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“UNDERSTANDING WAQF IN ISLAM AND ITS LEGAL FRAMEWORK IN INDIA”

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Summary

This article critically examines the legal and theological foundations of waqf (Islamic endowment) and its statutory treatment under Indian law. Beginning with the Quranic basis and essential conditions for a valid waqf, it delves into the requirement of milkiyyah (lawful ownership), a non-negotiable principle under Islamic jurisprudence. It emphasizes that long-term use of property cannot override this foundational requirement.

The article reviews the Waqf Act, 1995, and the significant changes introduced in the Waqf (Amendment) Act, 2025, including the expanded powers of Waqf Boards and the quasi-judicial role of District Magistrates. These amendments are currently under challenge in the Supreme Court on grounds of violating fundamental rights such as access to justice, property rights, and equality before law.

Through a systematic framing of legal questions and historical categorization of waqf-related obligations and disputes, the article presents a clear lens for judicial review. It argues for the

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primacy of constitutional safeguards, clarity of title, and the need for secular consistency in applying rules of property law.

The comparative section contrasts India's waqf framework with those of other Muslim-majority countries, revealing a global pattern of state involvement but also greater administrative clarity and oversight.

Ultimately, the article urges legal reforms that preserve the sacred purpose of waqf without compromising constitutional fairness, property rights, and judicial integrity.

Abstract

This article explores the concept of waqf (Islamic endowment) from its religious origins in Islamic jurisprudence to its statutory regulation under Indian law. It answers key questions on the definition, conditions, legal treatment, operational forms, and contemporary controversies surrounding waqf in India, while also comparing global practices. The article also analyses the 2025 Waqf (Amendment) Act and raises constitutional and legal questions currently under review by the Supreme Court.

Key words: WAFQ, WAFQ Board, WAFQ Bill, WAFQ Bill Amendment, Mutwalli, Milkiyyah

1. Introduction

The Waqf Act, 1995 and 2013 have emerged as a critical topic in Indian legal and political discourse. The 2025 Waqf (Amendment) Act has triggered nationwide debate and judicial scrutiny. This article aims to clarify what waqf is, who can create it, what its essential features are, and how it is regulated in India and globally. It also addresses questions about the misuse of waqf laws and examines their compatibility with Islamic principles.

2. What is Waqf as per Islam?

Waqf (from Arabic "waqafa" meaning to detain or preserve) refers to the permanent dedication of a property by a Muslim for religious or charitable purposes. Once dedicated, the ownership is transferred to Allah, and the property becomes inalienable. It is intended to generate continuous benefit (sadaqah jariyah).

"Allah is good and accepts only that which is good." — Sahih Muslim, Hadith 1015

"Do not consume one another's wealth unjustly..." — Surah An-Nisa (4:29)

"And do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness." — Surah Al-Ma'idah (5:8)

3. Legal Term and Recognition in India

Under Indian law, waqf is defined in Section 3(r) of the Waqf Act, 1995, as a permanent dedication by any person of any property for purposes recognized by Muslim law as pious, religious, or charitable. The Act provides for Central and State Waqf Boards, registration, supervision, and dispute resolution via Waqf Tribunals.

4. The Waqf (Amendment) Act, 2025: Overview and Impact

While the 1995 amendment introduced significant changes to the Waqf Act, including:

Broader powers to Waqf Boards to initiate inquiries and mark properties as waqf without full documentation.

The 2025 amendment highlights are: Delegation of quasi-judicial authority to District Magistrates to hear objections or disputes — a point now under constitutional scrutiny.

Enhanced penalties for non-registration or concealment of waqf property.

These changes have been challenged before the Supreme Court on grounds of violating fundamental rights, particularly:

Right to property (Article 300A)

Right to access the judiciary (Article 226)

Equality before law (Article 14)

No formal "framing of issues" exercise has yet been taken up by the Supreme Court, that is available in public domain.

5. Framing the Issue Before the Court

To bring clarity, the central legal questions may be framed as:

Can a quasi-judicial body (like the DM) adjudicate on land rights without judicial training?

Is mandatory waqf registration enforceable on pre-1923 properties where ownership cannot be established clearly?

Can a private citizen's property be declared waqf without a fair trial in a regular court?

Does barring civil courts and limiting judicial access under Section 85 violate Articles 14 and

21 of the Constitution?

Does the 2025 Amendment's vesting of adjudicatory power in District Magistrates breach the doctrine of separation of powers?

Can properties used for religious purposes but legally owned by non-Muslims be declared waqf under the doctrine of 'waqf by user'?

Should non-registration of waqf property in earlier periods result in penal consequences or gainful rights?¹ Does this doctrine of gainful rights not originate from a violation of the principle of equality before law—where a Muslim's claim is upheld on the basis of a verbal assertion, while persons of other faiths are required to submit documented ownership? Such a position appears constitutionally untenable and contrary to the rule of law.

Who has the locus and responsibility to approach the Waqf Tribunal — and at what stage?

Options Available Before the Supreme Court

In light of the above-framed issues, the Supreme Court may consider the following options:

Strike down specific provisions of the 2025 Amendment as unconstitutional (e.g., Sections expanding DM powers or limiting judicial access).

Read down or reinterpret key sections to ensure compliance with fundamental rights while allowing statutory functionality.

Issue guidelines for the exercise of power by DMs and Tribunals to ensure due process and procedural fairness.

Refer complex constitutional questions to a Constitution Bench for a broader interpretation on access to justice and property rights.

Direct Parliament or State Governments to revise/amend the law to bring greater clarity, fairness, and conformity with the rule of law.

Pass Any other Order: As it deems fit and lawful. And perceived as “Justice not only done but seem to be done”.

6. Scope of Religious Rights: Can Worship Happen on Others' Property?

While Article 25 guarantees the right to practice and propagate religion, it does not imply that such practices can be performed:

On private land without consent

On government-owned property unless expressly permitted

Thus, the right to prayer does not override the right to property.

7. Historical Evolution of Waqf Law in India

From the pre-colonial era to the Waqf Act, 1995:

1923 Mussalman Waqf Act imposed mandatory registration.

Section 3 made non-registration a punishable offence with a fine of Rs. 500.

This raises a paradox — how can a punishable act (non-registration) lead to reward (i.e., waqf recognition without proof)?

8. Responsibility for Registration

Responsibility to register waqf property lies primarily with:

The mutawalli (manager of waqf)

Supported by Waqf Board supervision as per (Section 36 of 1995 Act)

Failure to register can be penalized.

9. Role of the Waqf Tribunal

The Tribunal's role begins when:

A dispute arises regarding whether a property is waqf

Competing claims of ownership are presented

Anyone affected (individual, Waqf Board, or government authority) may file the dispute.

10. Access to Justice: Role of the District Magistrate

The 2025 Amendment has expanded the DM's role in waqf-related disputes. Critics argue this may violate separation of powers, but it is important to note:

The original 1995 Act already barred civil courts (Section 85), forcing parties to approach quasi-judicial Tribunals instead.

11. Categorization of Waqf Property Disputes by Period

To understand legal remedies, obligations, and evidentiary standards, disputes can be categorized as follows. Each period is shaped by distinct laws, registration requirements, and punishments.

Note: This periodical categorization helps bring clarity and ease in resolving waqf property disputes by anchoring each to the law governing that specific era. It also enables a structured understanding of the number and nature of disputes, the documentary obligations of each time, and the corresponding remedies or penalties involved.

Pre-Independence

Pre-1923: Based on Islamic customs and community management. **Obligation:** No statutory requirement; oral declarations accepted. **Remedy:** Relied on local adjudication or community resolution. **Penalty:** None; legitimacy dependent on uninterrupted public use and religious conformity.

1923-1947: Under the Mussalman Waqf Act, 1923. First time waqf registration made mandatory. **Obligation:** Registration within local court or prescribed authority. **Remedy:** Civil suits permissible for disputes. **Penalty:** Rs. 500 fine for non-registration.

Post Adoption of Constitution

1947-1995: Interim period with patchwork of state legislation. Limited central oversight. **Obligation:** Registration encouraged but inconsistently enforced. **Remedy:** Civil court jurisdiction remained open. **Penalty:** Minimal; mostly procedural consequences.

1995-2013: Waqf Act, 1995. Established structured Waqf Boards and Tribunals. Civil courts barred under Section 85. **Obligation:** Registration by mutawalli; Boards responsible for supervision. **Remedy:** Tribunal as first forum; writ to High Court possible. **Penalty:** Administrative fines; removal of mutawalli for mismanagement.

2013-2025: The Waqf (Amendment) Act, 2013. Introduced detailed survey mechanisms, bar on transfer of waqf property, and specific penalties for encroachment under Section 52-A. Strengthened Waqf Board authority immensely. **Obligation:** Mandatory surveys and stricter registration protocols. **Remedy:** Tribunals reinforced as primary adjudicatory forums. **Penalty:** Encroachment and illegal transfer attract penal provisions.

Post-2025: Governed by the 2025 Amendment. Stricter documentation requirements. Non-registration, concealment, or encroachment may lead to criminal liability. DMs empowered to conduct inquiries. **Obligation:** Mandatory registration with Waqf Board. **Remedy:** Appeal to Tribunal; limited judicial review. **Penalty:** Fines and possible prosecution.

12. Essential Features of a Valid Waqf

As per Islamic jurisprudence, only a Muslim can validly create a waqf, since it is a religious dedication to Allah. Although Indian law—being secular—permits non-Muslims to create a waqf if the purpose aligns with Muslim charitable objectives, this legal flexibility introduces an important constitutional dimension: if the right to create waqf is granted through legislation, then changing or regulating that right logically falls within the constitutional authority of the state. As long as such regulation does not violate fundamental rights, the government is within

its power to amend or reinterpret the waqf framework.

Expanded Features (with Jurisprudential Notes):

Permanence (Ta'bid): The waqf must be perpetual. Temporary waqfs are not valid under Hanafi law.

Irrevocability (Lazim): Once created, it cannot be revoked by the waqif.

Clear Intention (Niyah): There must be a sincere and express intention to dedicate the property to Allah.

Lawful Ownership (Milkiyyah): The waqif must have full legal title and authority over the property.

Religious/Charitable Purpose: The objective must serve Islamic religious, pious, or charitable functions.

Certainty of Subject Matter: The waqf property must be specific, identified, and in existence.

Appointment of Mutawalli: A manager must be appointed to administer the waqf as per Islamic and statutory rules.

Source Reference: Classical texts such as *Al-Hidayah* and judicial interpretation in *Md. Ismail v. Thakur Sabir Ali* (1963 SC) affirm these principles.

12A. Invalidity of Waqf Without Lawful Ownership (Milkiyyah)

If the essential feature of Milkiyyah is absent — meaning the waqif does not have lawful, complete ownership of the property — the waqf is considered void ab initio under both Islamic and Indian legal frameworks.

“*Lā waqfa illā mim mā yamlik*” — “There is no waqf except from what one owns.”

Quranic Support:

Surah An-Nisa (4:29): “*Do not consume one another’s wealth unjustly...*”

Surah Al-Baqarah (2:188): “*Do not use your wealth to wrongfully consume what belongs to others...*”

Sahih Bukhari, Hadith 2321: “*Whoever wrongfully takes a span of land, Allah will make him wear seven earths around his neck on the Day of Resurrection.*”

Judicial Authority:

Syed Mohd. Salie Labbai v. Mohd. Hanifa (1976, SC): “*No waqf is valid unless the waqif owns the property being dedicated.*”

Md. Ismail v. Thakur Sabir Ali (1963, SC): “*Waqf must be permanent and for a pious purpose; ownership is essential.*”

A waqf does not become valid merely by long-term use, and even that cannot override lawful

private ownership. This principle ensures legal certainty and protects property rights in a multi-faith constitutional framework.

Supplementary Note: The relevance of long-term use ('waqf by user') in establishing *milkiyyah* arises only if an ownership dispute surfaces after a valid waqf has already been created by someone with lawful title. Long-term use cannot serve as a substitute for the initial requirement of ownership. To do so would amount to bypassing the foundational condition of waqf, which is impermissible both legally and religiously.

Further Clarification: Before long-term usage ('waqf by user') can even be considered, the threshold question must be answered: was the waqif legally entitled to dedicate the property in the first place? In Islamic law, the essential condition of *milkiyyah* (lawful ownership) must be satisfied at the time of dedication. Only after establishing this, one can explore other circumstantial factors such as continuous use or public perception. Otherwise, long-term use risks being misused to override ownership, effectively displacing *milkiyyah* with an evidentiary shortcut — a substitution that lacks legitimacy both in Islamic jurisprudence and constitutional law.

Why Use-Based Evidence Fails to Qualify as Proof of Waqf

Use-based evidence — that is, showing that a piece of land has been used over time for religious, charitable, or communal activities — can only demonstrate continuity of practice, not legal dedication.

It is important to distinguish:

Use shows that people have *accessed* or *occupied* the land.

Waqf, however, requires a conscious, lawful act of permanent dedication (*ta'bid*) by someone with lawful ownership (*milkiyyah*).

Hence, use-based evidence fails to qualify as proof of waqf because it does not confirm:

That a waqf was ever formally or legally created,

That the person using or allowing the use of land had the right to dedicate it, and

That any waqf intent (*niyyah*) or formal declaration ever occurred.

The appointment of a mutawalli is a consequence, not a cause, of waqf creation. Therefore, the mere presence of a caretaker or organizer over such land does not backfill the legal requirements of waqf.

In both Islamic jurisprudence and constitutional law, usage without ownership and intent is inherently deficient to establish the status of a property as waqf.

The Supreme Court now has the chance to clarify where religious law ends and constitutional

safeguards begin — to protect not only sacred property, but also secular justice.

12B. Doctrinal Inconsistencies and Constitutional Incompatibilities: India, as a secular constitutional democracy, does not and cannot recognize the concept of *Dhimmi* — a term in Islamic jurisprudence referring to non-Muslims living under Islamic rule with reduced legal privileges. Any suggestion that non-Muslim property rights be considered secondary or subject to waqf claims rooted in community use or religious narrative runs contrary to Article 14 and 15 of the Indian Constitution, which guarantee equality before law and prohibit discrimination on grounds of religion. Similarly, judicial relaxation of the essential waqf condition of *milkiyyah* (lawful ownership) in favor of "use-based evidence" distorts both: The Islamic theological basis of waqf, and The constitutional sanctity of private property (Article 300A). While Indian secularism permits legislation allowing non-Muslims to create waqf, But the Islamic Jurisprudence does not have any reference in religious text books for creating a waqf by a non Muslim, other than Dhimmi. But this term Dhimmi is violation of principle of secularism. If courts or boards stretch core theological prerequisites (like milkiyyah), they dilute both legal integrity and religious authenticity—turning a clear-cut question of ownership into a complex doctrinal riddle."

13. Global Models of Waqf Administration

Across the Islamic world, the role of government in waqf management is significant and varies by country:

Saudi Arabia: Waqf is centrally managed by the Ministry of Islamic Affairs. Disputes are resolved in religious (Sharia) courts with government-appointed judges.

Turkey: Managed by the Directorate General of Foundations (Vakiflar), under the Ministry of Culture and Tourism. Disputes go to civil courts. This model is corporatized, digital, and bureaucratically streamlined.

Malaysia: Each state has its own Islamic Religious Council that manages waqf assets. Disputes are handled in Islamic courts, with civil courts ensuring administrative oversight. Malaysia has also pioneered cash waqf and Islamic financial instruments.

Indonesia: Managed by the national body Badan Wakaf Indonesia (BWI). Religious courts hear waqf cases. Indonesia has a progressive and structured waqf law (Law No. 41/2004) and promotes professional mutawalli certification.

Egypt: Fully nationalized under the Ministry of Awqaf. Religious courts hear disputes, and the state directly controls mosque funding and property management.

Pakistan: Managed by provincial Auqaf departments under the Ministry of Religious Affairs. Civil courts address waqf disputes, with considerable state involvement in shrines and religious institutions.

India: Perhaps India is the only democratic country where waqf act has a recognition in its current form in a multi faith country. In India Waqf is managed through statutory Waqf Boards under the Waqf Act. Tribunals are used instead of civil courts, and state governments play a direct role in appointments and oversight.

14. Case Citations

(Supreme Court and High Court Classification)

S.A. Gaffar v. State of Tamil Nadu, (2001, Supreme Court) – ownership must be lawful

Md. Ismail v. Thakur Sabir Ali, (1963, Supreme Court) – waqf must be permanent and for a pious purpose

Abdul Rahim v. State Waqf Board, (Madras High Court) – waqf on disputed property not valid

Bharat Sanchar Nigam Ltd. v. U.P. Sunni Central Waqf Board, (Allahabad High Court) – Waqf Board claim must be backed by solid proof

Syed Mohd. Salie Labbai v. Mohd. Hanifa, (1976, Supreme Court) – waqf without ownership invalid

Conclusion

The legitimacy of any waqf must rest first on the cornerstone of *milkiyyah* — lawful ownership. Long-term religious use, while relevant in evidentiary contexts, cannot override this foundational requirement without undermining both the rule of law and Islamic jurisprudence.

¹ *Explanation for “gainful rights”*: This phrase refers to the paradox where failure to register a waqf property—historically punishable under the 1923 Act—may now result in benefits such as presumed waqf status, immunity from challenge, or exclusive control by the Waqf Board. It raises the question: should historical non-compliance confer legal advantage today?

Waqf remains a sacred and socially powerful institution in Islam. Indian law has attempted to regulate it in a pluralistic framework, but challenges remain — especially concerning ownership disputes, misuse, and modern financial practices. A balance between religious sanctity and transparent governance is essential for its future relevance.

The Supreme Court now has the chance to clarify where religious law ends and constitutional safeguards begin — to protect not only sacred property, but also secular justice.