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Notes

Quaid-i-Azam and Wakf-ul aulad Law

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Quaid-i-Azam Mohammad Ali Jinnah was elected as a member of the Imperial Legislative Council in 1910 on a seat reserved for the Muslims from Bombay. He justified the trust reposed in him by moving Mussulman Wakf Validating Bill in 1911 and getting it enacted after some amendments in 1913. It was a major achievement of the Quaid-i-Azam aimed at removing the 'disability and great hardship' that had been created by the decision of the Privy Council in the case of Abul Fata Mahomed Ishak and others v. Russomoy Dhur Chowdhry and others related to the Law of Wakf in India. In order to comprehend the significance of the Mussulman Wakf Validating Act 1913 for Indian Muslims, it is necessary to understand the background in which it was adopted.

A 'wakf' in Islamic law is akin to what is called 'trust' in English law. Literally the term 'wakf' means 'confinement', 'detention', 'prohibition', causing something to stand still or not permitting something to move. *Wakf* may be defined as a permanent dedication or endowment by a Muslim of any property, movable or immovable, with the purpose of devoting profit or product derived from it for the benefit and welfare of the poor and needy or for any other object recognized by Islam as pious or good.

The person who makes the endowment i.e., the founder of the *wakf* is called *wakif*. He must be adult and sound of mind. He may take upon himself the responsibility of administrating the *wakf* or may appoint *mutawallis* to manage it. As far as beneficiaries of the *wakf* are concerned, they may be individuals or public utilities.

The institution of *wakf* became popular in India under the Muslim rule. Many Muslim rulers and Muslims of means constituted *wakfs* for maintenance of mosques, *madaris*, orphanages, shelters for the poor and other such institutions. Many wealthy Muslims also created what is called *wakf-ul aulad* or *wakf alal aulad*. These were essentially

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family *wakfs* for the purpose of economic well-being of the wealthy Muslims' progeny and they also helped in keeping the property within the family by making it safe from sell off. The *wakfs* enjoyed tax-exemptions.

After the British came to power, they confiscated a large number of *wakfs*. Perhaps in some cases the reasons were political, but the British also found to their dismay that in many instances the *mutawallis* had indulged in corrupt practices. In 1863, the British promulgated the Religious Endowment Act to regulate the administration of *wakfs* and also restored those *wakfs* to the Muslims which had earlier been confiscated. However, this did not end the controversies about the working and management of different *wakfs*, in particular about the true purpose of *wakfs-ul aulad*, as some viewed them as a means to promote and protect economic interests of the wealthy Muslim families rather than a source of benefit to the poor.

In 1873, the Bombay High Court gave an adverse decision regarding the validity of the *wakf-ul aulad* which decision was overruled by the decisions of the same court in 1882 and 1883. Other high courts in India also gave some conflicting decisions which created much confusion about the law of *wakf*. In the famous case of Abul Fatah Mahomed Ishak v. Russomoy, the matter reached the Privy Council in London which gave its decision in1894 to the effect that unless there was a substantial dedication to charity, a *wakf* was illusory and, therefore, bad. It also said that this dedication to charity should not be too remote.

The Muslim community of India regarded the decision of the Privy Council as interference in Mohammadan Law. Even before the pronouncement of the Privy Council, Sir Syed Ahmed Khan had been working on a draft bill in 1879, i.e., after the decision of the Bombay High Court, which he intended to move in the Imperial Legislative Council. Sir Syed Ahmed Khan's efforts did not bear fruit because his views on the matter were controversial in some respect and, before he could forge unanimity on the bill, the events overtook his endeavour.

After the Privy Council's decision of 1894, more and more Muslims, including *ulema*, scholars and political figures, took up the matter. Syed Amir Ali, Syed Hussain Bilgrami and Maulana Shibli Nuomani made efforts to safeguard Muslim interests. An organization called Anjuman-i-Wakf Alal Aulad was formed with Maulana Shibli Nuomani as its Secretary. In December 1906, Indian National Congress passed a resolution which called upon the government to appoint a commission to enquire if the Privy Council had not erred in its dicision.

Quaid-i-Azam, who had joined the Congress the same year, appreciated the gesture of the party. After the All India Muslim League

was founded in late December 1906, it adopted several resolutions emphasizing upon Muslim concern with the Privy Council's decision which had ruined many families. It asked the British Indian government to bring necessary legislation to undo the negative impact of the Privy Council's decision. In November 1908, a conference of *ulema* was held in Lucknow to discuss the issue. Despite differences of *fiqah*, the *ulema* supported the concept of *wakf-ul aulad*. The eyes of many a Muslims were set on Quaid-i-Azam Mohammad Ali Jinnah. Syed Amir Ali and Quaid-i-Azam were in contact to draft an appropriate bill to validate *wakf-ul aulad*.

On 17 March 1911, Quaid-i-Azam introduced the 'Mussulman Wakf Validating Bill' in the Imperial Legislative Council. While addressing the Council, he stated that the Privy Council's decision of 1894 had 'paralysed the Mussulman law' in respect of a Mussulman's power to make trust for his family, his children and his descendents. Referring to the substance of the Privy Council's decision, Quaid-i-Azam observed:

> ...they say that there must be substantial dedication to charity. What is substantial dedication to charity? This is not defined in any way at all. They further go on and say that that substantial dedication to charity must be at some period of time or other presumably not too remote. They do not fix any limit upon the time or period. Therefore, it has introduced the greatest uncertainty in our law. A Mussulman who wants to make a wakf of this character – wakf ul aulad – does not know at what period of time the charity should come in under the deed. He does not know what would be considered substantial dedication to charity by any Court of Law.[1]

Quaid-i-Azam explained that the principal point with which the Mussulmans were concerned was the proposition of the Privy Council that, unless there was a substantial dedication to the charity, the *wakf* would be illusory and, therefore, bad. He said that the decision of the Privy Council was 'not in accordance with the true principles of Mussulman law' and the Privy Council's exposition of Mussulman law was 'opposed to the fundamental principles of Islamic Jurisprudence'.[2]

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1 M. Rafique Afzal (ed.), *Selected Speeches and Statements of the Quaid-i-Azam Mohammad Ali Jinnah* (Lahore: University of Punjab, 1973), p.5. For full text of the Quaid-i-Azam's speech at the time of introduction of 'Mussulman Wakf Validating Bill', see pp.1-11.

2 *Ibid.*

He added that as a result of the Privy Council's decision the *wakfs*, including the ancient ones, had been hunted down in all parts of India and that it had prevented the Mussulmans from making any settlement in favour of their family and children.[3] After citing various sources to prove that the exposition of the Privy Council of the Mussulman Law was not correct, Quaid-i-Azam clarified that his Bill intended only to reproduce the Mussulman Law which had been disturbed by the decision of the Privy Council. It was not intended to define the general law of *wakf*.[4]

Section 3 of the Mussulman Wakf Validating Bill which the Quaid-i-Azam introduced in the Imperial Legislative Council provided: 'Subject to the provision of this Act, it shall be lawful for any person, professing the Mussulman faith, not being a minor or of unsound mind, to create a *wakf* for among other the following purposes:

(a) for the maintenance and support , wholly or partially, of his family, his children and descendents, and
(b) where the *wakif* is a Hanafia Mussulman, for his own support and maintenance during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated:

> Provided always that the ultimate reversion is, in such cases, expressly or impliedly reserved for the poor, or for some other religious, pious or charitable purpose of a permanent character.[5]

The Bill also contained provisions concerning registration of the *wakfnama* to ensure its authenticity, prevent fraud and protect the interests of the creditors because this point had been emphasized upon in the decisions of the high courts and the Privy Council. The Bill was sent to the select committee which thoroughly examined it and finalized its report in about two years.

While moving the Report of the Select Committee in the Imperial Legislative Council in April 1913, Quaid-i-Azam gave answers to some of the objections raised against the Bill. Responding to the objection that the Bill was not consistent with public policy, Quaid-i-Azam said that since the Bill was introduced to administer the Mohammadan Law to the Mussulmans, the question of public policy did

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3 *Ibid.*

4 *Ibid.* p. 9.

5 See 'Mussulman Wakf Validating Bill, 1911', reproduced in Sharif al Mujahid, *Quaid-i-Azam Jinnah: Studies in Interpretation* (Delhi: B.R. Publishing Corp., 1985), pp.453-58.

not arise.[6] Regarding the clauses which intended to prevent fraud against creditors, he said that the Select Committee, on careful consideration, had found it very difficult to maintain them without infringing upon the personal law that governed the Mussulmans and, therefore, it was decided by the Select Committee unanimously to drop the registration clauses. He clarified that other provisions of the Mohammadan Law provided safeguards against fraud on creditors at the time the *wakf* was created, and added that the Registration Act already laid down that every wakf that was made in writing must be registered.[7]

Quaid-i-Azam conceded that an oral wakf might prejudice the creditor to a certain extent but significantly stated: 'The answer to that is that that is Mussulman Law and you cannot override the Mussulman Law. If you compel the Mussulman to make wakf in writing and in no other manner, you are, to that extent, overriding the Mussulman Law, and therefore, I, for one, am not prepared to accept any provision which is in any way likely to overrule or affect the personal law of the Mussulman'.[8]

As regard the objection to that part of Section 3 which provided that a *wakif* could also be beneficiary of the *wakf* he had created, Quaid-i-Azam clarified that a Hanafia Muslim was allowed to make a *wakf* for his own support, maintenance or payment of debts. Explaining the legal position, he said: '...the Privy Council's decision was that if you postpone the dedication to charity for a certain period – and if the dedication to charity is proposed to be given at any period too remote – then that wakf is invalid. Therefore, if a Hanafia Mussulman makes a *wakf* for payment of his debts, and if this clause is not inserted, the Privy Council's decision will stand and you have only got to take it to any court of law to set aside the wakf'.[9]

Quaid-i-Azam stated that the secured creditors could not be affected if the *wakf* was created after the security was given. As regard unsecured creitors, he said that if the *wakif* had any intention to defraud, defeat or delay his creditors, then the *wakf* would be set aside by the Court of Law under Mohammadan Law.[10]

On the recommendations of the Select Committee, Section 3 of the Bill was slightly amended and sections related to registration of

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6 M. Rafique Afzal (ed.), *op.cit,* p.20. For full text of the Quaid-i-Azam's speech at the time of moving Report of the Select Committee, see pp.20-5.

7 *Ibid*., p.21.

8 *Ibid.*

9 *Ibid.,* p.24

10 *Ibid.*

wakfnama were removed. In the final version of the Bill, Section 4 stated:

> No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendents of the person creating the wakf.[11]

This virtually nullified the decision of the Privy Council regarding time period of *wakf ul aulad*. The Bill was duly passed by the Imperial Legislative Council in April 1913 and was assented by the Governor-General to become Mussulman Wakf Validating Act, 1913.

Quaid-i-Azam had made history.

[11] See 'Mussulman Wakf Validating Act, 1913', reproduced in Sharif al Mujahid, *op.cit.*, pp.459-60.