towards the same have largely contributed to the decline of the Institution of wakf.

**Judicial Treatment of Law of Wakf:**

A study of the law of wakf in India, in the light of judicial decisions, leads to the conclusion that some contraction, abrogation and elongation in the law of wakf are clearly discernible. The contraction and abrogation in the law of wakf are noticeable in the (a) compulsory acquisition of mosques, (b) extinction of wakf property on the basis of adverse possession and (c) statutory prohibition on the non-Muslims to create wakf.
The innovative elongations of the law of wakf is noticeable in the areas of (i) wakf by uses. (ii) presumption of wakf on the basis of ‘doctrine of lost grant’ (iii) Wakf of mashrut ul Khidmat grant. (iv) Wakf of government securities and shares in stock. (v) Dargahs, Takias and Khanqah as wakfs and (vi) a new judicially laid down rule that salary of Imams shall be paid by wakf Boards whether they possess sufficient financial resources or not and notwithstanding the fact that they never appointed these Imams and the wakf fund is not meant to be used for this purpose.5

In this backdrop, this chapter attempts to bring to light the judicial response to the various aspects of the Institution of Wakf.

Wakf: Judicial and Theoretical Framework

In Vidya Varuthi v. Balusami Ayer6, the court speaking through justice Ameer Ali has held that “the Muslim law relating to wakf owes its origin to a rule laid down by the Prophet of Islam; and means the tying up of property in the ownership of God, the Almighty and the devotion of its profits for the benefit of human beings”.

Explaining the technical meaning of wakf in M. Kazim Ali v. Asghar Ali7 the court laid down that the literal meaning of wakf is detention, stoppage or tying up. In the technical sense it means a dedication of some specific property for a pious purpose or secession of pious purposes. Following these decisions the Madras High Court in Kassimiah charities v. Secretary Madras State Wakf Board8 has held that wakf means the detention of the corpus in the ownership of God in such a manner that its profits may be applied for the benefits of his subjects.

6. (1921) 48 IA. 302.
7. AIR 1932 Patna 238.
8. AIR 1964 Mad 18.
Ever since the passing of the Wakf Act of 1954, the judiciary has adopted an empirical and interpretative approach to the concept of wakf not only as understood in Islamic Fiqah but also under the Wakf Act of 1954. In the landmark case of Nawab Zain Yar Jung v. Director of Endowments. The Supreme Court made an in depth analysis of the concept of wakf as defined under section 3(1) of the Wakf Act of 1954. The question that came for consideration before the apex court was whether a trust executed by the Nawab is a wakf falling within the meaning of wakf as defined in the Wakf Act of 1954, or is it a public charitable trust falling outside the purview of the said Act? The court observed that the decision on this point depends solely on the construction of the document which purports to create the trust of wakf. The Court, in the first place, purported to trace the historicity of wakfs and observed that the Mohammedan law owes its origin to a rule laid down by the Prophet of Islam and means the tying up of property in the ownership of God, the Almighty and the devotion of its usufruct for the benefit of human beings. The Court then proceeded to interpret the essentials of a valid wakf as envisaged by the S. 3 of the Act of 1954.

It is asserted that though there is no bar on a Muslim from creating a secular trust of a public and religious characters but a wakf to fall within the definition as under S. 3(1) of Act must conform to the prescribed essentials. In this case the trust was created for a general charitable purpose some of which were outside the limits of the wakf and hence the conclusion was indispensable that and trust that was created was not a wakf but a secular comprehensive public charitable trust. According to the Act the purpose for which a wakf can be created must be one which is recognized by the Muslim law as pious, religious as charitable and the objects of public utility which may constitute

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beneficiaries under the wakf must be objects for the benefit of the Muslim Community.

It was thus held by the Court that on a plain construction of the deed of dedication it is found that the intention of the settler was to help not only charities which would fall within the definition of wakf but also charities which would be outside the definition of wakf and so the whole argument of dedication breaks down, and thus once a dedication exceeds the narrow limits of the statutory definition of wakf the provisions of the Act become inapplicable to it.

Time and gain there have been problems that are posed before the court in relation to the valid objects of a wakf. The judiciary has now enumerated an exhaustive list as to what constitutes the objects of a wakf. Objects of a wakf are very essential and they need to be impressed because a wakf can be held to be void on grounds of uncertainty, vagueness and other trivial but very important flaws in a dedication by way of wakf. In most of the cases the judiciary has given literal interpretations to these dedications realising their socio-economic relevance.

In *Nawab Bahadur Muhammad Rustam Ali Khan and Another v. Nawab Maulvi Mushtaq Hussain & others*[^10], Nawab Azmat Ali Khan executed a wakfnama for religious purposes. However, the Deputy Commissioner of Karnal intimated the Nawab who lived in Karnal that it is expedient to place the Nawab and his property under the court of wards. The Nawab thereupon moved to Muzaffar Nagar beyond the jurisdiction of the Deputy Commissioner, Karnal. But Commissioner issued an order restraining all alienation by the Nawab of the said property until further order of the Court. Notwithstanding this, the

[^10]: AIR 1921 PC 105
Nawab executed another deed purporting to appoint trustees for the charity. After the death of the Nawab the appellants claimed inheritance and applied for mutation of names which was ordered in their favour by the collector. The respondents filed a civil suit against this order and the suit was decreed against this order.

The Privy Council made a perusal of the whole document of dedication. In doing so, it made a comparison between the position of trustees under English Trusts and Mutawallis under Muslim Law, as it was contended that the trustees in the wakfnama in the present case stand in the same relation to trust that trustees to whom property had been validly assigned would stand. Disagreeing with the said contention, the Privy Council held that the trustees under the deed would be more closely allied to Receiver and Managers appointed over property other than the trustees in whom the property is absolutely vested. A receiver or a manager by virtue of his appointment has no interest in the property, he is just called upon to manage. Secondly, he has supervisory powers over the property but he does not acquire any interest therein. And lastly, the grant of supervisory control does not have the effect of transfer of ownership. The same is the position of the mutawallis appointed for the administration of wakfs. The Mutawallis like receivers and Managers are only superintendents of the property.

Thus, since there was no transfer of ownership, the requirement of registration was not made out and the Privy Council dismissed the suit accordingly.

In S.K. Mamtai Ali v. S.K. Ali and other\textsuperscript{11} the central concern of the Orissa High Court was whether a wakf is for the purposes of fatia, recitation of Quran and maintenance of the tomb of the Wakif a valid

\textsuperscript{11} AIR 1968 Orissa 208.
objects of wakf. The court observed that it has long been settled that
wakf means the permanent dedication by a person professing
Musalman faith of any property for any purpose recognised by
Musalman law as religious, pious and charitable. Relying on the
established principles, the court held the alone mentioned objects as
valid. The court further observed that in cases of construction of wakf
deed for deciding whether a particular dedication constitutes a valid
wakf or not, it is not permissible to single out one clause and to hold on
to the strength of it without reference to the other clauses and
subsequently rejecting the other clauses which follow and which
materially qualify the earlier clause. The cumulative effects of all the
clauses should be considered to ascertain the intention of the testator.
The court thus held that a valid wakf has been created notwithstanding
the fact that there was no dedication of the property.

In Garib Das v. M.A. Hamid\(^\text{12}\) once again the validity of a wakf was
in question with regard to the alleged uncertainty of the dedication. It
was contended that the wakf must be declared void by reason of
vagueness of objects. The brief facts of the case may be taken into
consideration here. In this case the settler executed a wakf deed which
merely mentioned that he had settled the whole and entire property to
"the mosque and madarsa" in a certain Mohalla and the surplus of the
usufruct thereof was to be spent over the same. Subsequently he
executed another deed that clarified which of the two mosques in the
Mohalla was intended by him. Two issues emerged from this factual
situation:

1) There were two mosques in the Mohalla and it was not clearly
laid down to which of the mosques the wakf was made.

\(^{12}\) AIR 1970 SC 1035.
2) Secondly, since the settler has constituted himself the first Mutawalli, there was no delivery of possession and thus a valid wakf was not created.

As regard the first issue the Court held that the donor was the best person to identify the beneficiaries of the wakf which he had created and the wakif by executing a later deed clarifies which mosque and madarsa he had in mind. Therefore the wakf could not be held void for uncertainty.

So far as the second point was concerned, the court laid down certain detailed principles governing wakf *inter vivos*. These may be studied as under:

1) A wakf intervivos can be created by a mere declaration of endowment by the settlor.

2) The founder of the wakf may validly constitute himself as the first mutawalli and when the wakif and the mutawalli are the same person no physical transfer of property is necessary.

3) It is also necessary that the property should be mutated from the name of the donor into his name as mutawalli.

4) Fourthly, an apparent transaction be presumed to be real and the onus of proving the contrary is on the person alleging that the wakf was not intended to be acted upon.

On a perusal of the above judgement it becomes necessary to appreciate the fine judicial perspective of the Apex Court towards upholding the validity of wakfs, overlooking very trivial considerations attempting to invalidate the same.

The benefit of wakf in favour of one’s family and descendants has also been recognized as one of the valid objects of a wakf. However, this form and object of dedication has been the subject of greatest judicial controversy. As early as 1913 the issue began to take shape, but with the enactment of statute and widening of judicial acumen, these wakfs gained greater recognition.
In *Radhakant Seb v. Commissioner, Hindu Religious Endowments*\(^{13}\), the Apex Court speaking through Fazal Ali J. made a comparative analysis of the concept of trust as known under English law and that under both Hindu and Muslim laws. It has clearly distinguished that under Hindu and Muslim law there is a concept of private trust which is unknown in English law. The Court observed that it is firmly established that the concept of private endowment is wholly and completely unknown to English law. Under English law all trusts are public trusts of a purely religious and charitable nature. The Court expressly recognized that under Muslim law there exists a private trust which is also of a charitable nature and which is generally called wakf-al-al-aulad. The striking feature of this endowment is that although the property is held by beneficiaries and the income thereof is used for the maintenance and support of the family of the founder and his descendants. The ultimate benefit is no doubt reserved to God. In case the family becomes extinct then the wakf becomes a public wakf.

Another minute detail which came in the form of a vexed question before the Karnataka High Court in *K.C. Board of Wakfs v. Mohd. Nazeer Ahmad*\(^{14}\) was whether a dedication of a house by a Muslim for the use of all travellers irrespective of their religion and financial position constitutes a valid wakf under the definition of wakf as given under section 3 (1) of the Wakf Act of 1954. In answering this question, the court first of all proceeded and attempted to determine the meaning of a beneficiary as given under S.3 (a) and that of wakf as given in section 3 (1). Wakf has been defined in the Act as a permanent dedication by a person professing Islam of any movable or immovable

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\(^{13}\) AIR 1981 SC 798.

\(^{14}\) AIR 1982 Kant 309.
property for any purpose recognised by Muslim law as pious, religious and charitable.

So far as the meaning of the term beneficiary is concerned, the court observed that Section 3 (a) defines beneficiary to mean a person or an object for whose benefit and wakf is created and includes religious, pious and charitable objects and any other objects of public utility sanctioned by the Muslim law.

The Court held that on a plain construction of the relevant statue it is sufficiently clear that under Muslim law a wakf should have a religious motive and it should be only for the benefit of the Muslim Community. If it is secular, the charity should be to the poor alone. Therefore, the conclusion and decision seem to be amply clear that a property dedicated for the use of travellers irrespective of their caste, creed or religion and whether they were rich or poor, the dedication was not a wakf falling within the scope of the Wakf Act 1954.

The judicial interpretation of wakf institution has created an arena of dichotomies confronting specific aspects of wakf in particular and the institution of wakf in general. It has been reiterated for innumerable times that there exists no particular forms of words that may be used in order to conclude a valid dedication. The only requirement of such dedication is that the objects must not be uncertain. The same point came up for consideration before the Guahati High Court in Fazal Sheikh and others v. Abdul Rehman Mea and others. The question before the court was whether the use of words “Welfare Works permitted by shariat” can be said to constitute a valid object of a wakf; it is struck by the rule of vagueness and uncertainty of objects of a wakf. The Court observed that what is necessary for a valid wakf is that

15. AIR 1991 Gauhati 17
the purpose of a wakf must be one recognised by the Mohammedan Law as religious, pious or charitable. A person who dedicates his property by way of wakf may instead of enumerating the objects, for which the income of the wakf may be used, provide that it may be used for any welfare works permitted by the Shariat, that is, the Mohammedan Law such a provision is absolutely clear and there is no vagueness or uncertain in it. The only difference is that instead of restricting the use of the income of the wakfs to some specified objects which are recognise by the Shariat to be welfare works. No inception can be made out to such a form of dedication. It is very obvious that the declaration expressly uses the expression “permitted by the Shariat”. Thus there is ample matter to imply that the declaration has been made to give a very wide circumference to the objects of dedication. The income arising from such property can be used for such public works as are permitted by the Shariat. The Court applied the rule of incorporation of object by reference and deduced that if a wakf instead of enumerating the various purposes for which the income of the wakf may be used makes a general declaration and dedicates it to be used for any purpose of public welfare recognised by the Shariat, it cannot be said that the wakf is void for vagueness of object.

The judiciary has also not lagged far behind in its endeavour. In fact, it has shown an inclination towards the wakf institution and as could be ascertained from the pre-1995 judicial decisions on wakfs. In the post 1995 era the judiciary has adopted greater vigour in deciding questions relating to wakfs.

In the case of UP Sunni Central Board of Wakfs v. Mazhar Hasan and others the court was though dealing with the question of validity of a wakf but it had to deal with altogether a different situation. In the
instant case, certain persons made an appeal to the public to give subscriptions and set apart the property for the said purposes. It was alleged that such a dedication did not constitute a valid wakf. Dismissing these contentions the apex court held that the property nevertheless set apart for a definite purposes such property can be said to constitute a valid wakf.

The court further held that it cannot be said that it is only in cases when an individual divests himself of the property and after declaration of trust it is binding on the settler with the object for which the property was thereafter is to be held. If out of the monies given by the general public a property is purchased for a public purpose, which is religious and charitable in characters it cannot be said that such property cannot attain the character of wakf.

In the earlier instances we have seen that the thrust area of the judicial acumen was to lay down principles that tend to uphold the validity of wakfs. For the first time in *Sahreevan Nachias v. V.S. Mahmaed Hussain Maracuiar* the Madras High Court had to deal with the question that a person although an heir of the settler and a beneficiary but not an Indian citizen can become a trustee. Answering the question in negative, the court justified its decision on the basis of two points of dispute. The first one was that under the General Law of the land, a foreigner is not entitled to possess immovable property without the permission of the Reserve Bank of India. Secondly under the said deed of wakf, it was a necessary condition that the trustee was supposed to perform all the rites personally. Since the plaintiff had been away for such a long period he had not performed any duty but had got it done by some other relative. In the given circumstances, the Madras High Court thus held that there exists no reason why the plaintiff should not

17. *AIR 2001 Mad 36.*
be debarred from becoming a trustee and thus the plaintiff was denied all possessary rights in the wakfs.

**Wakfs: Legislative Proposition and Judicial Disposition**

In India, as many as twenty three enactments that applied to a wakf were enacted during the last two centuries. Out of these, only four have survived, while the rest were subsequently repealed. The post-independence era saw the enactment of several wakf laws providing for the better administration and management of wakfs. In the absence of uniform wakf legislation, various states enacted their own wakf legislations also. Some among these could not be enforced while others remain repealed in view of the Wakf Act of 1954 and then the Wakf Act of 1995.

The legislature by enacting the Wakf Act of 1954 attempted to lay down rules for the better administration of wakfs. However, when the actual working of the Act revealed innumerable flaws that led to the passing of the Wakf Act of 1995 what we are required to study under this chapter is the judicial treatment of the Wakf Act both of 1954 and 1995. A perusal of decided cases can throw some light as to how the judiciary has attempted to give practical shape to the legislative endeavours by interpreting rightly the provisions of the Act.

The general legal position both under Islamic *fiqh* and under the statutory enactments is that the wakf is administered through a mutawalli. He is the manager or superintendent of the wakf. Even the wakf Act of 1995 recognises the position of Mutawallis as a manager of the wakf but in order to restrain them from exercising unfettered powers over the wakf properties, the Act makes provisions for the constitution of Wakf Boards to exercise supervisory control over there
and also provides penalties if the Mutawalli acts contrary to the interests of the wakf.

The role of a Mutawalli is very crucial and requires a situation of Ubberima fides or utmost good faith towards his duty as the manager and superintendent of a wakf property that vests in Almighty Allah. The Judicial Committee, in *Tiwan Doss Sahoo v. Shah Kubeer ood Deen* called him 'procurator'. He is not the holder of the property but the only the holder of the post of Mutawalli. In order to be appointed a mutawalli a person must be of a sound mind, must have attained the age of majority and should be capable of discharging the functions required by him under a particular wakf.

**Pre-1995 Position**

In *Shahar Bano v. Aga Mohammed* their Lordships of the Privy Council have ruled that sex is no bar in cases where no religious duties have to be performed. Thus there is no legal prohibition against women holding a mutawalli ship when the trust by its nature involves no spiritual duties, which a woman cannot discharge.

Minority and unsoundness of mind are positive disqualifications. Neither a minor nor a person of unsound mind can be appointed mutawalli but where the office of the mutawalli is hereditary and the person entitled to succeed to the office is a minor, or where the mode of succession to office is defined in the deed of wakf, the rule will not apply. The Lahore High Court has in the case of *Mohammad Bakhtiyar v. Bashir Ahmad* has held that a minor can be appointed a mutawalli, if the office is declared to be hereditary. The power to appoint a mutawalli and to lay down a scheme for administration of trust has.

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18. (1840) 2 MIA 390
19. (1907) 34 IA 46.
20. PLD 1957 (W.P) Lahore 803
been appreciated in *Khalil Ahmad Khan v. Mallika Mehar Nigar Begum*. The Allahabad High Court made an exhaustive enumeration of the powers of a Wakif so far as the appointment of a mutawalli and alterations in the scheme of administration of a wakf are concerned.

In the present case the Wakif having restrained her relations with the next mutawalli, her daughter and plaintiff, the provisions relating to the appointment of mutawalli after her death by a second deed. The deed was a total make over of the earlier deed and it completely overhauled the prevailing scheme. It changed the mutawalli, the list of beneficiaries and also the amount payable to each of them.

The Court held that once a wakf is complete, the Wakif retains no right, title or interest in the property except such as is reserved by the deed. It would be against the fundamental concept of ownership to allow the wakif still to interfere with the arrangements of the property. It was further held that it is not open to a wakif to amend the wakf deed itself by changing its provisions and if by the second deed he has attempted to change the nature or character of the wakf and that portion is not separable from the portion relating to the change of mutawalli, then the second deed must be held to be invalid.

The court made a distinction between the disposal of the office of the mutawalli in "praesenti" and on the Wakif's death. So far as the disposal of the office of the mutawalli after the Wakif's death is concerned, the court laid down that if the disposal is by a separate document, such document is a will which can be validly revoked by the testator.

The *Board of Muslim Wakfs, Rajasthan v. Radhakishan and others*, the property in dispute in this case was a two storey building at Jaipur,

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21. AIR 1954 All 362
22. AIR 1979 SC 289
known as Dharmshala or Musafirkhana. The Wakif had clearly acknowledged the said property as wakf and appointed his son as Mutawalli. However, the said property was mortgaged by the Mutawalli to the father of the respondent along with the possession of the property. The property was mortgaged again for a second time to the respondents for raising a further loan; subsequently the respondents purchased the ground floor of the building by a registered sale deed dated 23rd Nov. 1954. The first floor was also sold by a registered sale deed dated 31st July 1956. In the meanwhile the Wakf Act 1954 was extended to Rajasthan on February 1, 1955. The State Government constituted the Board of Muslim Wakfs and appointed a Wakf Commissioner for the purpose of making a survey of wakfs in the state. In August 1962, one Shaukat Ali Khan applied to the Wakf Commissioner alleging that the said property is a wakf and its alienation was invalid. In reply, the other party contended that the property was not wakf and also that the Wakf Commissioner had no power to decide whether a particular property is wakf or not. The Commissioner overruled the objections.

The respondents filed a writ in the High Court of Rajasthan which was dismissed, observing that the commissioner had no jurisdiction whatsoever in the instant suit. The commissioner in compliance of the orders of the court proceeded with the enquiry and on the basis of evidence adduced before it, held the property to be a wakf and accordingly forwarded a report to that effect to the State Government. On the receipt of the report the Board of Muslim Wakfs published a notification for the inclusion of the said property in the list of wakfs.

A petition was filed in the High Court challenging the legality and Validity of the proceedings. The High Court held that the entire
scheme of the Wakf Act of 1954, indicates that the Board of Wakfs jurisdiction is confined to matters of administration of the Wakfs and not to adjudicate question of title. As against this, a civil appeal was filed before the Supreme Court. The following two issues were framed in this case:

1. What is the meaning of any person interested therein appearing in section 5(1) of the Wakf Act of 1954 and whether the inclusion of a property in the list of wakfs which is under the possession of a stranger, conclusive proof against such stranger.

2. Secondly, does the power of Wakf Commissioner to make survey of Wakf Property include the power to inquire whether a particular property is wakf property or not?

As regards the first issue, it was observed by the Apex Court that the purpose of section 6 (1) is to confine the dispute between the Wakf Board, the Mutawalli and the person interested in the wakf. The word "therein" in the expression "any person interested therein" appearing in section 6 (1) must and necessarily refer to the "wakf" which immediately precedes it. Consequently, where a stranger who is a Non-Muslim and who is in possession of certain property, his interest cannot be put in jeopardy merely because, the property is included in the list published under sub-section 2 of section 5 of the Act. The term person interested will not include a stranger who is in possession of the property merely because he happens to be a person affected by the publication of the list of wakfs.

In deciding the second issue, the court clearly held that the power of the Commissioner to make a survey of the existing Wakf property carries with it by necessary implications, the power to inquire as to the existence of wakf. The court further went on to hold that, it would be
illogical to hold that while making a survey of wakf properties existing in a state, a commissioner of wakfs appointed by the state government should have no power to inquire whether a particular property is wakf property or not. If the Commissioner of Wakfs has the power to make a survey it implicit that in the exercise of such power he should enquire whether a wakf exists.

Having dealt with the powers of a wakif next in line is the powers of a mutawalli. The mutawalli in this context does not enjoy unfettered powers. The judiciary has come with a heavy hand on those mutawallis who try to misappropriate the properties of wakf and try to meddle with the sanctity of the wakf institution. In Ramdhane v. Janki Rao23 it was laid down that a longer lease that the one permitted is not void, but voidable at the instance of the beneficiaries. Now that a Board has been validly constituted under the Wakf Act of 1954, such a lease can be retrospectively validated by the Board.

In Bibi Siddique Fatima v. Syed Mohammad Mahmood Hasan24 the Supreme Court has held that the use of the wakf funds for acquisition of property by a mutawalli in the name of his wife would amount to breach of trust and the property so acquired would be treated as wakf property. It is a settled principle that the mutawalli has no right to sell or mortgage the wakf property without the permission of the Court, unless the wakfnama empowers him to do so.

Post-1995 Position

The Wakf Act, 1995, is comprehensive, encompassing and pragmatic legislation to deal with the administration and management of the wakf properties, but unfortunately, it has not been implemented in its letter and spirit with which it has been passed. Political

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23. (1971) AIR All 553
24. 1978 All LJ 634 (SC)
consideration and narrow personal interest have got primacy in the administration and management of the wakf properties, therefore, there is urgent need to have re-look of the working of the present legislation i.e. Wakf Act, 1995. As stated earlier the power to appoint Mutawallis vested in wakif. However, section 63 of 1995 Act incorporates a situation where the Wakf Board can appoint a Mutawalli. The object of inserting this provision seems to be the fact that most of the wakf properties fall into neglect and disuse after the Mutawalli are dead and the wakf deed provides no scheme for the appointment of next Mutawalli.

In *M.A. Aziz v. A.P. State Wakf Board*, the present writ petition was filed against the proceedings of the Chairman of the A.P. State Wakf Board wherein he had delegated the power exercisable under section 27 and 28 of the Wakf Act of 1995. The petitioner was the Secretary of the Managing Committee of the Madina Masjid at Secunderabad and this Committee had been managing the Wakf Property since 1963. It was apparent from the facts of the case that the Wakf Board had duly acknowledged this Managing Committee. However, the Chairman of the Wakf Board vide proceeding No. 133 dated 19.10.1996 passed an order dislodging this Managing Committee and Constituting a new body for the management of this Mosque on account of alleged mismanagement of Wakf funds of the Mosque. The Chairman had passed this order on the basis of powers delegated to him by the Wakf Board. The legality of the said delegation and the subsequent dislodging of the existing Managing Committee was the issue in question in the present case.

There was only one issue in this case and that was “to what extent can the Wakf Board delegate its power under sections 27 and 28

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25. AIR 1998 AP 61
is of the Wakf Act of 1995 and what is the legality of the impugned order passed by the Chairman in the exercise of such delegated powers? 

In deciding the said petition, the court first of all analysed the words of the resolution that delegated the powers of the Board to the Chairman. The language that was used read "delegation of all existing powers to the Chairman".

This, in the eye of the court appeared to be vague, when interpreted and applied in the light of section 27 of the 1995 Act, which provides that the Board, either by general or special order can delegate in writing to the chairman as any member, secretary or any others officer as servant of the Board or any area committee such of its powers and duties under the Act as it deems necessary.

The Court implied from a plain reading of section 27 that each and particular power of the Board should be delegated specifically referring to a particular provision and not in general. The Board in using the words delegation of all existing power has attempted a blanket delegation of powers. It laid down that it is difficult to think that section 27 of the 1995 Act, contemplates total delegation of powers of the Board to other persons and to become mere spectators so far as the exercise of its own powers are concerned. There is no reference of delegation of any specific power to constitute a managing committee and hence the order by the Chairman constituting a Committee to the Mosque was held illegal.

In this case P.M. Dastagir v. Karnataka Board of Wakfs, a Mosque at Shimoga was a wakf property governed by the Wakf Act, 1995. It was under the direct management of the Wakf Bard of Karnataka and

26. AIR 1998 Kart. 297
an administrator for looking after the affairs of the Masjid on behalf of the Board was also appointed. By an order dated 26 July 1997, the then administrator was replaced by the petitioner, who was since then managing the affairs of the Mosque. The Board by its subsequent order dated 21st Jan 1998 relieved the petitioner of his duties and appointed another person as the administrator. The present writ petition was filed by the petitioners against the said appointment with a plea for quashing the same.

The issue involved in this case was whether the said appointment was in violation of the provisions of section 65 of the Wakf Act of 1995 which requires the recording of reasons by the Wakf Board in support of its order. The court while dismissing the petition held that on a plain reading of the provisions of section 65, it is clearly implied that the requirement of recording of reasons by the Board comes to the forefront only when the Board assumes direct Management of Wakf properties in the absence of availability of a suitable person to be appointed as a Mutawalli. In others words, the necessity for recording of reasons is relative only to the stage when the Board first decides to assume the management of the wakf. It does not extend to subsequent stages where the Board may be ordered to relieve or replace the existing administrator and appoint another person in that position.

Secondly, the court observed that the post of administrator did not carry any security of tenure and was purely honorary with no emoluments or other financial gains. Thus, the application of section 65 does not extend to nominations made by the Board and the petitioner has no case against the Board.
Aliyathammada Beethathabiyyapura Pookoya Haji v. Pattakkal Cheriyakoya and others, in this case the jurisdiction and the power of wakf tribunals constituted in the State of Kerala under the Wakf Act, 1995 was the main issue. The court held that under section 83 (2) of the Act, any Mutawalli or any other person aggrieved by an order made under the Wakf Act or rules may make an application to the tribunal for the determination of any dispute, question or other matter relating to the wakf.

Melvisharam Muslim Educational Society by its General Secretary v. The Tamil Nadu Wakf Board by its Secretary and State of Tamil Nadu by the Collector, it has been held in this case that it is irrelevant whether the properties are dedicated to the Wakf or not. They were purchased for the benefit of the Wakf from and out of the contributions made by the public. Education itself is a charitable object under Muslim Law. As a matter of fact, in the proforma the object of the wakf has been mentioned to impart religious and secular education to all communities and the same does not undermine the wakf deed.

In the post 1995 legal and judicial scenario, there is a judicial awakening towards clear interpretation of law so as not to leave behind doubts even when the case has been finally discharged. This may well might be seen in the decision of the Karnataka High Court in Karnataka Board of Wakfs v. Land Tribunal Sira the court laid down that Section 3 of the Wakf Act, 1995 makes it clear that a person can be said to be interested in a wakf when he is entitled to receive any pecuniary or other benefits from the wakf and includes any person who has a right to worship or to perform any religious rite in a mosque, Idgah, Imambaram, Dargah, Khanqah, Maqbara, graveyard or any other religious institutions.

27. AIR 2003 Kerala 366
28. Legal Pandits (website) LIS/The High Court/2007/10040
29. AIR 2000 Kart. 141
connected with the wakf or to participate in any religious or charitable institutions under the wakf any descendant of the wakif or the mutawalli.

In *Mutawalli v. Kerala Jamat-e- Islami Hind and ors* the court gave a wide interpretation to the term "person interested in wakfs". The Court laid down that the following persons can make an application to the Tribunal for the determination of any dispute, or other matters related to the wakf. These persons are:

1) Any Mutawalli
2) Any person aggrieved by an order made under this Act.
3) Wakif or any descendant of the wakif.

The Wakf Board is a statutory body and hence the Act of 1954 as well as the Wakf Act of 1995 have clearly provided that before filing a suit against the wakf Board or in which the Wakf Board is made a necessary party, due notice must be served on it.

As far as the creation of a wakf is concerned, the law does not enjoin upon every person this right. There are certain qualifications that a person must hold in order that he may make a valid dedication. Even a *de facto* guardian is not entitled to make a valid wakf for or on behalf of a minor. The Allahabad High Court in *Gyasuddin v. Allah Tala Waqf Mausuma and another* very correctly opined that a widow of the deceased who was in charge of the property of her minor children could not make a valid wakf. In dealing with this question the Allahabad High Court laid down the following essentials that may be fulfilled before a person may be granted the power and the authority to create a wakf.

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30. AIR 2007 Ker. 2653
31. AIR 1986 All 39
These may be summed up as under:

1) The property dedicated by way of wakf and belong to the wakif at the time of dedication.

2) A minor is incompetent to dedicate his property by way of wakf.

3) There is no essential formality for the creation of a wakf.

In the instant case, the widow had made a wakf of Musha for the purposes of mosque. In answering this question, the court relied on the opinion of jurists and concluded that a wakf of Musha for purposes like a mosque or burial ground irrespective of whether it is or is not capable of division is invalid for the reason that the continuance of participation in anything is repugnant to its becoming the exclusive right of God.

As stated earlier the power to appoint mutawalli vests in the Wakif. However, section 63 of the Wakf Act of 1995 incorporates a situation wherein the Wakf Board can appoint a mutawalli. The object of inserting this provision seems to be the fact that most of the wakf properties fall into neglect and disuse after the mutawallis are dead and the wakf deed provides no scheme for the appointment of next mutawalli.

In Mohammad Suleiman v. Andhra Pradesh Wakf Board the question related to the power and nature of appointment of mutawalli by the Wakf Board under Section 63 of the Wakf Act, 1995 (previously section 42 of the Wakf Act, of 1954). The Court made it clear that on a plain reading of the provisions of section 63 the board can appoint any person to act as mutawalli in two situations, namely (i) when there is a vacancy in the office of the mutawalli of the wakf and there is no one to be appointed under the terms of the wakf deed and (ii) secondly, where

32. AIR 1997 AP 387
the right of any person to act as a mutawalli is disputed. Further such appointment shall be made for such period and on such conditions as the board may think fit. It, however, will not be a regular appointment, where, however, the successor is named in the wakf deed, the Act does not provide for such appointment. The Board cannot grant succession or appoint hereditary mutawalli yet a successor mutawalli "can properly be appointed as mutawalli in disputed conditions".

The decision reveals the soundness and intelligible approach that the judiciary has shown by balancing law on one hand and statute on the other. The provision relating to appointment of mutawallis under section 63 is followed by the provisions relating to the removal of the mutawalli.

*Karnataka, Board of Wakfs v. Government of India*33, the dispute in the present case relates to a suit property at Bijapur over which both the parties claim propriety rights. The property in question was under the absolute ownership and continuous possession of the Government of India under the Ancient Movement Preservation Act, 1904 and was entered in the Register of Ancient Protected Movements. After the enactment of the Ancient Monuments and Archaeological sites and Remains Act, 1958, the suit property came under the department of Archaeological survey of India.

In 1976, the appellant Board issued a notification in the official gazette declaring the said property as Wakf Property. Three suits were filed by the respondents and in each case a declaration was sought that the notification issued by the Karnataka Board of Wakfs was illegal and subsequently null and void.

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33. (2004) 10 SCC 779
As much as five issues were framed by the Honourable Supreme Court but only one was concerned with wakf and that was whether the property in question was wakf property or Government property? And what property can be said to be wakf property while a survey of wakfs is made by Commissioner of Wakfs under the Wakf Act.

In deciding the said issue the court relied on the evidence of entry of the suit property in the register of Ancient Protected Monuments as conclusive evidence. It was accepted that the Government of India was in absolute ownership and in continuous possession of the said property since a century.

Secondly, the section 4 of the Act of 1954 provided that the "Survey Commissioners could only make a survey of the Wakf properties existing in the state at the date of commencement of the Act". The property in issue was not an existing wakf property and the Board cannot exercise any right over it. The Court, thus, held the notification issued by the Karnataka Board of Wakfs as null and void and decided in favour of Government of India that the property validly belonged to the Government of India and the Karnataka Board of Wakfs had no right therein.

*Karnataka Board of Wakf v. Anjuman-e-Ismail Madris-un-Niswan*\(^{34}\), the instant appeal was filed against the impugned judgement of the Karnataka High Court which had reversed the findings of two lower courts in a suit by the present respondents and then plaintiffs for declaration that the suit property is not a wakf property and consequential directions to delete the same from the list of wakf properties.

\(^{34}\) AIR 1999 SC 3067
The plaintiff claiming to be a society registered under the Societies Registration Act, 1960, contended that it had purchased the suit property by two sale deeds and is now running an educational institution for the benefit of the girls of the Muslim community. However, the objects of the said society did not confine itself to the benefits of the Muslim community itself and hence the suit property is not a wakf. The defendant Board of Wakfs, on the contrary alleged that the said property was dedicated by one Sultan for the benefit of the Muslim community who reserved for him the right to administer the same.

The only relevant issue, among several others for the disposal of the case was the question, whether the suit property is wakf property or not.

The court in deciding the issue made an interpretative analysis of the definition of wakf as provided under the Wakf Act of 1995 by virtue of section 3 (r). The definition reads as under “Wakf means 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 and includes Wakf by user, Mashrut-ul-Khidmat and Wakf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim Law as religious pious as charitable.

The court thus, observed that the necessary ingredient for the purposes of determining an issue whether a property is wakf property or not is whether there is a permanent dedication by a person professing Islam of any movable and immovable property for pious, religious and charitable purposes or not. In the instant case the recital of dedication clearly indicates that there was a clear dedication by way
of wakf for the valid objects recognised by Muslim Law and hence the suit property was a wakf property.

Mohd. Khasim v. Mohd. Dastagir and others\(^\text{35}\), one Muhammad Imam Saheb had four sons including Mohd. Dastagir and Mohd. Khasim and five daughters through his different wives. He owned several immovable properties and also a cloth business for which he had obtained a licence in the name of Mohd. Dastagir. Subsequently, Mohd. Dastagir executed a release deed in favour of Imam Saheb relinquishing all rights and title over all the properties of Imam Saheb. Thereafter, Imam Saheb executed a deed styled “deed of Trust” in respect of his various properties. He appointed himself as trustees in management along with his second wife and further provided that after his death the survivor would continue to be trustee and manage the trust properties according to the terms of the trust deed. It was stipulated that Imam Saheb would have the liberty to alienate the trust properties and to purchase fresh properties for the benefit of the trust.

After the demise of Imam Saheb, Mohd. Dastagir filed a suit for partition and separate possession against all the heirs of Imam Saheb. It was alleged by the defendants, now appellants that the Imam Saheb purported to create a wakf \textit{alal-aulad} and the properties which formed the subject matter of the said dedication were not liable to be partitioned. The trial court held that a wakf \textit{alal-aulad} had been created and thus the property could not be partitioned. The High Court in appeal reversed the findings holding that both trust deed and release deed were invalid.

The present appeal was preferred against this judgement of the High Court. The issue involved was whether the document purported

\(^{35}\) (2006) 13 SCC 497
to create a valid wakf or not? What are the essential conditions for the creation of wakfs?

Reversing both the judgements, the Supreme Court held that in order to create a valid wakf, there must be permanent dedication of the properties in question in favour of God, Almighty and the ultimate benefit in all cases must vest in God. Neither of these two test is the condition of inalienability of the properties forming nucleus of the wakf. The wakif divests himself of all interests in the property, hence, he has no power to alienate the same except for the benefit of the wakf.

In the instant case, the executants had reserved to himself the power to alienate the trust properties but there were several conditions in the deed that ran contrary to the concept of wakf. These are:

- That his two minor daughters were to be given immovable properties worth Rs. 8000/-. A further direction was given that these daughters could get their share of value of 8000 on condition that they would not be entitled to it if they had no male issues.

- A specific direction was given that the properties given to daughter Fathima Bee would also revert to the trust if they had no male issue.

The court held that these directions run contrary to the concept of wakf and it appears that the executants purported to create a simple English Trust and the appeal accordingly was dismissed.

The case of Hajee Dr. Syed Latheefuddin Shah v. Board relates to the power of the Board to remove the mutawalli. Section 64 of the Act of 1995 lays down the ground on which a mutawalli may be removed by

36. AIR 2000 Mad. 412
the Board. The main issue involved in this case was that the mutawalli was removed by the wakf board without proper notice and in his place a team of Board officials were appointed to assume the timely management of the wakf till a special officer was appointed and the new management elected. It was alleged on behalf of the petitioner that neither notice was properly served nor the proper opportunity of being heard was given to him. In this regard, factually, it had been proved that the petitioner was represented by the counsel but there was no service of proper notice to him either on the inquiry as on the launching of the complaint against him. Under the given circumstances, relying upon earlier precedents the court held that even though the petitioner was represented by the counsel, the conduct of the petitioner shows that there was no waiver of his statutory right to receive the notice. Hence, the action of the respondents in passing the impugned order without proper notice to the petitioner was in violation of principles of natural justice and consequently, the impugned order was rightly quashed. This decision leads to the direct conclusion that the judiciary is not included on either side. If the legislature has entrusted the Board with supervisory powers of the mutawalli, it no where implies that the interests of the post of mutawalli and the doctrines of fair play will have no role so far as wakfs are concerned.

The misappropriation of wakf properties is not a contemporary challenge and impediment facing the wakf properties. However, no doubt there have been constant legislative and judicial efforts to counter this ever growing menace. The institution of wakf is often concerned to be a support to the weaker sections of the Muslim society but by the mismanagement and misappropriation these resource centres have been transformed into “starving treasures”.

The mutawallis, being in a fiduciary position, are often not being questioned about their objectionable conduct. An interesting case on misappropriation of wakfs by mutawallis is *Wali Mohammad v. Rahmat Bee*. This case reflects the sound judicial policy adopted by the courts in dealing instances of misappropriation of wakf properties by mutawallis. Delivering the judgement, the Apex Court laid down a firm basis for protection of wakf properties and their optimum utilisation for the objectives set out for them by their settlers. In this case the mutawalli of a wakf had filed a declaratory suit in 1963 not only to assert his right to manage and possess a graveyard and a dargah but also title to a plot in the same compound by adverse possession. The trial court dismissed the suit on the finding that the said property was a wakf by user and the house was being used as a musafirkhana. Two issues were generated out of this factual position. There was (i) whether a manager of a property can claim adverse possession. (ii) Whether being in management forecloses the plea of adverse possession.

It was held by the Court that the respondents being mutawallis could not claim adverse possession of wakf properties. It is only that a stranger to the wakf may encroach on the trust estate and in course of time acquire a title by adverse possession but a mutawalli cannot take up such position. The court, therefore, held that the respondents answering the description of mutawalli, it is not open to them to set up a claim for adverse possession.

Pendency of proceedings is a normal feature of the Indian Judicial system. Often circumstances arise that a particular suit if filed under a particular Act, but before the case is finally decided, the provisions of the old Act are already superseded by a new Act. That is to say a new

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37. AIR 1999 SC 1136
Act gets enacted. Due to multiplicity of Wakf legislations such situations have arisen more than often. Ghulam Mohsin Jafri v. State of Bihar\textsuperscript{38} is one of such instances. The case is related to the commencement of the Wakf Act, 1995, which repealed the Wakf Act of 1954. The brief facts of the case are as under:

The petitioner was the chairman of the Bihar State Shia Wakf Board constituted by a government notification in 1992 for a term of five years. Its terms expired in 1997. In the meantime the Act, of 1995 had come into force by a notification of the Central Government. But, a new board was constituted by the State Government through a notification on 31.12 1997 under the Act of 1954. This was challenged by the petitioner on the ground that since the new Act had come into force the constitution of the Board was void in law. The respondents contended that the new Act had not come into force as it required a separate notification to be issued about its enforcement in each State.

Turning down this contention, the Patna High Court held that such an opinion is totally misconceived because the Central Government had brought the Act into operation throughout the country from a certain date without reservations. The court further observed that a comparative study of the provisions of the Act of 1954 and the Act of 1995 simply demonstrates that after the Act of 1995 has come into force, the constitution of the Board has to be under the new Act only and not at all under the provisions of the Act of 1954. Thus the impugned constitution of the Board under the 1954 Act is wholly misconceived and without jurisdiction. The Court said that a

\textsuperscript{38} AIR 1999 Pat. 115
comparison of the provisions of section 10 of the Act of 1954 (since repealed), with the corresponding provisions of sec 14 of the Wakf Act of 1995 with respect to the composition of the Board brings to light that the provisions are substantially different and it is not a case of using the same power by referring to a wrong provisions.

It is striking to note here that although the Patna High Court made such an exhaustive enumeration of the existing statutory position concerning wakfs, the Rajasthan High Court has failed to recognise and appreciate the same. In the case of Shaukat Ali Ansari v. State of Rajasthan, the question that came for consideration before the court was whether the state government was acting contrary to law when it intended. The term of the Wakf Board instead of reconstituting the Board under the new Act of 1995 and also appointed an administrator.

It was opened by the Rajasthan High Court that the extension of the term of the board by way of an interim arrangement till the constitution of the new Board did bar the appointment of an administrator. Although there was no provision in the Act of 1995 for such an appointment, the Act, did not even expressly bar such appointments. An analysis of this judgement reveals that there has been lack of appreciation on the part of the judge about the democratic governance of Wakf properties.

Syed Inamul Haq Shah v. State of Rajasthan is yet another case on this point. In this case the court made an in-depth analysis of the scope of sec 85 of the Wakf Act of 1995.

The Rajasthan High Court, relying on the earlier precedents, held that whenever the provisions of the Act are warded in the form as they are in section 85 i.e. clearly shows an intention of retrospective

39. AIR 1999 Raj. 175
40. AIR 2000 Raj 19
operation. It further opined that it is not essential that the legislature, if it intends to apply a statute to pending proceedings must formulate an express provision to the effect. Thus, the bar to jurisdiction of civil court under section 85 of the Wakf Act of 1995 was extended to pending proceedings also.

One of the most important case on this point is that of the Gujarat High Court in *Syed Khersha Sajanshah Mutawalli v. Bhuj Municipality.* In this case, the plaintiff a mutawalli filed a suit against a municipality had no right to make use of the *Kabarastan* or to make any construction at the *Kabarastan* which was owned and possessed by the plaintiff and for permanent injunction to restrain the municipality from making use of the suit *Kabarastan* or from making any construction thereon and to restrain the Municipality from obstructing the plaintiff from making use of it. The Wakf Board was joined as a second defendant, though no relief was claimed against it. The lower Appellate Court held that as the Board was impleaded as a defendant; notice of suit should have been issued to the Board under section 56 of the Wakf Act of 1954 and that in the absence of such notice. The suit was not maintainable.

However, the Gujarat High Court explaining the correct legal point on this part said that although the Board was joined as a defendant, prior notice of the suit to the Board under section 56 was not necessary, as no relief was claimed against the Board. It further laid down that even if the Board was not joined as party, under Section 57 of the Act, the notice would have been issued against the Board by the Court. Therefore, the Board was joined as party without claiming any relief the provision of section 56 which required statutory notice before filing of the suit were not attracted. When Section 56 was not attracted

41. AIR 1986 Guj 1.
to the facts of the present case, it could not be said that in the absence of the notice served on the Board before filing of the suit, the present suit was not maintainable.

Thus, it was held that the lower Appellate Court had erred in its judgement by committing a grave legal error.

Syed Abdul Jabbar and other v. The Board of Wakfs in Karnataka is another instance on this point. The case purports to deal with the requirement of sufficiency of notice in cases of suits against Wakf Boards as enjoined in section 56 of the Act. In the instant case, there were four plaintiffs and all of them claimed to be mega wars of wakf in question by inheritance, inheriting such rights from their fore fathers. The notice served on the board was signed by only two of them and they alleged that they did that in representative capacity.

However, the finding of the Court was that the plaintiffs having inherited the right from their forefathers and therefore, there was nothing like a boy recognized under the law and hence the notice issued by only two of the plaintiffs for filing of suit under section 56 could not be considered lawful. This situation corresponds to the case of an unregistered society against and by which no legal claim can be made and hence the notice was held to be bad in law.

In District Wakf Officer, Nanded v. Jeelanikhan Roshan khan is a case where the Aurangabad Bench has made a detailed study as to when a notice under section 56 is tenable. In this case the plaintiff filed a regular civil suit in the Court of Civil Judge for an injunction against the petitioners the District Wakf Officer and another alleging that they were obstructing in the plaintiffs possession of the suit premises, which

42. AIR 1992 Kart. 43.
43. AIR 2000 Bom. 240.
he had taken on a monthly rent from the Wakf Board for running his pan shop.

The Board contended that the suit was not maintainable for want of notice under section 56. However, adopting the correct channel of interpretation the court held that section 56 of the Wakf Act applies to such cases which are instituted against the Wakf Boards in respect of any act purporting to be done by it in pursuance of the Act as any rules made thereunder. The provision could not be invoked here because in the present case the suit has not been filed against the Board but against an official of the Board who was causing obstruction in the plaintiffs possession of the property taken by him on lease from the board.

The Act of 1995 vests the Wakf Boards with innumerable powers most of which are undisputed. The Board is empowered to assume the direct management of the wakf properties, in cases of misappropriation of wakf properties by the mutawalli.

In *P.M. Dastagir v. Karnataka Board of Wakfs* the board took over the management of a Masjid and appointed the petitioner as administrator to look after its affairs. The board later relieved the petitioner of his duties and appointed a new administrator. He challenged the order of his removal on the ground that no reasons were recorded by the Board for its action. The Court held that the board was bound to record reasons under section 65 of the Act only when the management of a wakf was taken over by it. It cannot be asked under section 65 to give reasons for the removal or appointment of an administrator, more so, in the instant case, when the appointment was purely honorary, and without emoluments or other financial gains.

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44. AIR 1998 Kart. 297.
Section 27 of the Act of 1995 provides that the Wakf Board may, by a general or special order in writing, delegate to the chairperson, any other member, the secretary, or any other officer or servant of the board or any area committee subject to such conditions and limitations as may be specified in the said order, such of its powers and duties under this Act, as it may deem necessary. Explaining the nature and extent of such delegation of powers it was observed by the Andhra Pradesh High Court in *M.A. Aziz v. A.P. State Wakf Board* that there can be no blanket delegation but delegation of specific powers only.

In the instant case the resolution in question provided “delegation of existing powers” which the court held as “very vague” too ambiguous and too general in nature. The court held that it is difficult to think that section 27 of the Act of 1995, contemplates total delegation of powers of the Board to other persons to sit by itself and watch the consequences.

A very innovative step by the legislature inscribed in the Wakf Act 1995 is the creation of Wakf tribunals for deciding disputes relating to wakfs. After the enactment of the Act of 1995, the jurisdiction of the Civil Courts has been completely ousted.

In *Subhan Shah v. M. P. Wakf Board*, the Indore Bench of the M.P. High Court made certain general notable observations about the jurisdiction of tribunals which may be taken as follows:

1. The Tribunal constituted under the Act is deemed to be a civil court, and has the same powers as that of a civil court under the code of civil procedure.

2. The relief which can be granted by the civil court can also be granted by the Tribunal.

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45. Supra Note 25.
46. AIR 1997 M.P. 8
3. In view of the express bar on the jurisdiction of the civil courts under the Act, no suit or legal proceedings would lie in civil courts, which are required under the Act to be determined by the Tribunal.

4. A Mutawalli of a wakf and a person interested in a wakf can file an application to the tribunal for determination of any dispute relating to the wakf.

5. The decision of the board to include a property in the register of wakf is a statutory decision and its validity can be decided by the Tribunal.

However, the procedural law on the jurisdiction of tribunal is not much like the substantive law. It is no doubt true that the jurisdiction of civil courts in matters pertaining to wakfs, but a pending proceeding is an exception to this general rule meaning thereby that, when a suit or appeal is pending in any court at the time of commencement of the Act of 1995, the Tribunal does not possess necessary jurisdiction to entertain the same.

In Sardar Khan and others v. Syed Najmul Hasan Seth and ors.47, the Honourable Apex Court had to deal with the same vexed question that if a suit is pending at the time of commencement of the Act of 1995 i.e. 1.1.1996, can the jurisdiction of the Tribunal be validly invoked. In answering the said question, the court made an exhaustive interpretation of the relevant provisions of the Act of 1995 namely Section 7(5) and Section 85 of the Act of 1995. Section 7 (5) reads as under “The tribunal shall not have jurisdiction to determine any matter which is the subject matter of any suit or proceeding instituted or commenced in a civil court under sub-sec (1) of sec 6, before the commencement of this Act or which is the subject matter of any appeal from the decree passed before such commencement in any such suit or

proceeding or of any application for revision or review arising out of such suit, proceeding or appeal as the case may be”.

Thus, it was observed by the court that sub-section (5) of section 7 clearly transpires that the Tribunal shall not have jurisdiction to determine any matter which is the subject matter of any suit or proceeding instituted or commenced before a Civil Court prior to 1.1.1996 and the Tribunal will have no jurisdiction to decide such matter and suit will be continued and concluded as if the Act had not come into force. Overruling the decision of Syed Inamul Haque Shah case, the Supreme Court laid down that on a conjoint reading of sub-section (5) of section 7 and sec 85, the result would be that the Act will not be applicable to the pending suits and proceedings or appeals or revision which have commenced prior to the enforcement of the Wakf Act 1995.

A Masjid or Mosque means a Muslim place of worship meant primarily for prays individual and congregational. It can, however, be used also for other religious and pious purposes. To consecrate a Mosque, it is not sufficient merely to construct it. The following are the essentials of valid dedication in favour of Mosque-

i) The building must be separated from other property of the honour.

ii) A way must be provided to the mosque, and

iii) Either public prayers must be said or possession must be delivered to the Mutawalli.

According to Ameer Ali, where a Mosque has been validly dedicated the right of the wakf in the property is entirely extinguished. Once a mosque is validly consecrated, a reservation in favour of the people of a particular locality is deemed to be bad and it must

48. Mahmood Tahir; The Muslim Law of India; 2006, p. 231
49. Fyzee; Op.cit., 4, 319
necessarily be open to all persons. Nor can a mosque be restricted to the followers of a particular school or Madhhab. A complete dedication has no place for such compartmentising of a public welfare religious dedication. It is open to all Muslims irrespective of their sects and sub-sects.\textsuperscript{50}

One of the earliest cases on this point is the decision of Allahabad High Court in \textit{Ataullah v. Azim-ullah},\textsuperscript{51} where the Allahabad High Court held that a mosque, being dedicated to God, is for the use of all Mohammedans and cannot be lawfully appropriated to the use of any particular sect.

The most important case on the issue of reservation of the use of Mosque dedicated as wakf to a particular class or classes of people is the case of \textit{Mohd. Wasi v. Bachchan Sahib},\textsuperscript{52} decided by a full bench of the Allahabad High Court.

Some Hanafi Muslims in the town of Mahmoodabad (U.P.) in their representative capacity filed a suit against their shitee co-regionalists to restrain them permanently from certain ceremonies which they were performing within the precincts of the mosque. An important group of sunnites refused to associate themselves with the plaintiffs and were impleaded as party defendants. It was shown by the evidence on record that the mosque was built by a Hanafi and all the ceremonies there were performed according to the Hanafi ritual. Gradually the Shiites also began performing other ceremonies there. The Hanafis objected and filed a suit to restrain the Shiites from practices which were abhorrent to them. The lower court dismissed the

\textsuperscript{50} Fyzee; \textit{Op.cit.}, 4, 319  
\textsuperscript{51} 1889 ILR, 12 All 494  
\textsuperscript{52} AIR 1955 All 68
suit and as a result it was referred to the full bench. The full Bench laid down as follows:

1) That a mosque is dedicated for the purpose that any Muslim belonging to any sect go and say prayers therein.

2) That it cannot be reserved for Muslim of any particular denomination or sect.

3) That no one claims to have the form of congregation al prayer usually said in a mosque altered to suit them.

4) That even though the congregational prayers are said in a mosque in a particular form any Muslim belonging to any other sect can go and say his prayers at the back of the congregation in the manner followed by him so long as he does not do anything malafide to disturb the others.

5) That the object of dedication can neither be altered nor the beneficiaries limited or changed and

6) That a Muslim will have a cause of action if he is deprived of his right to say prayers in a mosque or is prevented from doing so.

The case of *Haji Mohd. Sayeed v. Abdul Ghafoor*[^53] is yet another landmark judgement of the Allahabad High Court on similar line of argument. In this case Hanafis were in control and management of a certain mosque since 1915. The *Ahle Hadith* also used to pray separately in the same mosque. Two groups of Sunnites can offer prayers peacefully in the same place of worship, is a settled law. But the court going further on this line held that while every Muslim is entitled to pray in a mosque not every sect has an inherent right to form a separate

[^53]: AIR 1955 All. 686
congregation and offer prayers, more so when relations between the
two sects are virtually strained.

The Apex Court holds a view similar to that of full Bench of
Allahabad High Court with regard to the dedication of mosque and the
right of the public to enter into it and offer prayers. The case of Mohd. S.
Labbai v. Mohd. Hanifa is a very important case decided by the,
Supreme Court defines and bench mark all the essentials of a dedication
of mosque as wakf. It has also laid down at some length as to when
does a dedication of a site for the purposes of a mosque become a wakf.
The purposes of a mosque has been made but there is no entry to the
general public for offering prays there does not constitute a valid
dedication in favour of a mosque.

In N.R. Abdul Azeez v. E. Sundaressa Chettiar it has been laid down
by the Madras High Court that if a land has been used from time
inmemorial for a religious purpose for e.g. mosque or a burial ground
it becomes a wakf by user although no evidence of an express
dedication exists. The court further went on to say that the very
concept of a private mosque is unknown to Muslim law once a founder
dedicates a particular property for the purpose of a public mosque no
muslim can be denied the right to use the same.

Mosques occupy a pivotal position in the religion of Islam.
According to Islamic Shariat Muslims cannot worship effectively
without a mosque, and so compulsory acquisition of mosques cannot be
allowed neither legislatively nor judicially.

The acquisition cannot also be justified on the ground that the Act
allows the acquisition of places of worship of other religions too.
The land acquisition Act of 1894 is a piece of colonial legislation and it

54. AIR 1976 SC 1569
55. AIR 1993 Mad. 169
now calls for reform. The Allahabad High Court in *Mohd. Ali Khan v. Lucknow Municipality*\(^{56}\) without bothering to probe into the sanctity of mosques in Islamic law and unmindful of the apparent idea of compulsory acquisition of mosques held that graveyards and mosque was not an integral part of the right to profess and practise religion as guaranteed under article 26 of the constitution.

In yet another landmark judgement of *Ismail Faruqi v. Union of India*\(^{57}\) that a mosque likes any other place as property could be compulsorily acquired under the land acquisition Act of 1894 and also upheld the acquisition of the Babri Mosque under the acquisition of certain Areas of Ayodhya Act 1993.

Almost every city, township and village in India has a graveyard as a qabristan as we call it. Apart from public graveyards open to all Muslims, there are also some private qabristans built in the past and used by particular sects or families. A private graveyard may by user become a public graveyard. All public graveyards are wakfs either by user or by dedication and all are governed by the law of wakfs.\(^{58}\) In a very old and typical case the Patna High Court decided against the existence of graves and refused to be bound by all the rules of Mohammedan law which are laid down in the Muslim tent. The brief facts of this entitled *Ramzan Momin v. Dasrath Rou*\(^{59}\) are as under:

A Hindu brought a suit for declaration of his little to and possession of a plot of land against the Muslims in a certain village. The defendants pleaded that the land was wakf as it was used as a burial ground from time immemorial.

It was, however, held that the use fell to be decided not on the principles of Mohammedan law but on justice, equity and good

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56. AIR 1978 All. 280
57. AIR 1995 SC 605
58. AIR 1953 Patna 138
59. AIR 1964 MP 227
conscience. Thus, the court held that as the Hindu had proved his right he was entitled to a declaration.

A cemetery is a consecrated ground and is not a private property, whether it is a public burial ground or not depends upon the group of persons using them by burying their dead or evidence of dedication derived from testimony of witnesses or reputation. In *M. Kasam Abdul Rahman and another v. Abdul Ghafoor Ahmedji and others* the question that came up for consideration before the Indore Bench was whether any particular property dedicated as wakf for purposes of a graveyard is public or private. The court in answering this question made out several points that may be taken into account to determine whether a graveyard is public or private. The court held that where the land was used as a graveyard for pretty long time by the members of the public without discrimination of user. The land must be regarded as a public graveyard. A graveyard cannot be a private graveyard unless it is used for the family members exclusively. Once the public are allowed to bury their dead it ceases to be a private property. The Court further observed that the stoppage of use will not convert a graveyard which was once a wakf into a private property. A public graveyard continues to be so whether it is so used or not. A graveyard will always vest in public and it cannot be divested by non-user.

In *Mohd. S. Labbai v. Mohd. Hanifa* the Apex Court speaking through Fazal Ali J. laid down that under the Mohammedan Law the graveyards may be of two kinds a family or private graveyard and a public graveyard. A graveyard is private one which is confined only to the burial of corpses of the founder, his relations or his descendants. In such a burial ground no person who does not belong to the family of

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60. AIR 1964 MP 227
61. AIR 1984 SC 882
the founder is permitted to bury his dead. On the other hand, if any member of the public is permitted to be buried in a graveyard and this practice grows so that it is proved by instances adequate in character, number and extent then the presumption will be that the graveyard is public graveyard. The Court laid down the following rules to determine whether the graveyard is public or private.

1) That even though there may be no direct evidence of dedication to the public, it may be proved so by immemorial user.

2) That if the graveyard is a private or a family graveyard then it should contain the graves of only the founder, the members of his family and his descendants and no others.

3) Once even in the family graveyard members of the public are allowed to bury their dead, the private graveyard sheds its character and becomes a public graveyard.

4) That in order to prove that a graveyard is public by dedication it must be shown by instances of the character, nature and extent of the burials from time to time.

5) That where a burial ground is mentioned as a public graveyard in either a revenue or historical papers that would be conclusive proof to shown the public character of the graveyard.

In *Abdul Jalil v. State of U.P.*62 the Supreme Court has held in an old Sunni-Shia dispute relating to certain graves in the city of Varanasi, that shifting of a grave in a case of necessity is not the against the Islamic religion and law.

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In Persian and Urdu, the word Dargah means a threshold. In India it is a term applied to a shrine or to the tomb of a Muslim Saint, and is therefore a place of resort and prayer.\textsuperscript{63}

In India dargah means a tomb of Muslim Saint mostly used as a place of religious prayer. It is an established meaning of Dargah that it is a shrine or tomb of a Saint, such a tomb is respectively referred to as the portal to the spiritual place of the Saint. It generally includes a group of buildings of which the tomb is the nucleus.\textsuperscript{64}

The conceptual backdrop of the Dargah as a wakf is important and in this context the decision of the Bombay High Court in the case of \textit{Mohomed Oosman v. Essak Salemahomed}\textsuperscript{65} is an important one. It discusses at length the law relating to dargah, besides discussing the origin of dargah. The Court simply lay down that a dargah is a respectful term applied to the shrine of a Muslim Saint in India.

Although the Prophet had shown his disinclination towards the erection Mausoleums yet towards the 14\textsuperscript{th} century such complexes grew in eminence in Mongol Iran and from there it comes to India.

A dargah must be distinguished in all respects from a mosque in so far as a mosque does not comprise of any grave of a Saint or Sufi.

In \textit{Syed Shah Abdul v. Md. Lebbai}\textsuperscript{66} the Court draw out a distinction between a mosque and a dargah. The Court observed that a Mehrale which points the direction towards which the faithful must turn and pray is an essential part of a mosque while a dargah does not have a mehraj. In a mosque there is a call for prayer but there is no such thing in a dargah. The term “dargah” is used in two senses: (i) it may refer to

\footnotesize{\begin{itemize}
\item \textsuperscript{63} Rashid, \textit{Op.cit.}, 5, p. 236-327
\item \textsuperscript{64} Diwan, Paras, Muslim Law in Modern India, p. 254.
\item \textsuperscript{65} (1958) 2 MLJ 200
\item \textsuperscript{66} Fyzee; \textit{Op.cit.}, 4, p. 327
\end{itemize}}
the tomb itself or it may include the whole group of buildings of which the tomb is the nucleus. A dargah is managed by a Mujawar. He is actually a servant or sweeper of a Muslim Shrine. However, Mohammedan Law down not recognizes the office of a Mujawar as an integral part of the Dargah. Such office also does not dissolve by way of hereditary succession unless the same can be proved by long user.  

The earliest Statues governing the Management of Dargah was the Religious Endowments Act of 1863 which was later followed by separate Statues in different States? Now the Dargah Khwajah Saheb of Ajmer is the exclusively governed by a separate Statue called Dargah Khwaja Saheb.

_The Aligarh Muslim University v. Syed Mohammad Sayeed Chishty & Others_ in this case the dedication of a property to the Almighty God has triggered off legal disputes amongst the mortals and an institution. In this case one Hakim Nizamuddin an experienced physician and a devout Muslim owned a three storied building in Gali Langar Khana, opposite the Dargah Sharif at Ajmer. The building included not only shops, but also three libraries, which housed costly books and a "dawa khana" (clinic) of the Hakim Sahab. Being a religious man, on 6.7.1942, Hakim Sahib executed a "wakf al-al-aulad (family wakf) with regard to the three-storied house. According to the wakif Hakim Sahab - the said wakf was to be governed by the Hanafi School of Muslim Law. Hakim Sahab was to be the first Mutawalli and after him, his eldest son, Hakim Nasiruddin, was to be the next Mutawalli. After his son Hakim Nasiruddin, the Mutawalli would be chosen by lots from the families of Hakim Sahab's male issues. Thus, the succession of Mutawalli was fixed. Hakim Sahab did not retain any power to change the said line of succession.

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68. AIR 2007 (NOC) 2493 (Raj) – The certified and original copy of the judgment has been consulted in the Office of the Wakfs and Properties, AMU, Aligarh
succession of Mutawallis. The usufruct of the suit property was to be used by Hakim Sahab during his lifetime. The 1942 Wakf was not only registered but also published in the Official Gazette dated 23.9.1965.

However, the partition of the country in 1947 changed the scenario. With the partition, Hakim Sahab’s children three sons, including the eldest son, Hakim Nasiruddin and daughters – migrated to Pakistan. Since the succession of Mutawalli as contained in the 1942 wakf could not be implemented. On 30.6.1952, Hakim Sahab created a trust deed wherein he changed the succession of Mutawalli during his lifetime, but after him, Smt. Zohra Begum, the great-grand daughter of his sister, Mst. Kulsum Begum, was to succeed as the next Mutawalli. But, after sixteen years Hakim Saheb again changed his mind and on 15.7.1966 executed a will of entire property in favour of the Aligarh Muslim University, Aligarh, while Islamic Law permits only 1/3rd of the property to be transferred as a gift through a will. Therefore, on 28.9.1966 Hakim Saheb created another wakf in favour of the University.

The Rajasthan High Court held that the 1942 wakf is valid under section 4 of the Act 1913 and 1966 wakf was invalid. It appears, that had 1966 wakf valid then University would have got the wakf property in its favour. The intention of the wakif could have been interrogated in this case as there occurred a big change in the wake of the partition. Consequently, all the descendent of Hakim Saheb migrated to Pakistan. Thus, in the absence of institutional framework on the part of the University to attend litigations in the courts pertaining to its properties which are located in far flung areas lost the instant case. Whereas, the respondents were the interested parties i.e. why they got the case settled in their favour.
The researcher has made number of enquiries with regard to instant case and interviewed Dr. M. Wasim Ali, Associate Member Incharge, Properties and Wakf, AMU, Aligarh. He categorically averred that an Special Leave Petition (SLP) was filed before the Hon’ble Supreme Court but it was dismissed in limine. Therefore, it is evident that there should be a properly institutionalised, well equipped and result oriented mechanism to look after legal affairs and litigations pertaining to the University properties in different part of the country.

The Wakf Act of 1995 was a positive step towards better and more organised statutory control of wakfs in India. It is considered to be an improvement over all the preceding enactments strictly as indirectly dealing with wakfs. There are greater checks on the misappropriation of wakf funds and mismanagement of wakf properties by unscrupulous Mutawallis. It is pertinent to mention here that the Act of 1995 prescribes certain penal provisions also in dealing with mutawallis. Another lacuna that the wakf faced was the pendency and unnecessary dragging of litigations relating to wakfs. The Act here has ousted the jurisdiction of Civil Courts and replaced it by Wakf Tribunals that will specifically deal with the cases pertaining to wakfs.