



From Trust to Transparency: Statutory Turn in Charitable Endowment Reform

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Index Terms – Trust – Charitable Endowment- Personal law

Abstract:

The legislative landscape of Islamic charitable endowments in India has undergone a transformative overhaul by the Waqf (Amendment) Act, 2025. Under this amendment, the Waqf Act of 1995 has been renamed “*Unified Waqf Management Empowerment, Efficiency and Development Act*”, for short, the UMEED Act. The thrust of the reform is the instilling of transparency, mitigation of systemic encroachment, and rationalisation of management of Waqf holdings. By addressing the existing structural vulnerability, the amendment aims at safeguarding Waqf assets against unlawful transfer or misappropriation while diluting the existing arbitrary powers of the Waqf Boards.

Pre-Amendment Framework: 1995 Paradigm

Traditionally, the Waqf Act, 1995, defined "Waqf" as the permanent dedication of movable or immovable property for purposes recognized by Muslim law as pious, religious, or charitable. A cornerstone of this regime was the doctrine of "*Waqf by User,*" which conferred legal status upon properties used for religious purposes, such as graveyards or prayer grounds, since "time immemorial," even in the absence of a formal, written declaration. Central to this jurisprudence was the inviolable principle of "Once a Waqf, always a Waqf," signifying that property dedicated to the Almighty was irrevocable and could never be reclaimed, sold, or transferred.

To oversee registration and preservation of these endowments, the 1995 Act established State Waqf Boards. The most potent instrument of their authority resided in Section 40, which empowered the Board to initiate *suo motu* inquiries to determine status of a property. If the Board had "reason to believe" a property constituted Waqf, it secures the power to register it as such. Furthermore, the Central Waqf Council and State Waqf Boards were comprised entirely of Muslim members, including legislators, legal professionals, and Islamic theologians, with no provision for non-Muslim representation.

The 1995 Act was largely insulated from the traditional judiciary. The Act established Waqf Tribunals, whose adjudications were deemed to be final and binding. No statutory right of appeal existed; the High Courts could only intervene on narrow grounds to review the "correctness, legality, or propriety" of a Tribunal's decision. Crucially, Section 85 of the pre-amended Act expressly barred civil court from exercising jurisdiction over any dispute pertaining to Waqf properties.

The Catalyst for Reform

Despite the robust legal safeguards embedded in the 1995 Act, the management of Waqf lands became the subject of criticism. Allegations of administrative inertia, opaque governance, on widespread encroachment led to a growing disconnect between the statutory intent and operational reality of Waqf administration. Such perceived crisis of governance ultimately necessitated legislative intervention.

Key Amended Provisions

The 2025 Amendment introduced significant change to how Waqf properties are created, managed, and regulated. As per the Amended Act:

- Abolition of "Waqf by User": Formal documentation or deed is now mandatory. A property can no longer be declared Waqf simply based on long-term traditional use.
- Strict Criteria for Creation: To establish a Waqf, an individual must have practiced Islam for at least five years and must hold clear legal ownership of the property.
- Protection of Women's Rights: The creation of *waqf-alal-aulad* (family endowments) can no longer be used to deny inheritance rights to women.
- Reduced Board Authority: The Waqf Board no longer has the unilateral power to "inquire and determine" if a property belongs to the Waqf.
- Enhanced Role of the District Collector: The Collector (or an equivalent officer) is now empowered to investigate and make final determinations in disputes between government and Waqf property. The Collector also replaces the Survey Commissioner in supervising property surveys.
- Protection of Tribal Lands: The Act explicitly prohibits converting land in Fifth and Sixth Schedule (tribal) areas into Waqf property.
- Digital Accountability: All properties must be registered on a centralized digital portal within six months to facilitate real-time monitoring.
- Financial Oversight: The Central Government may now order audits by the Comptroller and Auditor General (CAG). Additionally, any Waqf institution earning over Rupees one lakh annually must undergo a mandatory audit.
- Judicial & Legal Changes: Waqf Tribunals will now include a District Court Judge and a State Joint Secretary. Decisions can be appealed to the High Court within 90 days.
- The Limitation Act, 1963, now applies to Waqf properties.

- **Diverse Representation:** The Act mandates inclusion of non-Muslim members, at least two Muslim women, and representatives from various sects.

Constitutional and Legal Implications

While the Act introduces progressive reforms like digitization and gender inclusion, it has sparked of significant legal debate. Critics argue that abolishing "Waqf by User" may violate Article 29(1) (the right to conserve culture) and Article 26 (freedom to manage religious affairs) of the Constitution of India. For many grass root communities in the country, Waqf endowment is rooted in oral history and traditional usage; requiring formal titles may undermine these arrangements.

The shift of power to District Collectors and the Central Government has raised baffling questions regarding legal infirmity of the law from a constitutional angle about:

- **Federalism:** Since "religious endowments" and "land" are subjects under the State List (Schedule VII), critics argue that increased Central control oversteps legislative boundaries.
- **Property Rights:** There are growing concern regarding potential infringements on the right to property under Article 300A.

Beyond administration, critics apprehend that the Act could deeply affect beneficiaries who depend on Waqf assets for essential services such as education, social welfare, and burial grounds.

Proposed Recommendation for Reform

To address these concerns while maintaining transparency, stakeholders have suggested the following:

- **Safeguard "Waqf by User":** Allow traditional usage to be recognized through affidavits and community testimonies to protect informal religious sites.
- **Community Consultation:** Public consultation before any Waqf property is sold or redeveloped should be mandatory requirement.
- **Welfare Fund:** Dedicate a specific portion of "Waqf income" to a "Waqf Welfare Fund" for scholarships, healthcare, and housing for the disadvantaged under strict surveillance.
- **Refining Board Roles:** While non-Muslim members provide expertise, some suggest they should serve in consultative or technical roles without voting rights on purely religious matters as requirement of Article 26 of the Constitution of India.

Validity

The validity of the Waqf (Amendment) Act, 2025 (the "Amended Act") has been formally challenged before the Supreme Court in Writ Petition (Civil) No. 276 of 2025 and connected matters. The petitioners contend that several provisions, specifically Sections 3(r), 3C, 3D, 3E, 9, 14, 23, 36, 104, 107, 108, and 108A, are *ultra vires* the Constitution, alleging violations of Articles 14, 15, 19, 21, 25, 26, 29, 30, and 300A.

Expropriation or Religious Infringement alleged by the aggrieved section of the community

In seeking an interim stay of the operation of the Act, the petitioners submitted that while the statute purports to "protect" Waqf properties, its underlying intent is their expropriation. It was contended that:

- **Abolition of "Waqf by User":** By amending Section 3(r) the Act effectively terminates the doctrine of "Waqf by User." New provisos require all such existing Waqfs (*auqaf*) to have been registered prior to the commencement of the Act. This, petitioners argue, disrupts centuries of religious practice and the rights protected under Articles 25 and 26 of the Constitution of India.
- **Protected Monuments and Section 3D:** Under Section 3D, if a property is notified as a "protected monument," any prior Waqf declaration becomes void. This is viewed as a direct encroachment on religious endowments.
- **Discriminatory Eligibility Criteria:** The new requirement that a donor must demonstrate at least five years of practicing Islam to create a Waqf was attacked before the Supreme Court of India as arbitrary and discriminatory, violating the equality mandates of Articles 14 and 15.
- **Restrictions on Scheduled Tribes (Section 3E):** The prohibition against members of Scheduled Tribes (under the Fifth and Sixth Schedules) creating Waqfs (*auqaf*) was termed a "direct attack" on the religious freedom of tribal Muslims.
- **Secularization of Administration (Sections 9, 14, and 23):** Petitioners expressed concern over the restructured Central Waqf Council and State Waqf Boards. By allowing a significant number of non-Muslim members, up to 12 out of 22 in the Council and 7 out of 11 in the Boards, the Act allegedly enables non-Muslim interference with religious management of property. This is without any valid reason. Furthermore, the Chief Executive Officer is no longer required to be a Muslim, and the Board's composition has shifted from an elective to a nominative process, without any justification or reason.
- **The "Government Property" Controversy (Section 3C):** Section 3C mandates that any property identified as "Government property" shall not be deemed Waqf. The petitioners argued that the inquiry process, conducted by a State-designated officer (Collector rank), lacks procedural safeguards. Crucially, the proviso allows a property to cease the status of being Waqf even before inquiry report is finalized.

- **Mandatory Registration and Oral Gifts (Section 36):** The requirement for a written "Waqf Deed" and mandatory registration was challenged as contrary to personal law, which recognizes oral gifts (*Hiba*). Non-registration now results in total bar on legal remedies.
- **Omission of Key Protections:** The deletion of Section 104 (donations by non-Muslims), Section 108 (evacuee properties), and the second proviso to Section 2 (trusts created by Muslims) was characterized as a systematic dismantling of the Waqf framework, leading to killing the soul of the system.

The State's Defense: Transparency, Secular Regulation

The Union of India contended that the Act is necessary regulatory measure:

- **Prospective Nature of "Waqf by User":** The State argued that the abolition is prospective. Registered Waqfs (auqaf) remain protected unless the property is in dispute or is identified as Government land.
- **Administrative Inquiry:** Defending Section 3C, the State maintained that the Collector's inquiry is a preliminary mechanism to correct revenue records. Possession is not disturbed until a final judicial determination is made by the Waqf Tribunal or higher courts.
- **Secular Administration vs. Religious Practice:** Regarding non-Muslim representation, the State argued that the Council's role is purely advisory and limited to secular activities (financial audits, revenue records, etc.), which do not interfere with the religious core of Islam.
- **Judicial Recourse:** The State emphasized that the aggrieved are not "remediless." The Waqf Tribunal retains broad jurisdiction, and Section 83(9) provides a robust right of appeal to the High Court.
- **Tribal Protections and Article 29:** The restriction in Section 3E was defended as a constitutional obligation to protect the identity of Scheduled Tribes, ensuring their ancestral lands are not alienated.
- **Harmonization of Laws:** Deletions and amendments (like the application of the Limitation Act under Section 107) were framed to reduce indefinite litigation and for simplifying property recovery.

The Directions

The Hon'ble Supreme Court considered the stay applications and rival contentions. It concluded that a case was not made out to stay the provisions of the entire statute. The prayer for a stay was rejected; however, the Court issued certain directions:

1. **Suspension of Practice Requirement:** The requirement for a person to prove they have practiced Islam for at least five years (under Section 3) is suspended until the State Government creates a formal legal process to verify such claims.

2. **Suspension of Automatic De-notification:** The Court suspended the rule that would have allowed property to be removed from Waqf status simply because a "designated officer" labels it as Government property. Property cannot be denied Waqf status just because an investigation is pending.
3. **Restriction on Record Changes:** The State cannot automatically change land records based solely on an officer's report before a final legal decision is made. Until a Waqf Tribunal (under Section 83) or a High Court makes a final ruling, Waqf authorities cannot be evicted, and official records cannot be altered.
4. **Freeze on Transfers:** While the case is ongoing, the Waqf cannot sell, lease, or transfer the property to any third party.
5. **Limits on Non-Muslim Representation:** The Supreme Court set strict limits:
 - i) **Central Waqf Council:** A maximum of four non-Muslim members out of 22.
 - ii) **Waqf Board:** A maximum of three non-Muslim members out of 11.
6. **CEO Appointment:** Whenever possible, the Chief Executive Officer should be appointed from the Muslim community.

Conclusion: The Constitutional Responsibility

The Supreme Court of India now faces a profound responsibility. Its task is not merely to interpret a statute but to reconcile the State's power of enacting secular regulation with the fundamental guarantees of religious autonomy. The primary task of the Apex Court is to apply the Doctrine of Proportionality as envisaged by the Hon'ble Supreme Court. It must determine whether the State's objectives, transparency, accountability, and the prevention of encroachment, justify the significant limitations placed on the administration of religious endowments.

Specifically, the Court must adjudicate on the Secular-Religious Divide and distinguish between "secular activities" (financial and land administration), which the State can regulate, and "matters of religion," which are the exclusive domain of the community. The Court will scrutinize whether the amendment has overstepped its bounds transgressing into subjects reserved for the States under Schedule VII. Furthermore, it will evaluate if empowering the executive (District Collectors) to unilaterally determine property status violates the Basic Structure doctrine, specifically the principle of judicial review and the Right to Property under Article 300A.

To resolve this legal conflict, the Supreme Court may apply the Doctrine of Harmonious Construction. This means the Court must find a "middle ground" that enforces transparency without destroying the core principles of personal law. The goal is a just and valid legal framework where transparency serves the endowment, by all means, not undermining it even slightly.