LAW AND PUBLIC OPINION RELATING TO WAKFS

by

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By the Code of Mahammedan Laws, promulgated on 5th August 1806, later known as The Mahamedan Law Ordinance 1806, the British Government gave the necessary legal form to some of the guarantees contained in the Royal Charter of 1801, that "in the case of Mussalmaan natives, their Inheritance and Succession to Lands, Rents and Goods and all Matters of Contract and Dealing between Party and Party, shall be determined by the Laws and Usages of the Mussalmans....". In this Code comprising 102 sections, there is no provision concerning Wakfs, nor is there any reference, express or implied, to the Law of Wakfs, despite its distinctiveness and distinguished role in the development of Muslim jurisprudence.

Yet, for another one hundred and twentyfive years, till sponsored by the first set of elected Muslim Representatives in Ceylon's Legislative Council, this term "Wakf" despite its wide currency among the people, gained no admittance into the Legislative Enactments of Ceylon. In 1927 the Legislative Council agreed, in principle to the promotion of legislation to control and regulate matters affecting the administration of Wakf (trust) properties. This was implemented four years later by the Muslim Intestate and Succession and Wakfs Ordinance No. 10 of 1931.

It would not, however, be correct to assume thatduring all the preceding years (1806-1931) the Muslims were without any relief, whether judicial or administrative, in matters relating to Wakfs. The good offices of the Kachcheries were generally available; where parties could afford the expenses, the aid of the District Court was often invoked. A good example of this is the Kachchimale Mosque case, fully reported in the Ceylon Morning Leader of 12th May 1908. In such cases the wakf aspects pertaining to the trust properties often tended to be obscured by the proprietary rights concerning the contending parties. This situation was no doubt vastly improved by the Trusts Ordinance of 1917. Many of the wakfs came within its definition of 'charitable trusts'. As a result the proprietory rights of individuals now receded to the background yielding their place to the public rights of the community. Now it was made possible for five persons interested in religious trusts to institute action in the District Court after a

petition to the Government Agent, for a decree settling a scheme of management or vesting say property in the trustee or directing accounts and inquiries etc. In the case of charitable trusts, other than religious trusts a distinction not obtaining in the Muslim Law of Wakfs - action could not be instituted without the consent of the Attorney General.

It is significant that "the originating cause of the Ordinance of 1917 is the unsatisfactory condition of the law relating to religious trusts, more particularly so far as it concerns Hindu religious trusts Chapter 10, headed Charitable Trusts owes much to the experience of India which is embodied in the Indian Act of 1863, which has been considered and adapted to Ceylon, after consultation with those conversant with local conditions. Some of the special provisions do not apply to Christian religious trusts and neither these special provisions nor the provisions of the whole chapter apply to Buddhist religious trusts falling within the scope of the Buddhist Temporalities Ordinance No. 8 of 1905. The application of the customary religious law of the community is provided in section 106. So far as Hindu trusts are concerned, this Section will bring into force the principles laid down in. These principles will also have a salutary application for the purpose of Mohamedan religious trusts." (p. 251 et al seq. of Ceylon Hansard November 15, 1916).

The Trusts Ordinance of 1917 specifically provided that in the matter of religious trusts the Court shall have regard to the religious law and custom of the community concerned, and to the local custom or practice with reference to the particular trust concerned. This Ordinance in addition, made it clear that the Court in respect of charitable trusts had the same general powers as the High Court of Justice in England and that English Law would apply where "no specific provision is made in this or any other ~~xxxxxxx~~ enactment."

But idealogically there was a vital difference between a wakf and a trust. Under the Muslim law of Wakfs "the ownership is vested in God, the mutawalli in His manager and he cannot transfer the corpus." Under the English Law of Trusts, "the ownership is vested in a human being, he can transfer it subject to the obligations imposed thereon." In fact "a trust as distinguished from a wakf is not unknown to Muslim Law - viz. amanet".

Despite this disparity the Wakfs Ordinance of 1931, equated for all practical purposes 'charitable trusts' with 'Wakfs' and contained no definition distinctive of wakfs, even though such a definition was readily available from the Mussalman Wakfs Validating Act VI of 1913 of British India. There Wakfs was defined as "the permanent dedication of a person professing the Mussalman faith of any property for any purpose recognised by the Muslim Law as religious, pious and charitable". The cautious manner in which the Wakfs Ordinance of 1931 was framed could be gauged from the title of the Bill, which was at the commencement of the Committee Stage, "An Ordinance to amend the Muslim Law relating to donations; and to declare the Law relating to Muslim charitable trusts or Wakfs". This during its subsequent passage through the Legislative Council became transformed into "An Ordinance to define the Law relating to Muslim ... donations and charitable trusts or wakfs'. In this change of title is dimly visible the baffling conflict ofviews that prevailed then with regard to the applicability, in Ceylon, of the Muslim Law in respect of (a) these matters for which the Code of 1806 had made as provision and (b) of these matters specifically covered by the common law of the land e.g. Roman Dutch Law.

A close scrutiny of the two Ordinances would reveal the influence in approach and procedure, of the Trusts Ordinance of 1917 as the Wakfs Ordinance of 1931. In this context it is significant that section 24 dealing with the general powers of the court is a reproduction of section 100 of the Trusts Ordinance of 1917, with its reference to the High Court of Justice in England; it was further stated that Chapter 10 of the Trusts Ordinance shall not apply "to religious trusts regulated by Ordinance No. 10 of 1931, in so far as this Chapter is inconsistent with the provisions of that Ordinance". However additional ground was gained by the provision in the ordinance of 1931 of a new remedy, namely, applications by way of petition direct to the Court by any five persons interested in charitable or religious trusts. Under the Trusts Ordinance action could not be instituted in the District Court without a previous petition to the Government Agent.

Some months after the promulgation of the Ordinance of 1931 a Special Committee was appointed in February 1933 by the Minister of Home Affairs to frame rules for the efficient working of the Ordinance. The Committee however recommended that "the Ordinance should be amended before Rules are framed" and that "this Ordinance is not likely to be

worked satisfactorily unless some Central Authority is established to be responsible for its proper administration". The Committee was of the view that this Central Authority should be a Government Official acting with the consent of an advisory Board of five Muslims.

In pursuance of the Committee's recommendations, published as Sessional Paper 25 of 1935, Rules could not be framed till this Amending Bill became law or was on the verge of being enacted; and the Amending Bill could not be introduced without adequate clauses for the constitution of this Central Authority. For this Central Authority, possessed of the necessary powers to prevent positively the misappropriation of funds or the malversation of properties belonging to wakfs, the Muslim Community had to wait for twenty five long years i.e. from 1931 to 1956. The judicial remedies available were not potent enough to cure the mismanagement of Wakfs.

"In the words of M.T. Akbar, "under the existing Law, for want of such a Central Authority private persons had to take the initiative to get trusts administered properly. They were hampered by two considerations:

(a) the want of funds for prolonged litigation, and

(B) for want of proof to convince the court that there has been a breach of trust.

On the other hand the defaulting trustee could make use of the Mosque funds to put every obstacle in the way of the plaintiffs and he could make use of every legal device to drag out the litigation, in the course of my experience in the law courts, I came across, I am afraid, many instances, in which trust properties had been wrongly used and attempts made to convert them into private property". Thus in some one, on the discovery of an instance of mismanagement had decided to improve matters for the benefit of the congregation and community, he would have to expend his time and energy, search for and secure the essential documents, collect the necessary evidence, seldom receiving assistance from the affluent and influential of the area, often inviting the wrath of the powerful trustees and their henchmen, and find the money himself to buy the legal guidance without which he could not conform strictly to the set procedure of the District Court.

In purusance of the Committee's recommendation a draft Ordinance, prepared with the assistance of a Special Committee, of which M.T. Akbar was a distinguished member, was published for public information in the Ceylon Government Gazette, with a Statement of Objects and Reason dated August 14, 1943, under the hand of the Minister for Home Affairs. It looked something was been achieved even after ten years.

The Bill provided for the registration by the Public Trustee of Mosques and his control and supervision of them. "An Advisory Board consisting of the Public Trusts as Chairman and seven other persons being Muslims, will be constituted for the purpose of advising and assisting the Public Trustee in the exercise and performance of his powers and duties relating to mosques and Muslim charitable trusts". The Bill also contained provisions setting out the frame work of the somewhat elaborate procedure to be adopted with regard to the election of trustees and the preparation of registers of congregations. One part of the definition of Muslim charitable trusts was improved by the alteration from "those for the maintenance of a mosque" to "those for the benefit of a mosque". Another new feature of the Bill was the constitution of a Muslim Charities Fund to be administered by the Public Trustee in consultation with the Advisory Board to which contributions were due from all registered mosques.

To those determined to oppose the Bill, the most objectionable feature was the status accorded to the Public Trustee by the Bill. His role was considered to be a definite violation of the Law of Shareeath, particularly because of the injunctions contained in verses 17 and 18 of Sura Thowba of the Holy Quran. Therefore the Bill was strongly condemned. They were not convinced by the argument that "the Public Trustee Department is a Department of State with no body to kick or a soul to save. The Mosque will be maintained, repaired and supported by the Muslim Congregation itself. The prayers and other rites will be still conducted by the Muslims themselves. They will not be conducted by the Public Trustee. The present case is parallel to the free use of the law courts, Under the existing ordinances the law courts can settle a scheme of management and direct how the funds are to be spent. There is no difference between this state of affairs and the one under the amendments, except, that the latter is more effective from the point of view of the trust property".

In reply to the above, the answer was given that "the judicial department and the Public Trustee's department have been compared and false parallel has been drawn. The fundamental difference between a judicial department and an executive department is plain enough. X appears before the judge; when the adjudication is over, he goes; there is no abiding grip on him. But the mosques and trusts bound to the Public Trustee's department for his administration by means of an Ordinance fare differently. He has to have an enternal hold on them. He dictates; he commands; he directs; he controls; he denies; he orders; et cetera multa agit. The Mosques are under his permanent tutelage. He sits astride the dome of every mosque like a colossus. Muslims must manage Muslim affairs".

From these and other arguments, redolent of jurisprudential punditry and scholastical polemics, emerges the sharp distinction between a judicial decisions and an administrative directive, the former invariably dealing with specific issues and instances and the latter generally concerned with good management and day to day administration throughout a definite period, of the trust properties. These arguments, while not demolishing the case for a Central Authority, proved that the shape and form the structure and function, of the Authority was indeed compled and controversial.

As a result of this considerable opposition to the Bill from the Muslims, its Second Reading was deferred. The Special Committee was enlarged and representations were heard. In the light of them, amendments were made to the Bill and the final draft was transmitted to the Minister for Home Affairs by the Public Trustee a few weeks before it came up for discussion at the meeting of 7th August 1946 of the ExC. The Executive Committee of Home Affairs.

The Special Committee had recommended an unofficial Executive Board of seven Muslims should be established for the administration of the Ordinance and "the Public Trustee shall preside at every meeting of the Executive Board but shall not vote at any such meeting nor shall there be vested in the Public Trustee any executive or other authority except to carry out the decision of the Executive Board". The Ex Co was however unable to approve the consititution of this Unofficial Executive Board. It was therefore, decided that "it should be left to a Muslim Member of the State Council to introduce a Billin the form of a private Member's Bill for the control of Muslim mosques and Charitable Trusts. If such a bill embodied provisions requiring the assistance of the Public Trustee in the administration of

the Ordinance, the matter should be considered when the Bill is referred to the Executive Committee for its comments". Thus in 1946 did come to an abortive end the Amending Ordinance, envisaged by the Committee of 1933. No Rules were framed either, even though fifteen years had elapsed - 1931-46.

This fate of the Amending Bill of 1946 cannot be attributed to any absence, in Ceylon Administration, of the kind of set-up provided in the Bill, as the Ex-Co of Health had already created through Ordinance No. 17 of 1941, the Board of Indigenous Medicine, in which the role of the Principal of the College was similar to that of the Public Trustee in the Amending Bill of 1946. There was however a difference that mattered; the Board of Indigenous Medicine was subject to the control and general direction of the Ex-Co of Health - a kind of provision that the Special Committee could not embody in the Amending Bill dealing with mosques and trusts. The Ex-Co Home Affairs however could have considered legislation to set up a Wakfs Board on the lines of the Corporation established by Ordinance No. 20 of 1942 for the University of Ceylon. That such action was not pursed was probably due to the interpretation, then in vogue, of State neutrality in religion and religious affairs.

As far as the Muslims were concerned there were several among them of the definite view that in the administration of their mosques, no protection should be sought from the Government which could even remotely give room for the State to interfere with the religion of Islam, for which the Community had made such heavy sacrifices since the advent of the Portuguese in Ceylon. There were many who sincerely felt that the administration of each mosque should continue to be autonomous and as such any form of control or supervision would tantamount towanton and reprehensivle interferences. In this sunshine of Islamic zeal and basked those of the trustees who for love of power or private gain clamoured for freedom - freedom to mismanage the wakf properites, which really did not belong to them. They were naturally keen on thwarting the efforts of those anxious to promote a bill to amend the .... Wakfs Ordinance of 1931. This strange combination of the sincerely religious and the selfishly inclined proved formidable throughout the period. In such circumstances the promoters of an amending bill found themselves on the horns of a dilemma. The Government

was not prepared to sponsor a bill vesting control and supervision of mosques and trusts in a Muslim Executive Board, and any measure short of it, they realised, would not accord with the general will of the Muslim community.

During the next five years no successful efforts were made to resurrect the bill. This was the period of Ceylon's First Cabinet. During the first part the Legislature was busily engaged in major political problems (1947-48), and the Ministers were fully occupied during the remaining years (1948-52) with far reaching policy decisions. As far as the Muslim community itself eas concerned, during these years its political centre of gravity was shifting and in consequence the old Establishment was in need of a blood transfusion. The new Muslim Parliamentarians agitated in 1952 for the Amending Bill originally recommended by the Committee of 1933 and the then Minister of Home Affairs appointed in July 1952 a new Committee consisting of all Muslim Parliamentarians - Senators and M.P.s - "to examine the whole question afresh, to receive representations and to recommend legislation for the registration of Mosques and for prescribing the powers, duties and functions of the Trustees of registered Mosques and Muslim Charitable Trusts or Wakfs". The Wakfs Act of 1956 is very largely based on this Committee's recommendations which were supplemented by the amendments suggested by the Select Committee of the Senate.

The only Section of the Bill, that was debated on the floor of the House in the Senate, was the one relating to the appointment of a Muslim Commissioner. The following Section of the Wakfs Act the Muslim Mosque Charitable Trusts or Wakfs Act, No. 51 of 1956 - deal with this question.

"2. (1) There may be appointed for the purposes of this Act a Commissioner for Mosques and Muslim Charitable Trusts or Wakfs and such number of Deputy Commissioners for Mosques and Muslim Charitable Trusts or Wakfs and other officers and servants as may be necessary. Such Commissioner, Deputy Commissioners and other officers and servants shall be servants of the Crown in respect of the Government of Ceylon.

(2) A person who is not a Muslim shall not be appointed as the Commissioner or as a Deputy Commissioner.

(3) The Commissioner shall, in the exercise of his powers and the perofmrnance of duties, be subject to the directions of the Board.

(4) A person shall be disqualified for appointment as a member of the Board or if so appointed, shall vacate his office as such if he -

(a) is not a Muslim, or

(b) is, or becomes, a Senator or a Member of Parliament, or

(c) is, or becomes a trustee of a registered mosque, a Muslim shrine or place of religious resort or a Muslim Charitable trust or wakf."

The Draft Ordinance of 1943 did not find acceptance among the Muslims because the Public Trustee was made the chief officer with an Advisory Board of Muslims. This was altered in the draft of 1946 by which the Public Trustee was made the Chairman of this Board without a vote, the Advisory Board itself having been converted to an Executive Board. This on the other hand did not receive the approval of the Government. When the Government finally accepted the principle contained in the secions quoted above, the strange and strong combination of the sincerely religious and the selfishly inclined was broken and the passage of the Bill should thereafter have been quite smooth.

But opposition came from an altogether different quarter - sincere friends of the Muslim community who unfortunately did not fully appreciate the Muslim point of view on a matter that vitally affected the community. Objections were raised in the Senate on the ground that in a Secular State, Law should not take into consideration the religious faith of a candidate in respect of an appointment to a public office and that such an appointment would contravene Article 29(2) (c) of Ceylon (Constitution) order in Council. The Muslims were advised "do not provide by law that only a Muslim shall be eligible for appointment as head of the department because to do so itself is illegal and let us not commit a breach of the law of the land and try to confer on ourselves rights which the law itself cannot confer on us."

But in this case the duties attached to this particular office was intimately associated with religion. "The pitch and substance of the true nature of the proposed legislation to govern mosques and Wakfs is the setting up of the machinery for the proper administration of those institutions and not to confer an advantage or

privilege in favour of the Muslim community. The provision contained therein to appoint Muslim Commissioners is to ensure the successful working of this Act by bringing in a person or two who would have intimate knowledge of those matters and the necessary sympathy and understanding.

It cannot therefore be said that Section 2(2) is intended to confer an advantage or privilege on persons of the Muslim community which is not conferred on others. In the interpretation of statutes judicial notice ought to be taken on such matters as the reports of Parliamentary Commissions and of such other facts as must be assumed to have been within the contemplation of the Legislature which the Acts in questions were passed (sec. 54 W.L.R. 433). The Provisions to appoint Muslims as Commissioner as members of the Wakfs Board were included in the Bill because of the representation of the Muslims that otherwise it would offend against certain provisions of Islamic law."

The Senate did not consider that clause 2 sub-clause 2 of the Bill to govern Muslim Mosques and Wakfs was ultra vires and the Bill was passed by the House of Representatives and became law as Act No. 51 of 1956 7th November 1956.

The following sections in the Madras Hindu Religious and Charitable Endowments Act (XIX of 1951) lend support to the view that just as a professional or technical qualification is required for the performance of professional or technical duties, e.g. a doctor or an engineer, a religious qualification is equally necessary for a public officer dealing with the management of properties of temples or mosques.

"8. The Government shall appoint the Commissioner and such number of Deputy and Assistant Commissioners as they think fit.

9. The Commissioner, every Deputy or Assistant Commissioner and every other officer or servant appointed to carry out the purposes of this Act, by whomsoever appointed shall be a person professing the Hindu religion, and shall cease to hold office as such when he ceases to profess that religion."

This provides additional proff that the structure of Government e.g. Public Administration - cannot be dissociated from the history of its country and the character of its people; that is the developing countries of the East, where Voluntary Organisations with a history of having undertaken satisfactorily some ofthe Welfare duties of the Modern State, are ~~xxx~~ not in existence, the English system of

administration cannot be adapted whole and entire, without modifications.

A comparison ofthe text of the Wakfs Act of 1956 with the clauses of the previous Bills and the various drafts of them would reveal the many changes of far reaching import introduced by the Act. Some of them may be cited:

(i) trustees are not elected at a meeting of the jamn'ath but are appointed by the Board, having regard to, inter alia, the local custom and the practice in force for the administration of the mosque.

(ii) No trustee shall lease any immovable property without the previous approval of the Board

(iii) when five persons have instituted an action inthe District Court and some have withdrawn, the action should be continued, and concluded, so long as one of them continue to be a party

(iv) Shrines and Places of religious Resort are specifically included in the title of Act.

(v) The building and restoration of mosques are included as purposes for which the Board may expend the moneys in the Muslim Charities Fund; such purposes also include the advancement ofthe education of the Muslims.

(vi) MMosque is defined to include any thakkiya or zaviya

(vii) not only every mosque but also every Muslim Charitable trust or wakf was required to make a contribution to the Muslim Charitable Fund.

In place of the previous one per centum of gross annual income, there is a sliding scale of rates ranging from one to five per centum ofthe income for any year.

The Wakfs Act of 1956 having repealed sections 5 to 24 of the Wakfs Ordinance of 1931, also expressly provided "that sections 100 and 109 of the Trusts Ordinance shall not apply to any Muslim Charitable Trusts or wakf". Besides for the first time, the Act of 1956 provided for the registration of mosques and prescribed the powers, duties and functions of the Trustees of registered mosques. Mosques were thus considered per se and not as a group of the Muslime Charitable Trusts a recognition that the Mosque was the Centre of Muslim Worship and the Focus of the local community; that

the interest of each jama'ath, autonomous and constitutionally independent of other jama'aths, should dominate all other interests. If the elective principle was abandoned in respect of the trustees, the Board was still statutorily required in their appointments, to have regard to the terms of the trust, the religious law and the custom of the sect, the local custom and the practice and other arrangements in force. Thus was it tacitly accepted that there existed no uniform practice in Ceylon , and yet the powers conferred by the Act on the Wakfs Board enable it to bring about a large measure of uniformity by the enforcement, wherever it prevailed, and the encouragement, whenever possible, of the elective principle in regard to the trustees of Mosques. Another new feature of the Act is the inauguration of the Charities Fund, which the Board could utilize for the building of mosques, advancement of Islam and promotion of education etc. In addition the Act provides remedies, safe sure and strong, to prevent frauds and acts of personal aggrandizement.

The Governmnt through the Wakfs Act of 1956 has "hindered the hindrances" suffered by those possessed of serious intent to protect the mosques and other wakfs against the misinterpretation of their funds and the malversations of their properties - by curbing the liberties of the trustee and yet preserving the freedom of the jama'ath. Thus have the Muslims of Ceylin in their hands this i instrument - the Wakfs Act - which, if courageously and responisbly used, will undoubtedly prove to be very potent in promoting a cultural revival in their midst - by reinculcating a serious sense of devotion and discipline and re-establishing the jumma mosque as a the focus of the social life of the local community.

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